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REPORTS

OF CASES RELATING TO

MARITIME LAW;

CONTAINING ALL THE

DECISIONS OF THE COURTS OF LAW AND EQUITY

IN

The United Kingdom.

EDITED BY

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

BARRISTERS-AT-LAW.

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INDEX

TO

NAMES OF THE CASES

REPORTED IN THIS VOLUME.

NAMES OF CASES.

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ERRATA ET CORRIGENDA.—Page 195, column 2, line 13, for "plaintiffs" read "defendants." Page 296, column 2, line 48, between "to whom" and "in the goods" insert "the property." Page 440, column 1, line 51, for "100" read "99." Page 553 column 2, after line 40 delete from "Held further" down to "sustained by them." This part of the headnote was printed in error.

SUBJECTS OF CASES.

SUBJECTS OF CASES.

See *Vendor and Vendee.*

CARRIAGE OF PASSENGERS.

CATTLE.

See *Marine Insurance*, No. 2.

CERTIFICATE OF LLOYD'S SURVEYOR.

See *Carriage of Goods*, No. 46.

CHARTERER.

See *Carriage of Goods*, No. 38.

CHARTER-PARTY.

REPORTS

OF

All the Cases Argued and Determined by the Superior Courts

RELATING TO

MARITIME LAW.

HOUSE OF LORDS.

Nov. 21, 27, 1907, *and Feb.* 6, 1908.

(Before the Lord CHANCELLOR (Loreburn), the Earl of HALSBURY, Lords MACNAGHTEN and ATKINSON.)

JAMES NELSON AND SONS LIMITED *v.* NELSON LINE LIMITED. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Agreement—Construction—Lay days—Fortnightly sailings—Agreement to load—Loading on holidays.

An agreement in the nature of a charter-party, made between the owners of a line of steamships and charterers, provided for a two-weekly service of steamships from P. to L., having the sailings at intervals of fourteen days. A subsequent clause provided that on the arrival of each steamship at the loading berth at P. notice should be given to the charterers of her readiness to load, and twelve hours after the receipt of such notice the lay days of the ship should commence.

Held, that the former clause controlled the latter, and that there was no obligation on the charterers to begin loading until such a date as would suit an interval of fourteen days between the sailings.

The agreement also provided that holidays were not to count as lay days. In fact, one of the ships was, with the consent of the master, loaded on a holiday.

Held, that, in the absence of any evidence of an agreement varying the terms of the charter-party such holiday did not count as a lay day.

Judgment of the Court of Appeal reversed.

APPEAL from a judgment of the Court of Appeal (Vaughan Williams and Buckley, L.JJ., Moulton, L.J. dissenting), reported 10 Asp. Mar. Law Cas. 544; 97 L. T. Rep. 661; (1907) 2 K. B. 705), affirming a judgment of Channell, J., reported 10 Asp. Mar. Law Cas. 472, note (*b*) (1907); 96 L. T. Rep. 887n.; (1907) 1 K. B. 788n.

The question was as to the construction of a very long and obscurely worded agreement of the nature of a charter-party made between the appellants as charterers and the respondents as shipowners.

The material clauses appear in the judgment of the Lord Chancellor, and are set out in the reports in the courts below.

The document had given rise to other litigations between the parties, in which another appeal had been brought to the House of Lords (*Nelson Line Limited* v. *James Nelson and Sons Limited*, 97 L. T. Rep. 812; 10 Asp. Mar. Law Cas. 581; (1908) A. C. 16), and decided in favour of the charterers. In the present case the courts below decided the matter in dispute in favour of the shipowners, and the charterers appealed.

R. Isaacs, K.C., *J. R. Atkin*, K.C., and *Leslie Scott*, for the appellants, argued that they were entitled to insist on intervals of fourteen days between the sailings under the contract, and could not be required to load at any time, but only at such times as would be consistent with fortnightly sailings. The fact that work was actually done on a holiday does not vary a contract as to lay days in the absence of express evidence of a new agreement. They referred to

Houlder v. *Weir*, 10 Asp. Mar. Law Cas. 81; 92 L. T. Rep. 861; (1905) 2 K. B. 267;

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.;

The Katy, 7 Asp. Mar. Law Cas. 510, 527 (1894); 71 L T. Rep. 709; (1895) P. 56.

Commercial Steamship Company v. *Boulton*, 3 Asp. Mar. Law Cas. 111 (1875); 33 L. T. Rep. 707; L. Rep. 10 Q. B. 346;

Whittall and Co. v. *Rahtken's Shipping Company Limited*, 10 Asp. Mar. Law Cas. 471; 96 L. T. Rep. 885; (1907) 1 K. B. 783.

J. A. Hamilton, K.C., *Horridge*, K.C., and *Maurice Hill*, for the respondents, contended that there was no warrant for adding an implied condition to the contract. Nothing is said as to the intervals between the loading of the ships, but only as to the final sailings from the River Plate. The ships are not to be placed at the disposal of the charterers at intervals of fourteen days, but to sail at such intervals. Of course, the ships must not be tendered at such times as to frustrate the whole object of the venture; short of this the

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

owners may require the charterers to load at any time after due notice. Their remedy, if any loss is sustained, is an action for damages. The fact that work was done on a holiday raises a reasonable presumption that it was agreed to treat it as a working day (see per Bowen, L.J. in *The Moorcock* (6 Asp. Mar. Law Cas. 357, 373 (1888); 60 L. T. Rep. 655; 14 P. Div. 64) as to the necessary intention of the parties. They also referred to the cases of *Commercial Steamship Company*, *Branckelow Steamship Company*, and *The Katy*, cited for the appellants.

R. Isaacs, K.C. was heard in reply.

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

Feb. 6. — Their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Loreburn). — My Lords: In this action the plaintiffs, appellants here, claim dispatch money for days saved in loading two steamships of the defendants, the *Highland Heather* and the *Highland Enterprise*. They also claim a return of demurrage money paid under duress, and the defendants counterclaim for still more demurrage on the same vessels. The relevant facts are very few. By an agreement of the 18th June 1904 (which will have to be considered presently), the plaintiffs were bound to load frozen meat and offal on these two ships and on others forming a two-weekly service from the River Plate to England. The *Highland Heather* was ready to load on the 5th March 1906, and the defendants, the shipowners, asserted that the lay days began on the 6th March. The *Highland Enterprise* was ready to load on the 14th March, and defendants asserted that the lay days began on the 15th March. On the other hand, the plaintiffs (charterers) asserted that the lay days began on the 7th March and the 21st March respectively. The ground of difference really amounted to this: in the shipowners' view the lay days began to run when they had berthed their vessel and given a twelve hours' notice. In the charterers' view that was subject to a condition—namely, that the vessels tendered for loading should be tendered at such times as were suitable to two-weekly sailings, with intervals of fourteen days between each sailing. Minor questions as to whether holidays were to count as lay days and as to an exception of strikes were raised, but the first and main question was that which I have stated. The contract which must regulate this controversy is dated the 18th June 1904, and is called a charter-party. It is an agreement by the shipowners to supply and by the charterers to fill a part of each vessel. The rest of the space was to be filled with cargo of others. To begin with, let us see what this contract is, taken as a whole. It has already been considered by this House in another appeal (*Nelson Line Limited* v. *James Nelson and Sons Limited*, *ubi sup.*), and a part of it found so ambiguous that on one point effect could not be given to the words used. Still, the main purpose of the document is fairly clear. The owners bind themselves to run a two-weekly line of steamers from the River Plate to Liverpool, and a monthly line from the River Plate to London. They also agree that the sailings from the River Plate shall be at intervals of fourteen and thirty days respectively. I say no more about the London sailings with the thirty days' interval, for Liverpool sailings at a fourteen days' interval alone are in question here. This is under the second clause of the agreement. The charterers bind themselves to ship in each vessel sailing in the lines above mentioned so much frozen meat and offal as will fill certain insulated chambers. So much is, I think, pretty clear. Then comes the question which lies at the root of this litigation.

What are the duties under this contract of the shipowners and charterers respectively as to the time when the several vessels of these lines are to begin loading and the lay days are to commence and the charterers are bound to load? The clauses dealing with these important details have to be considered, but in considering them we must bear in mind, as it seems to me, that the obligations to load and to give facilities for loading are all obligations in reference to a regular two-weekly service, with intervals of fourteen days between the sailings, as provided by clause 2 of the agreement, and must be construed in reference to that. Apart from clause 2, there are three clauses providing for these matters. By 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 at the disposal of the charterers for the carriage of the frozen meat. Nothing can be clearer. The charterers are to be the first to load this space reserved to them in the vessels as soon as they are ready to load. But then comes clause 7. Under that clause each steamer, either before or after loading meat from the charterers, may load for the owners' benefit meat or any other cargo of any kind for her intended voyage, at any port or ports in the River Plate, or tributaries, or on the east coast of South America. This clause 7 absolutely contradicts clause 1. I am compelled to give effect to it, and I can only conclude that the shipowners' obligation under clause 1 is subject to their right to break it under clause 7. So that the charterers are not to be the first to load the vessels if the shipowners choose first to load for their own benefit some other goods. If the shipowners do not so choose (which I understand to be this case), then the charterers are the first to have the vessel at their disposal. That being so, clause 6 remains to be considered. It provides that, on arrival of each steamer at her loading berth (fixed by the charterers) in the River Plate, notice shall be given to the charterers or their agents in writing of her readiness to load. The notice is not to be given until a certain temperature is attained in the insulated chambers, which is to be maintained up to the time of shipment commencing. Twelve hours after such notice (subject to the point of temperature which is not raised here) the lay days are to commence, and provisions for demurrage and dispatch money are appended. Now the main controversy in this case is raised on this clause. The shipowners say that they are entitled to take their vessel to the loading berth when they please, and that as soon as they have given the notice (always subject to the point of temperature), then twelve hours later the lay days begin. They maintain that they may give such notices at intervals of, say, seven, or twenty-one, or even twenty-eight days, or at less than seven days' interval, and that the charterer is bound to load on pain of paying

demurrage, and that clause 6 is wholly independent of clause 2. One mitigation, and only one, do they admit. If the notices are given at such times as to frustrate the commercial adventure altogether—in that case alone, they say, the charterer may refuse to load with impunity. If there was any breach of clause 2, which required an interval of fourteen days between the days of sailing, then, they say, they may be compensated for by damages, but it is not a ground for refusing to load. On the other hand, the charterers maintain that the 2nd clause must be read with the 6th clause, and must control it, and that they were under no obligation to begin loading a vessel until such date as would suit an interval of fourteen days between the sailings. In my opinion, the charterers' contention ought to prevail. Indeed the shipowners flinch from pushing their own argument to its logical conclusion. If, as they contend, the 6th clause is quite independent of the 2nd clause, I do not see why any limitation should be placed upon their right to berth the vessel and give notice to load at any time. Their admission that, if given at such a time as to frustrate the commercial adventure, the notice may be disregarded, partially relieves their argument from being utterly impracticable and unbusinesslike. But it also shows, what is to my mind plain on other grounds, that clause 6 is not an independent clause, and that some limitation must be placed on the liberty to berth and give notice, which in the language of that clause, standing by itself, is unrestrained. I think that the limitation is that the berthing and the notice must be at such times as will suit an interval of fourteen days between the sailings from the River Plate. In other words, it must be a berthing and a notice appropriate to a service of steamers sailing every fortnight with intervals of fourteen days. Mr. Hamilton enumerated the contingencies which might arise between notice and sailing, as if to show that it was not possible so to fix a berthing and a notice as to be sure that it would square with sailings at fourteen days' interval. I do not think that there is any real business difficulty; but that is what in my view the shipowners have contracted to do, and there are plenty of exceptions which might relieve them in proper cases. Also the obligation is fairly elastic. It is not that there must be fourteen days between the notices, but such a period as is appropriate to sailings at an interval of fourteen days. For the whole agreement is dominated by the central fact that everything is arranged for a two-weekly service, with regular sailings, and it is unnecessary to repeat that in every clause. In substance, therefore, I think that the charterers are right, and that, subject to two other points, they are entitled to judgment on their claim and counter-claim, in respect of dispatch money and demurrage.

The second point is a very short one. Under the agreement, holidays are not to count as lay days. In fact, there were some holidays during which one of the ships was loaded by the charterers with the consent of the master. No special arrangement was made. But the Court of Appeal held (apparently regarding it as a point of law) that an agreement to treat the holiday as a working day, and so count it among the lay days, ought to be inferred from the mere fact of working by consent. This inference seems to have been drawn in other cases, and those cases were treated as binding in law. In my view it is a question, not of law, but of fact, whether or not there was an agreement varying the terms of the charter-party and providing that the holidays in question should count as lay days. I am unable to see any evidence of such an agreement. Very likely it was convenient to both sides to do what was done. I do not believe that it entered into the heads of either that they were making such an agreement as is suggested. At all events there is no proof of it, and, therefore, the charter-party, which excludes holidays, must prevail. In regard to the last point, that some allowance is to be made for strikes, this House cannot entertain it, for it was not decided by Channell, J. or argued in the Court of Appeal. It must go to be determined as an issue in the action. In the result, I move your Lordships to allow this appeal, and that judgment be entered for the plaintiffs for the sums of 80*l.* and 182*l.* 10*s.* in their claim, and also for the plaintiffs on the counter-claim, subject to the issue whether the discharge of the *Highland Heather* and *Highland Enterprise*, and in consequence their arrival at the plaintiffs' factory, was delayed by strikes, and the consequent congestion of shipping, as alleged by the defendants. And that this House declare that the said issue, not having been decided either by Channell, J. or by the Court of Appeal, or by this House, remains to be decided in this action, and that the aforesaid judgment be, if necessary, altered accordingly. And that the respondents do pay to the appellants their costs here and below, subject to any order that may be made by the court determining the issue left undetermined by this House for costs arising in consequence of such issue.

Earl of HALSBURY.—My Lords: This instrument has been already the subject of disputed construction before your Lordships' House, with the result that the particular part then under debate was not considered to be susceptible of any definite meaning. It is, however, only justice to the draftsman to consider what it was sought to do by this agreement. It consists of thirty-six clauses and two schedules. It was sought to regulate the rights and duties of eleven vessels, whereof the bills of lading were to form part of the agreement (sect. 22). Inasmuch as it primarily had to do with the importation of frozen meat, provisions are inserted with reference to the machinery appropriate to such a business and the maintenance of the proper temperature; the agreement is to operate in turn as the charter-party of each of the vessels in the schedule, and it recites that, "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." In the second section it is again expressly provided, "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." It seems to me that the main purpose and design of the arrangement was the maintenance of this two-weekly line to the respective ports interested. This brings one to the question where the clauses of this very complex document come into conflict as they may, and as, indeed, I should have thought must, do sooner or later; and I agree with the Lord Chancellor as to what, as matter of construction, must be the result.

The second point seems to be the more important one—I do not mean the more important as between these parties, but as matter of general application, since I do not think that we shall have more such documents as this to construe. I mean the claim to treat as matter of fixed law the justice of lay days being counted, when, though holidays, they were used by the charterers for the loading of one of the ships. I entirely agree with the Lord Chancellor in refusing to infer something of which there is no evidence. I do not deny that there are some things so commonly known and practised, so universal, that without evidence other than the transaction itself one infers a contract. What the parties do is itself, in the face of such a known course of dealing, evidence of their agreement. It is enough here to say, that this does not come within the category to which I refer. I do not know whether it was more for the convenience of one or the other or of both that this work should go on notwithstanding the holidays. I concur also in the rest of the Lord Chancellor's judgment.

Lords MACNAGHTEN and ATKINSON concurred.

Judgment appealed from reversed. Respondents to pay to the appellants their costs here and below. Cause remitted to the King's Bench Division with a declaration.

Solicitors for the appellants, *C. Russell* and *Co.*, for *Lightbound, Owen*, and *Maciver*, Liverpool.

Solicitors for the respondents, *Rawle, Johnstone*, and *Co.*, for *Hill, Dickinson*, and *Co.*, Liverpool.

Supreme Court of Judicature.

COURT OF APPEAL.

Oct. 23 *and* 24, 1907.

(Before Lord ALVERSTONE, C.J., and BUCKLEY and KENNEDY, L.JJ., sitting with Nautical Assessors.)

THE CITY OF BERLIN. (*a*)

Collision—Risk of collision—Alteration of bearing—Duty to stop—Constitution of court—Judge sitting with assessors—Duty of assessors.

A steamship proceeding down the Elbe sighted the masthead and both side lights of a tug about ahead. The tug crossed on to the starboard bow of the steamship and got green to green in a position to pass all clear, the steamer slightly starboarded and steadied, but the tug's lights were seen to be narrowing, and finally though the tug gave no whistle signal the red light of the tug opened on the starboard bow of the steamship, and the pilot then ordered the engines of the steamship to be put full speed astern, but a collision occurred. In the Admiralty Court the nautical assessors agreed with the judge that the tug was to blame, but disagreed as to whether the steamship was to blame for not stopping her engines earlier. The judge held that the steamship was not to blame. The owners of the tug appealed:

Held, varying the decision of the court below, that the steamship was to blame for not stopping or reversing her engines when it was seen that the green light of the tug was narrowing on the starboard bow, as that fact showed there was risk of collision.

Per Lord Alverstone, C.J.: The assessors in the Admiralty Court and in the Court of Appeal when trying admiralty appeals do not constitute the court, and whatever the advice or opinion of the assessors may be the decision of the court both in fact and law is the decision of the judge alone, the assessors being only present to assist the court with advice on questions of nautical skill.

ACTION FOR DAMAGE.

The appellants, plaintiffs in the court below, were the owners of the steamtug *Carl Kiehn* and the survivors of her crew and the personal representatives of those of the crew who were drowned.

The respondents, defendants, and counter-claimants in the court below were the owners of the steamship *City of Berlin*.

The collision between the two vessels occurred about 4.45 a.m. on the 3rd Feb. 1906 in the river Elbe, off the Juelssand Light, the wind at the time being fresh from the west, the weather fine and clear, and the tide ebb.

The case made by the appellants in the court below was that the *Carl Kiehn*, a German screw tug of 13 tons net register, manned by a crew of eight hands all told, while proceeding from Brunsbuttel towards Hamburg was in the river Elbe about off the Brunshausen Light.

The *Carl Kiehn* was proceeding up the river, and at the time was heading about south and making about ten knots. Her regulation lights were being duly exhibited and were burning brightly, and a good look-out was being kept on board her.

In these circumstances the masthead and red lights of the *City of Berlin*, which was coming down the river, were seen from the *Carl Kiehn* about three to three and a half points on the port bow, and about two miles off or a little more.

The *Carl Kiehn* kept on the same heading until she had to starboard to proceed up the channel between the Juelssand and the Mittelgrund, when her helm was starboarded, and she was put on to her proper course up the side of the channel, which was on the starboard side of the *Carl Kiehn*.

The *City of Berlin* was then about a quarter of a point on the starboard bow of the *Carl Kiehn* still showing her red light, and was in position, if she had kept her course, to pass the *Carl Kiehn* port side to port side, as she could and ought to have done. Shortly afterwards, however, the *City of Berlin* opened her green light and shut in her red light.

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

In the expectation that the *City of Berlin* would still navigate on her proper side, her own starboard side of the channel, and pass port to port, and to give her more room to do so, the helm of the *Carl Kiehn* was ported a little and steadied. The *City of Berlin* then again opened her red light showing both side lights. The helm of the *Carl Kiehn* was again ported a little and steadied, and the *City of Berlin* shutting in her green light, and being about a quarter of a mile off and about half a point on the port bow of the *Carl Kiehn*, the vessels were in position to pass clear port-side to port-side.

The *City of Berlin* came on, keeping her red light open on the port bow of the *Carl Kiehn* until she was about 100 to 150 yards off, when she suddenly sounded a two short-blast signal, and, apparently under a starboard helm, opened her green light again, thereby causing imminent danger of collision.

The helm of the *Carl Kiehn* was at once ported again, and, as the only chance of avoiding a collision, her engines were kept full speed ahead. The *City of Berlin*, however, coming on at a great rate of speed, came into collision with the *Carl Kiehn*, which was on her own starboard side of the channel, striking with the stem and port bow the port side of the *Carl Kiehn* just clear of the bluff of the bow, doing her so much damage that she shortly afterwards sank, six of her crew being drowned.

The appellants charged the respondents with not keeping a good look-out, with improperly failing to pass port to port, with improperly starboarding, with improperly failing to keep on the starboard side of the fairway, with improperly failing to slacken her speed or stop or reverse, with failing to indicate her course by whistle signal, and with neglecting to stand by in accordance with sect. 422 of the Merchant Shipping Act 1894.

The case made by the respondents was that the *City of Berlin*, an iron screw steamship of the port of Dublin, of 990 tons gross and 612 tons net register, and manned by a crew of seventeen hands all told, was in the river Elbe, between Jule and Juelssand Beacon, in the course of a voyage from Hamburg to Bristol with a general cargo.

The *City of Berlin*, in charge of a duly licensed Hamburg pilot, was proceeding straight down the river, keeping well on the starboard side, and making about eight to nine knots. Her regulation masthead and side 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 of her.

In these circumstances those on board the *City of Berlin* observed distant about a mile and a half, and bearing about right ahead, the masthead and both side lights of the *Carl Kiehn*. The helm of the *City of Berlin* was thereupon slightly ported, one short blast was sounded on her steam whistle, and her helm was then steadied. Shortly afterwards the *Karl Kiehn* shut in her red light and drew with her green open on to the starboard bow of the *City of Berlin*. The helm of the *City of Berlin* was thereupon starboarded slightly and steadied, and two short blasts were sounded on her whistle. The vessels approached in a position to pass each other, all clear, green to green, but shortly afterwards, and when close to the *Carl Kiehn*, suddenly opened her red light, causing danger of collision. The helm of the *City of Berlin* was immediately ordered to port, and her engines full speed astern, and one short blast was sounded on her whistle; but, nevertheless, the *Carl Kiehn* came on at high speed, and with her port side about amidships struck the stem of the *City of Berlin* a violent blow, doing damage to the *City of Berlin*, and herself sustaining such damage that she shortly afterwards sank. Ropes and lifebuoys were immediately thrown over the port bow and side of the *City of Berlin*, and without any delay the working boat of the *City of Berlin* was lowered and rowed to the place of collision, where for about half an hour search was made for any of the crew of the tug who might be in the water, but without success.

The respondents charged the appellants with not keeping a good look-out, with failing to pass port to port and afterwards when all clear starboard to starboard failing to keep clear, with failing to keep to the starboard hand side of the channel, with improperly starboarding and afterwards improperly porting, with not easing, stopping, or reversing their engines, and with failing to signify their course by whistle signals.

The following collision regulations were referred to during the course of the case:

Preliminary to Steering and Sailing Rules.

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.

18. When two steam vessels are meeting end on, or nearly end on, so as to involve risk of collision each shall alter her course to starboard, so that each may pass on the port side 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.

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.

28. 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., one short blast to mean, "I am directing my course to starboard." Two short blasts to mean I am directing my course to port.

29. Nothing in these rules shall exonerate any vessel or the owner, or master or crew thereof, from the consequences 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.

The following section of the Merchant Shipping Act 1894 (57 & 58 Vict. c. 60) was also referred to:

Sect. 422 (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 . . . (2) If the master or person in charge of a vessel fails to comply with this section, and no reasonable cause for such failure is shown, the collision shall, in the absence of proof to the contrary, be deemed to have been caused by his wrongful act, neglect, or default.

Laing, K.C. and *Stubbs* for the plaintiffs.

Aspinall, K.C. and *H. C. S. Dumas* for the defendants.

The case was heard on the 14th and 15th June 1907, and judgment was given on the 17th June, the plaintiffs' tug being held alone to blame.

BARGRAVE DEANE, J.—This is an action for damages by reason of a collision which occurred in the river Elbe, on the 3rd Feb. 1906, at about 4.45 a.m. by German time, and the result was that one of the vessels was sunk, and six out of eight of the crew were drowned. The matter is a very serious one, in consequence of that, and I am sorry to say that the Elder Brethren are not agreed in their views, and the result is that I, unfortunately, have to give my view of what the judgment should be. The story is this: The *Carl Kiehn*, which is a small tug boat in the river Elbe, with a crew of eight men all told, was proceeding up the Elbe. She had only one man on deck, and he was in the wheel house on the upper deck steering, and in sole charge. I do not know what her beam may be, but her length was about 100ft., and from the photograph put in I suppose her beam would be about 20ft., or something like that. As the tug proceeded up the river this man, who was the only witness called from the tug, says that he saw, about a mile and a half above him, the lights of a steamer, the red and white, which afterwards proved to be the red and white lights of the *City of Berlin*. I do not think that he said how she bore from him, but we know from the *City of Berlin* that all three lights of the tug were visible to the *City of Berlin* at about the same distance, so that she would probably be right ahead of the tug. At this particular part of the river the light of Brunshausen below was open to both these steamers. The light of Brunshausen seems to be a single light, with three sectors. There is a green sector, which opens to the north of the channel of the river, a white sector, which opens to the centre of the river, and a red sector, which opens to the south of the channel of the river; in the mid-channel is the white sector. This tug says she was going up the river in the white sector, when she saw these red and white lights ahead of her. The proper course for vessels navigating the Elbe is to keep to the starboard hand, vessels going down to keep to the north, and vessels going up to the south side, both in the white sector; and therefore the tug ought to have kept to the south on her starboard side of the white sector, and the *City of Berlin*, coming down, to the north side of that sector. These two vessels were meeting almost end on, and the first movement seems to have been on the part of the *City of Berlin*. The *City of Berlin* says: "I saw the three lights of this tug ahead of me a little on my port bow, and I thought I had better give her a little more room by porting a little, and that took me just on to the green sector line, so that I was well away on my right, or starboard side of the channel." The tug admittedly did wrong. She admittedly starboarded across the bows of the *City of Berlin* into the green sector line, which was her wrong water on the north side of the river. The *City of Berlin* steadied after having ported as she thought sufficiently, not daring, as she says, to go further into the north shore because of the groynes, she steadied, and that brought the two vessels green to green, both of them on the north side of the channel. I must now mention, because it is the crux of the case, the speed of these two vessls. The tug was going, according to the man who has been called, from nine to ten knots and the steamer from eight to nine knots. That makes a joint speed of about eighteen knots. They first sighted each other a mile and a half apart. That distance would be covered in about five minutes at the combined speed. They were green to green, after having performed these two manœuvres, and, according to the evidence of both, they were very fine green to green. I think it is only about a point to a point and a half on the starboard bow of each other. The photograph of the *Carl Kiehn*, after she was raised shows exactly the angle of the blow. The angle of the blow was almost end on. A part of the side of the *Carl Kiehn* seems to have been sliced off. Eventually the tug got across the bows of the *City of Berlin* at so fine an angle that it was a slice and not a cut. That meant a very slight turn of the helm. Now one of these vessels must have ported. According to the tug she starboarded across the bows of the steamer, and then ported back, ported a little, ported a little more, and at the last hard-a-ported. The two vessels, being green to green, the German pilot, who was in charge of the steamer, says that he thought that this green light was narrowing on his green light, that is getting more end on. That would be for a very short space of time, considering what I have already said, and at the last moment the red light of the tug opened, and there was a collision. I have already said that the tug starboarded, and then ported three times, ported, ported a little, and then hard-a-ported, but, admittedly, she did not blow a signal blast on her whistle to indicate any one of her movements of her helm. The steamer ported, and blew a single blast, and then steadied. Afterwards she starboarded a little to come out from the north shore and blew two blasts to indicate that she was starboarding. Therefore on the one side you have got the steamer giving information of her movements to the tug, but you get no indication from the tug of any single movement she made with her helm. These are all very material questions to consider when we have got to come to a conclusion as to whether the *City of Berlin* was to blame in anything that she did, or neglected to do! We are of opinion unanimously that the tug was to blame. She was to blame for not blowing her whistle, and for crossing the bows of this steamer without any indication whatever of her movements. Further than that, she crossed ahead of the steamer into the steamer's water, and then she came back again across the bows of the steamer. She was manœuvring in a way which undoubtedly is

blameworthy, and makes her responsible. I do not know what the German law is about the navigation of these small craft, but I confess it seems to me very extraordinary that, with a crew of eight hands, there should have been nobody on the deck of this tug to take charge of her navigation, as a look-out man, or to look after the wheel, or to steer, or to be in control, except this one man, who was shut up in this wheel-house on the bridge deck. So much for the tug.

Now was the *City of Berlin* also to blame? There are only two matters to which I need refer in respect to the *City of Berlin*. It seems impossible not to be struck with the fact that here was a vessel of 990 tons gross tonnage, with a crew of seventeen hands, which had a master and a chief officer, but no other certificated officer on board. The boatswain, who was not a certificated officer, was acting as second mate. Coming down the Elbe she was in charge of a German pilot, whom we have seen, and who struck me as a very intelligent man, although I am not quite sure that he fully understood all the questions. He was examined in English. But, so far as I can judge, he was an intelligent and careful man. The other man on deck was this boatswain, whom we have also seen, who did not strike me as an intelligent man. The captain had gone below to lie down, leaving the deck in charge of the officer of the watch, this boatswain and this German pilot to whom I have referred. No doubt, as far as pilotage was concerned, the pilot was responsible. So far as the ordinary navigation was concerned the man in charge was the boatswain, because the pilot, by German law, is only an advisory officer; he does not take control of the ship as pilots do here. I think, and to this extent we are all agreed, that the *City of Berlin* did not do wrong, when she found the three lights of the tug ahead of her a little on her port bow, in porting. She ported to go port to port into her right water, or, rather, in her right water, and then, having got as close as she dare go, she steadied. Then she saw by the lights that the tug had starboarded, and was coming across her bows, and did cross her bows, till she got green to green. So far no blame attaches to the *City of Berlin*. Then comes the point on which the Elder Brethren are not agreed. It is said by the pilot—I put the boatswain out of the case as of no value to us in this matter—that, "being green to green, and very fine, I starboarded a little and then steadied. Notwithstanding my starboarding it seemed to me that the green light of the tug got no broader, if any thing it got narrower, finer, on my starboard bow. I watched it. Suddenly the red light opened, and I was surprised. I immediately ordered the engines to be put full speed astern. It could not be done, because the boatswain was not standing near the telegraph, and I did not realise that he was not doing it, and I did it myself afterwards, but it was too late, the collision happened immediately." The question we differ upon is this: Ought the pilot who was in charge of the *City of Berlin* to have felt there was risk of collision when he saw this green light on the starboard bow not broadening, when he himself had starboarded? He cannot have starboarded much, or else the angle of the collision would have been different. If he had starboarded much and the other vessel had ported, the angle would have been certainly a two-point angle, whereas it must have been almost end on. Therefore there must have been an alteration just at the last moment, but the vessels must have been very nearly end on just before the last moment. It seems incredible to us that this tug should have ported as she did, unless it was suddenly borne in upon the mind of this individual on the deck of this tug that he was under the bows of a big steamer. Ought the pilot of the *City of Berlin* to have reversed his engines when he found that on starboarding the green light did not broaden? I am in the unfortunate position of having to decide in this case between the two Elder Brethren, whose advice is so valuable to me, and I hesitate when I find two seamen differing upon such an important question. But it seems to me that I have to take into consideration, not only the moment of the collision, or the few moments before the collision, but I have to take into account the whole of the story over these five minutes, the whole conduct of this tug in dodging about as she was doing, the fact that the pilot gives us that in the Elbe these tugs are always dodging about, you never know which way they are going to pass you, or what they are going to do. They are constantly in the wrong water. Am I to say that this pilot ought to have seen that the tug was going to throw herself suddenly under his bows at the last moment? It is not in the open sea, but a narrow channel, a narrow river, where you have to pass fairly close. I confess, taking the whole of this story together, I cannot say that in my opinion this pilot was bound to have seen that there was risk of collision before the time when this red light opened. It is a very narrow line: but I do not feel bound to take it, and therefore my view is that that which is the only point on which the owners of this vessel can be held in fault—namely, the failure of the pilot to reverse his engines before the collision—has not been established. I wish to say this about the *City of Berlin*: It is not, I think, right that a vessel coming from Hamburg to the sea should, even if there is a responsible pilot on board, be left without a certificated officer on deck. If there is no second officer to a ship then either the captain or the chief mate should be on the deck and in charge. It seems to me to have been improper, where it is not a case of compulsory pilotage, that there should have been no certificated officer on the deck of the steamer, and that she should have been left in charge of a boatswain such as we have seen here in court before us. For the reasons I have given, so far as this collision is concerned, I have to put my own opinion forward, supported by the opinion of one of the Elder Brethren against the view of the other, that the tug is alone to blame for this collision. As I have stated already, we are agreed about the tug being to blame. The only question upon which we are not agreed is whether the *City of Berlin* ought to have reversed her engines after the vessels came green to green.

On the 25th July 1907 the plaintiffs, the owners of the tug *Carl Kiehn*, delivered a notice of appeal asking that the judgment might be varied and that the owners of the *City of Berlin* should also be held to blame, and that a judgment of both to blame might be entered. The appeal

came on for hearing on the 23rd and 24th of Oct. 1907.

Laing, K.C. and *Stubbs* for the appellants, the owners of the *Carl Kiehn*.—If vessels are approaching so as to involve risk of collision, as was the case here, they ought to stop and reverse their engines. It became the duty of the *City of Berlin* to do that as soon as those on board her saw the green light of the tug was not broadening on her starboard bow, but if anything was getting finer. Risk of collision may be ascertained by watching the compass bearing of a vessel; if the compass bearing does not appreciably change risk of collision is to be deemed to exist:

Preliminary to Steering and Sailing Rules of the Collision Regulations 1897.

Aspinall, K.C. and *H. C. S. Dumas* for the respondents, the owners of the *City of Berlin*.—Since the year 1897 there is not an imperative obligation upon a master of a ship to stop and reverse his engines under circumstances such as existed in this case:

Article 18 of the Collision Regulations 1884.

[Lord Alverstone, C.J.—The *Khedive* (43 L. T. Rep. 610; 4 Asp. Mar. Law Cas. 360 (1880); 5 A. C. 876) was decided on Art. 18 of the old rules.] There is no such rule in the present code of regulations. The only point to be considered is, Did those on the *City of Berlin* act in a seamanlike way having regard to the directions contained in Art. 23? This collision occurred in a river, and therefore the mere fact of the tug narrowing on the bow of the *City of Berlin* does not of itself point to risk of collision. If the tug meant to port so as to come nearer the *City of Berlin* it was her duty to sound a whistle signal under Art. 28, but she did not. The mere fact that a green light narrows tells one nothing as to helm manœuvre. [Lord Alverstone, C.J.—But your pilot admits that he saw the tug's green light getting finer for an appreciable time before the collision. Ought he not to have stopped?] No, the tug had not given him the signal under Art. 28, which she should have done; he had no notice that the tug would continue to port. We know now that in fact there was risk of collision, but the facts should be considered as they appeared to the man on the bridge; ought he to have thought there was risk of collision? Further, if the engines of the *City of Berlin* had been reversed, the head of the *City of Berlin* would have been thrown towards the tug, and she might have got out of command and got into trouble with other vessels.

Lord Alverstone, C.J.—In this case we have to decide whether the judgment of the court below is right in finding the tug alone to blame, the blame of the tug not being now disputed. Before I deal with this case, I should like to say one word with reference to the Court of Admiralty and this court assisted by assessors. The language of the learned judge I am afraid by inadvertence rather seems to have treated the Elder Brethren as constituting the court, and I understand that this case was re-argued because there was a difference of opinion between the assessors. It may, of course, be desirable under some circumstances to adopt that course, but I think it wise to point out that, whatever may be the opinion and advice given by Elder Brethren in the Admiralty Court, who are there to assist the court, as are our assessors here, the decision, both of fact and law, is the decision of the court, and we cannot protect ourselves, nor can the judge of the Admiralty Court protect himself by the opinion of the Elder Brethren against responsibility. Dr. Lushington said, in *The Alfred* (7 No. Cas. 354), "If I had entertained a contrary opinion, notwithstanding all their nautical skill and experience, I am clearly of opinion, having looked carefully into the question, it is my duty to pronounce such contrary opinion." And in *The Magna Charta* (25 L. T. Rep. 512; 1 Asp. Mar. Law Cas. 153 (1871), Sir Joseph Napier said in the Privy Council, "It has been said that there was a difference of opinion between those gentlemen by whom the learned judge of the Admiralty Court was assisted; that they took a different view of the case; and that when the case was referred to the Elder Brethren of Trinity House, a difference of opinion existed there. It was, however, the duty of the learned judge to decide the case upon his own responsibility. The learned judge has got the responsibility cast upon him of arriving at a judicial conclusion. He is advised and assisted by persons experienced in nautical matters; but that is only for the purpose of giving him the information he desires upon questions of professional skill; and having got that information from those who advise him, he is bound in duty to exercise his own judgment; and it would be an abandonment of his duty if he delegated that duty to the persons who assisted him." I am not for a moment suggesting that Deane, J. did not decide this case on his own responsibility, but I think a little too much appears to have been made in the court below of the fact that the Elder Brethren differed from one another in this case. They certainly must not be regarded as being members of the court in the sense of being responsible for the decision given. Now a very able argument has been addressed to us by counsel for the respondents, mainly based upon calculations which must be always received with some caution—that because the time was very short during which these vessels were in sight of one another, taking a combined speed of 18 knots, something like three minutes and a third, the action of the pilot of the *City of Berlin* was such that you cannot impute to him negligence in not having stopped and reversed. I quite agree that, probably for the reasons which counsel for the appellants has given, the old rule which made it imperative upon both ships to slacken their speed or stop and reverse, if necessary, when approaching, so as to avoid risk of collision, has been altered, and now there is Rule 23, which says:—"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." According to 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." Therefore the question of stopping and reversing, apart from the obligation under the rules, depends now upon the general rules of navigation which are preserved by Art. 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." I do not think it ought to be forgotten in this case that so important has the question of bearing been considered that in these rules there is put a direction that "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." I believe that was put in the rules in consequence of a very learned argument of Mr. Cohen in the House of Lords, where it was pointed out that there was a mathematical certainty of vessels coming into collision if their bearings did not change for an appreciable period of time. In this case the *City of Berlin* rightly ported for the purpose of getting a little nearer over to her starboard side of the channel, and I do not think anybody can suggest that there was any erroneous navigation in the *City of Berlin* from the fact that she ported. She appears to have starboarded a little afterwards, the reason being given by the master that he got as far over as he could, and the other vessel, the tug, for reasons which we really cannot exactly ascertain—it is said by the *City of Berlin* because the tug people are very careless in the river Elbe—had got over on to the starboard bow of the *City of Berlin*, and it is said even into the green sector. Under these circumstances, at a distance which cannot be quite inappreciable, at the very last moment the pilot of the *City of Berlin* observes the green light upon his starboard bow, and he observes that while he has steadied his helm that green light does not broaden upon his bow, but is even getting finer. He says in cross-examination by counsel for the appellants—and I think also in chief in effect, but in cross-examination distinctly—that "he was getting nearer us. He was getting no broader all the time as that, I suppose, he was getting a little more to us." "Q. You starboard a point when he is about half a point or a point; that would bring him a point and a half or two points on your starboard bow, and he is about half a mile to three-quarters of a mile away, something like that?—A. Yes, about that. Q. Did he get any broader from that time, or did he get narrower all the time?—A. He got narrower all the time. Q. That looks like as if he was porting back again, does it not?—A. Yes, he was coming more over again to the south side. Q. That would be a port helm?—A. Yes, of course. Q. And giving no signals of any kind?—A. No. Q. Then he keeps coming over to the south side, gradually edging over to the south side, as I understand?—A. Yes. Q. And then you see his red light?—A. At once, yes. Q. And when you see his red light he is what—half a ship's length from you?—A. Not more. Q. It looks to me, from what you say, tell me if I am right or wrong, that after getting on your starboard bow about a point or two he is edging away to the south to get back to his right side?—A. Yes, the angle was getting sharper; of course, he was not so much on the starboard side the last time as he was at the first." Therefore it cannot be suggested that this was anything very, very sudden. That is why I say it is dangerous to rely upon calculations, however accurate they may be, assuming certain facts as to the length of time. The pilot is not describing the action of the vessel suddenly porting and coming unexpectedly across his bows. He is describing an action which he can see and watch for an appreciable period of time, and he describes it as gradually edging in towards him. Counsel for the respondents have said that would be the effect if he was porting only sufficiently to go under the stern of the other vessel. I am afraid I cannot agree with that. I am afraid if he was only porting sufficiently to go under the stern, the green light must have got broader, certainly would not have got narrower. But, be it as it may, the suggestion, however ingenious, is one which I cannot think a sufficient excuse for the pilot. I cannot help also pointing out that very soon after that, possibly when the red light opened—I should doubt the red light being as close as suggested—the man appreciates the necessity of stopping and reversing, and gives the order. He thought the order was being obeyed by the mate. He did not know the telegraph was close by himself, and afterwards at the time of the collision he looks and finds the engines are still going full speed ahead. That points to neglect on board the ship with regard to the stopping and reversing of the engines quite independently of the misjudgment of the pilot. Looking at the whole of the case quite apart from any advice we receive, I cannot help thinking the ordinary construction, according to good seamanship, which ought to be put on the rules as applied to this state of circumstances, is that a reasonably prudent man would have seen that this vessel was approaching him at a short distance, involving very serious risk of collision.

I am glad to say that we are not in the difficulty that my brother Deane was in in the court below, because we are advised by both our assessors that this steamship ought to have stopped and reversed. Under those circumstances I think we must differ from the conclusion of the learned judge. I must say I have less hesitation in doing so, because in the first place we have the advantage of the advice I have indicated, and next the passages in his judgment show that he had very considerable doubt about it. He says: "It seems to me I have to take into consideration, not only the moment of the collision, or the few moments before the collision, but I have to take into account the whole of the story over these five minutes—the whole conduct of this tug in dodging about as she was doing. . . . I confess, taking the whole of this story together, I cannot say that in my opinion this pilot was bound to have seen that there was risk of collision before the time when this red light opened. It is a very narrow line, but I do not feel bound to take it.' I must say I think that that is not giving sufficient effect to the instructions that are put in the preliminary to art. 17. I think the learned judge ought to have come to the view, that after the man had made the admissions he did make to counsel for the appellants in cross-examination, he had for an appreciable time, a substantial time, failed to appreciate that the tug was not only not going safe, but must have been porting across his bows, and he ought immediately to have stopped and reversed. I am, therefore, of opinion the appeal should be allowed by the *City of Berlin* being found to blame as well as the tug.

Buckley, L.J.—I agree. The question here is not how the *City of Berlin* ought to have used her helm at the relevant time or at the

critical time. The question is whether there was not risk of collision so that the vessel ought to have stopped and reversed. The cardinal facts are that at the relevant time the two vessels were green to green, and that the tug was fine on the starboard bow of the *City of Berlin*. As time went on that green light did not broaden, but narrowed. Whether regarded as a mathematical proposition or as an application of the matter preliminary to art. 17, if the bearing does not appreciably change during a sufficient portion of time, the result must be that the two vessels will come into collision. If the light narrows during that time that must indicate that the tug is so changing her position as that she will pass the point of danger at a slightly earlier time than if the bearing did not change ; in other words, she is coming across the bow of the *City of Berlin*. The only question is whether she will get past the point of danger before the *City of Berlin* gets there. Under those circumstances it seems to me there must be risk of collision. Now it may be, and I think it is, the fact, that under the new rules as art. 23 is now expressed the ship may probably defend herself by proving that by continuing her speed she was reducing the risk of collision. But nothing of that kind is, of course, shown here. It seems to me that there was risk of collision ; that the *City of Berlin* was bound, not necessarily, I agree, under art. 23, but under art. 29, which brings in the ordinary practice of seamen—that she was bound under those circumstances to stop and reverse. For not doing so I think she was to blame.

KENNEDY, L.J.—I am of the same opinion, and I am bound to say, having regard to the very fair and frank evidence of the German pilot on board the *City of Berlin*, it seems to me to be an unusually plain case. The vessels were approaching each other at a comparatively short distance, having regard to the joint speed—a distance that would be quickly traversed. One vessel had been brought a point and a half to two points on the starboard bow of the other, and instead of broadening as it would have done if they had been simply keeping their courses, the green light actually narrowed, showing there was an action of the port helm on the part of the vessel which was apprcaching the other. It is quite clear, as Buckley, L.J. has said, there must come a point if that operation is being continued at which they will actually be end-on exactly, and a further point, if there is time to traverse so much ground, at which the red will be actually across the bows of the vessel which had been maintaining her course. I am bound to say, when I see what the pilot said, that I cannot conceive anything fairer than the plain indication of what the pilot himself says he saw. He speaks of giving the order, which, unfortunately, was not carried out on board the ship after the red light was visible—to go full speed astern. "Q. And then you see his red light?—A. Yes. Q. And then it is to late to do anything?—A. Yes. Q. Do you not think you might have taken your speed off, seeing the position the vessel was in?—A. I would not say it was right." That is to say, that what I did was right. "But I have thought of no danger, because he was passing green to green, and, as usual in the river, you know that with the small tow-boats they usually keep on the wrong side of the river." If they usually keep on the wrong side of the river it was exactly what he was not doing on this occasion. Because, as has been pointed out by the learned counsel for the respondents, they say he was making an unfortunate action to get on the right hand side, but that is not the view of the pilot. Now comes what I am afraid is the secret of the whole accident: "We do not take any notice of them in the Hamburg river." Well, I can only hope they will do so in the future. The more casual the management may be, the less right you have to count upon seamanlike action, the less right you have to suppose that this vessel was deliberately endeavouring to port its helm just in time to shave round the stern of the other vessel. If you know they do not do such things, and unfortunately are sometimes careless, the rules of the sea, as well as the dictates of humanity, point to the importance of obeying that which was always a rule of seamanship long before these rules were made at all—namely, to stop and reverse, which action, if it does not avoid a collision, may easily, and in fact will, tend if there is an impact to minimise that impact and to save human life, which unfortunately was lost on this occasion.

Solicitors for the appellants, *Stokes* and *Stokes*.
Solicitors for the respondents, *Pritchard* and *Sons*.

HIGH COURT OF JUSTICE

KING'S BENCH DIVISION.

Friday, Dec. 13, 1907.

(Before WALTON, J.)

BENNETTS AND CO. *v.* J. AND A. BROWN. (*a*)

Charter-party—Construction — Bill of lading — Detention by surf—Custom—Surf days not weather-working days — "Weather-working days" well-known business phrase—Demurrage —Admissibility of evidence.

A charter-party made in London provided that a vessel should "proceed to one or two safe ports between Valparaiso and Pisagua inclusive as ordered on arrival at Valparaiso and there deliver . . . in the usual and customary manner alongside such wharf, vessel, steamer, floating dock, hulk, launch, or pier where she can always safely lie afloat as directed by the consignees . . . (detention through strike of pitmen, . . . delay by . . . storms, surf, weather . . . lockouts, . . . stoppage of work of any persons engaged in the . . . carrying, delivering . . . of any of the cargo . . . or its discharge, receipt, or removal at the port of discharge, or by . . . or any cause beyond the control of charterers, not to count in the time allowed for loading or discharging. . . .) The cargo to be taken delivery of from alongside ship at port of discharge, at the average rate of not less than 250 tons per weather-working day (Sundays and holidays excepted).

By custom at Valparaiso surf days are not weather-working days, and the port captain declares which days are surf days. The vessel arrived and lay in the bay, and delivery was taken ex ship into lighters. The lighters delivered part to another vessel and part was

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

discharged, as was customary, on to the beach. The port captain declared certain days to be surf days, but on all those days discharge into the lighters took place. The surf, however, detained the lighters in regard to the landing of the cargo from the lighters on to the beach and prevented them sometimes from landing and from making as many journeys to and from the vessel as they otherwise could have done.

Held, there was detention through surf, and that time so lost was not to count in the time allowed for discharging; and that the exception therefore applied.

"Weather-working day" is a well-known business phrase and means a day on which the work of loading or discharging is not prevented by bad weather. It was not competent to the charterers, in a charter-party so worded, to put upon that expression a different meaning which it was said the words by custom had obtained at the port of Valparaiso. The plaintiffs were entitled to two and a half days' demurrage.

COMMERCIAL LIST.

Trial of action before Walton, J. sitting without a jury.

Claim for 328*l.* 16*s.*, being demurrage in respect of the plaintiffs' steamship *Candleshoe* alleged to be due from the defendants, the charterers under a charter-party, dated the 6th Oct. 1905, and a bill of lading, dated the 31st Oct. 1905.

By the charter-party, which was made in London, it was provided that the vessel should

Proceed to Newcastle, N.S.W., and there . . load . . . a full and complete cargo of coals . . . and . . . shall therewith proceed to one or two safe ports between Valparaiso and Pisagua inclusive, as ordered on arrival at Valparaiso within twenty-four hours, and there . . . deliver . . . in the usual and customary manner alongside such wharf, vessel, steamer, floating dock, hulk, launch, or pier, where she can always safely lie afloat as directed by the consignees . . . (the act of God . . . detention through strike of pitmen, . . . delay by railway, . . . storms, surf, weather, . . . lock-outs, holidays, or cessation or stoppage of work of any persons engaged in the . . . carrying, delivering, or loading of any of the cargo, to be shipped hereunder, or its discharge, receipt, or removal at the port of discharge, or by . . . , or any cause beyond the control of charterers, not to count in the time allowed for loading or discharging, and all and every other dangers and accidents of the sea, rivers, and navigation, of whatever nature and kind soever, always mutually excepted, even when occasioned by the negligence, default, or error in judgment of the pilot, master, or other servants of the shipowner) . . . The cargo to be taken delivery of from alongside ship at port of discharge, at the average rate of not less than 250 tons per weather-working day (Sundays and holidays excepted) with ten days allowed on demurrage at the rate of 4*d.* per net register ton per day. . . . The cargo to be brought to and taken from alongside at merchants' risk and expense as customary. . . .

The vessel loaded a cargo of coals (4720 tons) shipped by the defendants, who were the holders of the bill of lading, which incorporated the above provisions of the charter-party as to discharge, and proceeded to Valparaiso, arriving on the 6th Dec. 1905. The defendants took delivery.

The discharge commenced on the 9th Dec. and finished on the 10th Jan. 1906, the vessel lying in the bay.

Part of the cargo was taken *ex* ship into lighters and thence discharged on to the beach, which was usual; part was taken *ex* ship into lighters and then discharged on to another ship.

Between the 6th Dec. and the 10th Jan. the port captain at Valparaiso declared, as was customary, certain days to be surf days, but on all those days discharge from the ship into the lighters took place.

Evidence was tendered that at Valparaiso it was customary not to treat surf days as weather-working days, and that half a surf day counted as half a weather-working day.

Between the 9th Dec. and the 10th Jan. there were five Sundays, three holidays, and, as the defendants alleged, ten surf days and five half surf days.

The surf on the beach to some extent detained the lighters and prevented them sometimes from landing, and from making as many journeys from the ship to the beach and back again as they otherwise would have been able to do.

J. A. Hamilton, K.C. and *Adair Roche* for the plaintiffs. — The cargo should have been discharged, excluding Sundays and holidays according to the charter-party rate in nineteen days—viz., by 2nd Jan. 1906. Eight days' demurrage have been incurred. The delay was caused by shortage of lighters. The discharge was not stopped by reason of the surf, for that took place on all the alleged surf days. Discharge is discharge into the lighters. The whole process of landing on the beach is not included in the word discharge. The delay, if any, was in the ultimate disposal of the goods. Had the consignees ordered the vessel to discharge to another vessel no difficulty as regards surf would have been encountered. Discharge was given as contracted for. Delay in "removal" at the port of discharge refers to stoppage of work by the persons engaged in the removal. The alleged custom is unreasonable and inconsistent with the terms of the charter-party. "Weather-working days" is a well-known phrase, and it cannot be reasonable to apply to it a custom by which a captain of a port can declare arbitrarily that a certain day is a surf day. A surf day can be a weather-working day. For a large vessel a certain day might be weather-working, even though it might not be for a small ship.

The following authorities were referred to:

Smith and Service v. *Rosario Nitrate Company*, 7 Asp. Mar. Law Cas. 417; 70 L. T. Rep. 68; (1894) 1 Q. B. 174;

Hudson v. *Ede*, 3 Mar. Law Cas. (O.S.) 114 (1868); 18 L. T. 764; L. Rep. 3 Q. B. 412;

The Sailing Ship Allerton Company Limited v. *Falk*, 6 Asp. Mar. Law Cas. 287 (1888);

Holman v. *Peruvian Nitrate Company*, 5 Sess. Cas. (4 Ser.) 657;

Elswick Steamship Company Limited v. *Montaldi*, 10 Asp. Mar. Law Cas. 456; 96 L. T. Rep. 845; (1907) 1 K. B. 626;

Carver's Carriage by Sea, 4th edit., s. 196.

Scrutton, K.C. and *Leck* for the defendants.—Discharge on to the beach is customary at Valparaiso, and the delay in discharging on to the beach was caused by reason of the surf, which sometimes prevented discharge on to the beach, and which prevented the lighters from discharging at as fast a rate as would have been otherwise

possible. "Discharge" means discharge into the lighters and from the lighters on to the beach. In the charter-party occur the words "receipt or removal at the port of discharge," which refer to the happening of something subsequent to the placing of the goods in the lighters. Those words being used in conjunction with the word "discharge" shows that the whole process of landing is covered:

Lyle Shipping Company Limited v. *Corporation of Cardiff*, 9 Asp. Mar. Law Cas. 23, 128; 83 L. T. Rep. 329; (1900) 2 K. B. 638;
Cunningham v. *Dunn*, 3 Asp. Mar. Law Cas. 595 (1878); 28 L. T. Rep. 631; 3 C. P. Div. 443;
Ford v. *Cotesworth*, 3 Mar. Law Cas. (O.S.) 190, 468 (1870); 23 L. T. Rep. 165; L. Rep. 5 Q. B. 544, per Martin, B., at p. 548.

The intention was not to limit the exceptions to work alongside the ship; that is clear from the exception referring to strikes of pitmen. "Surf" is the breaking of the sea on the beach, and if surf is to be read with "detention or delay," so as to mean that detention or delay through surf was not to count in the discharging time, then the construction must apply to "removal" as well as "discharge":

Branckelow Steamship Company v. *Lamport and Holt*, 10 Asp. Mar. Law Cas. 472, note (*a*) (1897); 96 L. T. Rep. 886 n; (1897) 1 Q. B. 570.

The charter-party is not contradicted by the custom. The custom at Valparaiso is that the captain of the port decides which days are to be deemed surf days, and that a surf day is not a weather-working day, and that half a surf day counts as half a weather-working day. There is nothing unreasonable in that. No demurrage is due to the plaintiffs.

Cur. adv. vult.

WALTON, J.—This was an action brought by shipowners against charterers for demurrage alleged to have been due under a charter-party at the port of discharge, which was Valparaiso. The charter-party provided that the vessel was to proceed to "one or two good safe ports between Valparaiso and Pisagua inclusive, as ordered on arrival at Valparaiso within twenty-four hours." She was ordered to discharge at Valparaiso; nothing turns upon that. So the voyage really was a voyage to Valparaiso. The charter-party proceeds: "and there, or so near thereunto as she may safely get and deliver the said full and complete cargo in the usual and customary manner alongside such wharf, vessel, steamer, floating dock, hulk, launch, or pier, where she can always safely lie afloat as directed by the consignees to whom the vessel is to be consigned inwards." Then follow certain exceptions. I will pick out the exceptions which seem to me to apply in the present case; detention through various things, but amongst them surf. I may point out other exceptions just to illustrate the kind of clause the exception clause is: "Cessation or stoppage of work by any persons engaged in the winning, getting, carrying or delivering, or loading of any of the cargo to be shipped hereunder, or its discharge, receipt, or removal at the port of discharge." Detention from those and other causes is not to count in the time allowed for loading or discharging. So detention through surf by the terms of this charter-party was not to count in the time for loading or discharging. Now with regard to the time for discharging it was a fixed time, and therefore the obligation was a strict one to discharge within the time fixed, and it was fixed by these words: "the cargo to be taken delivery of from alongside ship at port of discharge at the average rate of not less than 250 tons per weather-working day (Sundays and holidays excepted), with ten days allowed on demurrage at the rate of 4*d.* per net register ton per day; the cargo is to be brought to and taken from alongside at merchants' risk and expense as customary, the master to employ such stevedore at port of discharge." I do not think that that matters. Now the defence here is that if there was delay it was caused by surf, and there is a further defence which puts it in a somewhat different way, viz.: "further, by the custom of the port at Valparaiso, surf days are not weather-working days, and half surf days are half weather-working days." It is said, and a good deal of evidence was read to me which was taken at Valparaiso, that by the custom of Valparaiso a surf day—by which I understand is meant a day on which the surf on the beach is so heavy that lighters cannot land their cargo there—does not count as a weather-working day, and although it is not quite so stated in the plea there was further evidence that by the custom of Valparaiso the port captain fixed and settled conclusively in a binding way what days were to be counted or not as surf days, so that the custom relied upon was a kind of double custom that surf days were not weather-working days, and that the number of surf days by custom was to be fixed absolutely by the decision of the port captain. Now the first question I have to consider is whether as between the parties to this charter party which was made in London, and, as I have said, for one or two ports in South America, the charterers can rely on such a custom. The custom appears to me to give a meaning which is not the plain and natural meaning of the words "weather-working days." I may mention that here as far as I can understand the figures and the accounts in the evidence which has been before me, leaving out Sundays and holidays, about which there is no dispute, the discharging did go on every day including those days which are called surf days. The conclusion at which I have arrived is that "weather-working days" is quite a well known phrase. Whether it is perfectly grammatical and perfectly good English it is not for me to consider, but it is a phrase, I think, which has grown into common use and is generally understood, and has come to have an ordinary meaning as part of the English language; at any rate as part of the English language which is used by men of business, and I think it has a natural meaning, and that natural meaning is a day on which the work, it might be of loading—but here it is of discharging, is not prevented by bad weather. Of course, it might be half a day. Half a day might not be a weather-working day and the other half might be weather-working, but I think that is the natural meaning of the words, and I do not think that it is competent to the charterers in a charter party of this kind, worded as this charty party is, to put upon that expression a different meaning which, it is said, the words by custom have obtained at this port of Valparaiso at which it happened that this cargo was discharged. I think that the charterers are bound by the

words of the contract, and that they were to discharge 250 tons per weather-working day. And one must remember here, too, that the obligation upon the charterers was to take delivery from alongside the ship. The charterers had the right to order the ship to any wharf, vessel, steamer, floating dock, hulk, launch, or pier. They had a large option given to them, and in this case they selected to have the vessel discharged into lighters, the vessel lying at anchor in the bay. That being so, it became the duty of the charterers to take delivery in lighters from alongside the ship so lying at anchor. Strictly speaking, when the shipowner had delivered the cargo into the lighters, the shipowner had nothing further to do with it: the responsibility ended; it was for the charterers to take delivery from alongside the ship, and as far as I can understand there was never anything in the weather to prevent that being done. There were a number of days which were called surf days, but the surf did not in any way, so far as I understand, interfere with the operation of bringing the lighters alongside the steamer and placing the goods from the steamer into the lighters. The only way in which the surf interfered with the process of discharging, if it can be called part of the process of discharging, was this—that when the lighters were loaded of course they had to be discharged somewhere themselves, and as it is a very common thing at Valparaiso to discharge lighters on to the beach, quite a proper thing, and the ordinary thing too, there was a difficulty when there was a heavy surf, because the lighters could not discharge easily and sometimes not at all on the beach. The result of that was of course to detain the lighters and to prevent the lighters from making as many journeys as they otherwise would from the beach to the steamer and back again. But there was nothing to prevent the actual operation of discharging from the ship, and, as I have said, it went on every day except Sundays and holidays. But although that is so, and although I do not think that the charterers can rely on any custom which would give anything different from its natural sense to the words "weather-working day," and I certainly think that they cannot rely on any custom which would make the captain of the port a kind of arbitrator who should settle conclusively what was a weather-working day and what was not, although that is so, I think it is open to the charterers to rely upon the exceptions to which I referred just now—that is to say, detention through surf not to count in the time allowed for discharging. It has been suggested that as the surf did not prevent the discharge of the cargo from the ship into the lighters, but only the discharge from the lighters on to the beach, those words do not apply, the operation of discharge being completed by placing the goods into the lighter. However, I do not take that view. Of course, it is quite competent for parties to agree that something which would prevent getting the goods away from the ship's side should not count in the days for discharging. It is quite competent to the parties to agree upon that, and indeed it is a very natural thing for them to do because it obviously would be an unreasonable and a very troublesome and inconvenient thing to have the lighters lying loaded afloat for a long time and probably impracticable to readily and quickly fill up their places so as to keep on the rate of discharging from the ship just as if there was no surf on the beach, and I think that by the terms of this charter-party the parties have agreed that if surf interferes with the discharge and causes detention that detention shall not be taken into account in the time for discharging. Now, by "surf" they must, I think, have meant surf upon the beach, and the detention they must have had in their minds must have been detention not in discharging the cargo into the lighters but landing the cargo from the lighters on to the beach, and I come to the conclusion that that exception does apply. But now as surf days may still be weather-working days, and as I am not bound and the plaintiffs are not bound by the decision of the captain of the port, it leaves to me the very difficult question of saying precisely how much delay there was caused by the difficulty created by the surf. I am quite satisfied that there was delay directly caused by the surf. I think that is perfectly obvious, but there is very little evidence that enables me with any confidence to measure the extent of that delay. Of course, there having been delay, it is for the defendants to bring themselves within the exception. I have gone into the figures as well as I can, and fortunately this case has been made to turn mainly upon the contention that a surf day is not a weather-working day and upon the certificate of the captain of the port. I think, as I have said, that there was considerable delay. I should think, as well as I can arrive at it, that probably there was delay of more than three days over the whole period caused by the surf difficulty. On the whole, I think I shall be doing justice if I give judgment for the plaintiffs for two and a half days—that is, 42*l.* odd per day. I may say that I do not measure the delay merely by the quantity that was left from certain days in the lighters owing to the surf. If that was the only thing to take into account it would be rather easy to calculate. Although that affords some measure of the delay, I think there was more delay than that which arose merely from the detention of loaded lighters from one day to another, as on some days, no doubt, it would have been very difficult for the lighters to make as many journeys as they would have done if there had been no surf.

Judgment for the plaintiffs for two and a half days' demurrage.

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

Solicitors for the defendants, *J. Wicking Neal.*

Wednesday, Jan. 22.

(Before PHILLIMORE and WALTON, JJ.)

SMACKMAN *v.* GENERAL STEAM NAVIGATION COMPANY. (*a*)

Bill of lading—Exemption of shipowner from liability—Negligence of servants or agents of owners—"Management, loading, stowing, discharging, or navigation of the craft or otherwise."

The plaintiff shipped 312 *baskets of plums to be carried from Hamburg to London in a ship belonging to the defendants. By the terms of the bill of lading the goods were to be discharged at the shipowners' expense, but at merchant's risk, and were to be delivered to the plaintiff's agent subject to the exceptions and conditions set out in the bill of lading. One of these exceptions exempted the shipowners from liability "for all accidents, loss, or damage whatsoever arising 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 other craft or otherwise." The* 312 *baskets were duly discharged from the ship, but, owing, as found by the jury, to the default of the persons in charge of the wharf, for whose negligence the shipowners were primarily responsible,* 213 *baskets were delivered to the wrong persons, and the plaintiff's agent never received them. In an action by the plaintiff against the shipowners for damages:*

Held, that the defendant shipowners were protected by the exception in the bill of lading.

APPEAL from the decision of the learned Common Serjeant sitting with a jury at the Mayor's Court, London.

The plaintiff sued to recover damages for the loss of 213 baskets of plums shipped from Hamburg upon a vessel belonging to the defendants. It was proved at the trial that 312 baskets of plums were shipped by the plaintiff for consignment to J. Morris, Covent Garden Market, London, the goods to be landed at Irongate and St. Katharine's Wharf or at Cotton's Wharf at ship's option. The ship, which carried a cargo of 16,000 baskets of plums in all, arrived at Cotton's Wharf, and J. Morris was duly there to receive them on behalf of the plaintiff. Of the 312 baskets consigned by the plaintiff, only ninety-nine were delivered to Morris.

It was found by the jury that the 312 baskets were delivered on to Cotton's Wharf, and that the baskets consigned by the plaintiff, with the exception of ninety-nine, were delivered to the wrong people by the fault of those who had control of the goods at the wharf.

By the terms of the bill of lading the goods were expressed to be:

Shipped in apparent good order and condition by C. Smackman on board the good steamship or vessel *Balgownie* . . . bound for London, where the goods will be, at the company's expense, but at merchant's risk discharged and (or) stored either on shore or afloat, and transported by land and (or) water by any conveyance, and neither the company, the wharfingers, the bargeowners, or lightermen will be responsible for the risks of lighterage, wharfage, shipping, landing, fire, or any insurable risk afloat or ashore. . . .

Shipped on deck at shipper's risk. J. M. 312 baskets plums . . . to be delivered, subject to the exceptions and conditions hereinafter mentioned, in the like good order and condition either into lighter or on the quay, at master's option, where the ship's responsibility shall cease, at the Port of London unto the order of the General Steam Navigation Company, to be forwarded to London for delivery to Mr. Jacques Morris, Covent Garden Market, London, or to his or their assigns, subject to all clauses and conditions in the bill of lading. . . .

By No. 1 of the exceptions and conditions above referred to, the bill of lading exempted the shipowner from liability for "all accidents, loss, and damage whatsoever" arising 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 other craft or otherwise, the owners being in no way liable for any consequences of the causes before mentioned. By exception 5 of the bill of lading it was provided that "all goods immediately they are discharged from the steamer shall be entirely at the risk of the consignees." The following clause appeared in the margin of the bill of lading:

In cases where land carriage, shipping, landing, lighterage, &c., or transhipping is effected by or at the cost of the shipowner, it is so done at the risk of the owner of the goods, and neither the shipowner, the wharfingers, the bargeowners, the lightermen, or land carriers, are responsible for the risks of lighterage, strikes or combinations afloat or ashore, fire afloat or ashore, damage by vermin, wharfage, or any insurable risk. Merchants are particularly requested to see that their policies of insurance include all the above and other excepted risks on bill of lading.

Upon the findings of the jury the learned Common Serjeant held that the defendants were not protected by the first exception in the bill of lading, and that the goods were not lost by default, but were taken by somebody else, and that the defendants, having failed to put them in the train for delivery to Morris, were liable for the loss. He accordingly gave judgment for the plaintiff for 37*l.* 10*s.*, the amount claimed.

The defendants appealed.

Scrutton, K.C. and *Stuart Bevan* for the defendants.—The learned Common Serjeant was wrong in holding that the defendants had not brought themselves within the exception to the bill of lading. *Primâ facie*, no doubt they were liable, because the goods were not delivered to Morris. But they come within the exception because the jury found that the goods were lost owing to the default of those who had the control of the wharf. The people in default were clearly the agents of the defendants, who had contracted to deliver the goods to Morris, and, being their agents, the defendants are exempted from liability from the consequences of any act, neglect, or default whatsoever on their part.

Dunlop for the plaintiff.—The decision of the learned Common Serjeant was right, and the exception clause does not apply. The clause in question does not apply to the second portion of the transit at all. The first portion of the bill of lading applies to the transit from Hamburg to London, and it is that portion which is covered by the exceptions in clause 1. The marginal clause is the one which relates to the delivery to Morris, or on the wharf. In that clause the

(*a*) Reported by PHILIP B. DURNFORD, Esq., Barrister-at-Law.

words "wharfingers" and "lightermen" are used, whereas these words do not appear among the list of servants mentioned in clause 1 of the exceptions. [PHILLIMORE, J.—I think the marginal clause is a warning to merchants to insure against the risks mentioned.] Clause 1 of the exceptions must be applied to the sea portion of the transit, and the clause in the margin to the land transit. If the exception applies, then the goods were not lost within the meaning of the exception. Loss means a total injury, and goods are not lost if they are not delivered to the right people. Further, the exception does not apply to any act, neglect, or default totally unconnected with the ship. The words "servants or agents of the owners" must be read as meaning words *ejusdem generis* with the preceding words "pilot, master, officers, engineers, crew, stevedores," &c. [He referred to *Bearselman* v. *Bailey*, (1895) 2 Q. B. 301).]

PHILLIMORE, J.—In my opinion this appeal must be allowed. This is a special form of contract whereby the shipowners contract not merely for their own vessel's services, but that they will perform certain duties with regard to forwarding the goods after they have been delivered from the ship's side on to the wharf, for which purpose apparently they make themselves consignees. They put that contract into and as an addition to the ordinary bill of lading for sea carriage; but they provide expressly that that forwarding will be at the merchant's risk, and neither the company, the wharfingers, the bargeowners, nor the lightermen or the land carriers will be responsible for certain things. The defendants say that these goods will be discharged, stored, and transferred at merchant's risk. These goods were sent and, according to the findings of the jury, reached the wharf and were duly landed. Thereupon they disappear, and in the view of the jury they disappeared owing to some carelessness on the part of the wharfingers, who were not the direct servants of the shipowners, but for whose conduct the shipowners had made themselves responsible to the extent that they have contracted that at the merchant's risk (which would not protect them against (negligence) and subject to the clauses and conditions in the bill of lading these goods shall not merely be landed at the wharf, but forwarded to the destination given in the bill of lading. The goods having been brought safely to the wharf and having been lost on the wharf owing, we will assume against the defendants, to the negligence of the people for whom the defendants were primarily responsible, the question is, Have the defendants protected themselves? They have expressly said that this part of the conveyance is to be subject to all clauses and conditions in the bill of lading. The only difference in the language being that the carriage on sea is "subject to the exceptions and conditions hereinafter mentioned," I myself do not see that the words "all clauses and conditions in the bill of lading" are narrower than the words "the exceptions and conditions hereinafter mentioned." At any rate, I think they incorporate the clauses which immediately follow underneath.

Now, the following are the exceptions and conditions above referred to: First (*inter alia*), all accidents, loss, or damage whatsoever from any act, neglect, or default whatsoever by pilot, master, officers, engineers, crew, stevedores, servants or agents of the owners in the management, loading, stowing, discharging, or navigation of the ship or other craft or otherwise; with a further clause that the owners are not to be liable for those consequences. First of all, if the baskets were lost in this way, was it through an act, neglect, or default? I think it was. Secondly, was it an act, neglect, or default by the servant or agent of the owners? I think the proper expression to use is that it is the act or neglect of the agent of the owners, because the people on Cotton's Wharf were not their servants, but it is immaterial, as they were either the servants or agents, and either will do. Is the act, neglect, or default "in the managing, loading, stowing, discharging, or navigation of the ship or other craft or otherwise"? Why not? Most things have been covered by the other clauses, and the words "or otherwise" are put in to cover what has been otherwise forgotten. I think the right construction is to give the words "or otherwise" their ordinary meaning. It is obvious that the shipowners here intended to protect themselves, and it would be strange indeed if the construction of this exception were strained so as to say that the owners had safely protected themselves against the negligence of their own people, but had not safely protetcted themselves against the negligence of other people. Such a construction of the exception is possible, but it would give it a very strained meaning. Therefore, in my opinion, the shipowners here have brought themselves within the meaning of the exception. Then it is suggested on behalf of the plaintiff that there is a conflict between the observations in the margin of the bill of lading and these words, and that we ought to read the marginal note or observations in the bill of lading as applying to land carriage and not these words in the first clause of the exception. But as it is expressly said in the body of the bill of lading that this land carriage is to be subject to all clauses and conditions in the bill of lading, that is a very difficult construction, but in truth the two clauses are not inconsistent. It is not as if there was a different measure of damages, or a different rate for measuring liabilities in the margin to what there is in the body of the bill, and I think the real view of the clause in the margin is that it is a *nota bene*. It all really leads up to the first paragraph. It is advice to the merchant: "Note that by this bill of lading so-and-so and so-and-so are the responsibilities and no more; and you had better protect yourself against this risk which otherwise you might not think of. Of course you have effected a policy of insurance and protected yourself against the ordinary sea perils, which include practically at the present day negligence of the master and mariners, but you may not think, unless you are warned about it, that you have got to protect yourself against any accident due to negligence or otherwise in the carrying of the goods from the wharf, for example, say, to Covent Garden Market, and you had better, therefore, insure." So much do I think that it is only a *nota bene* that in my opinion we should put a wrong construction on the body of the bill of lading if we took any other view of it. Either way I do not accept it. It is not necessary perhaps to discuss that which has not been

argued. I do not think it extends the exceptions, nor do I think, as at present advised, that it can limit them. I do not think it necessary to discuss that question, because it does not arise. It may be cumulative, or it may be explanatory or cautionary; whichever way it is it is not contradictory; therefore the result remains that the defendants ought to succeed upon this appeal.

Walton, J.—I am of the same opinion. The duty undertaken by the defendants here was in two parts—first, to carry the goods to London and deliver them there into a lighter or on to the quay at master's option; secondly, to forward them to Mr. Morris. The goods were carried. The option was exercised to discharge, not into a lighter, but on to Cotton's Wharf. The goods were discharged on to Cotton's Wharf, and, as the jury have found, were lost by being delivered to the wrong people through the fault of those who had control of the goods at the wharf. The forwarding is expressly made subject to all clauses and conditions in the bill of lading. One of the clauses contains an exception of negligence. I think clearly that the duty of forwarding, which by other words in the bill of lading is to be at merchant's risk, was subject to this exception of negligence. The exception of negligence was of all accidents, loss, and damage whatsoever from any act, neglect, or default whatsoever of the crew, taking it shortly, or agents of the owner "in the management, loading, stowing, discharging, or navigation of the ship or other craft or otherwise." "The management, loading, stowing, discharging, or navigation of the ship, no doubt, would apply to the carriage to London, "or other craft," that might apply to the forwarding where the goods were delivered by the ship into a lighter and then forwarded; "or otherwise," I see no reason why, being read as a qualification of the obligation to carry by land or by sea and on land, these words should not apply to carriage by land, and therefore I see no reason why that exception should not apply to the present case. The learned judge below gave judgment for the plaintiff on the ground that there was no loss here. It seems to me pretty plain that the plaintiff lost his goods. I suppose if he had not lost his goods he would not have brought the action. He lost them because they had been delivered to someone else. I do not quite appreciate the reason why this should not be described as a loss within the meaning of this exception. It seems to me it was, and therefore the appeal must be allowed, and there must be judgment for the defendants.

Appeal allowed.

Solicitors: *C. J. Parker*; *William Batham* and *Son.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Nov. 29 *and* 30, 1907.

(Before Bucknill, J. and Elder Brethren of the Trinity House.)

THE SUEVIC. (*a*)

Salvage—Life salvage—Risk of danger to those rescued—Merchant Shipping Act 1894 (57 *&* 58 *Vict. c.* 60), *s.* 544.

A steamship having on board about 400 *passengers and a general cargo, got ashore about midnight on the* 17*th March* 1907 *on the Stag Rocks near the Lizard. The weather was dense fog, and there was a high sea. Four tugs left Falmouth to render assistance, and they were all employed to tow lifeboats with passengers in them, which were standing by the ship to C. and F., where the passengers were safely landed.*

Held, that the tugs were entitled to life salvage for the work done in expediting the landing of the passengers, because there was danger or reasonable apprehension of danger to those rescued, and the work was done at risk to the tugs.

Salvage suit.

The plaintiffs were the owners, masters, and crews of the steamtugs *Triton*, *Victor*, *Marion*, and *Briton*; the defendants were the owners of the steamship *Suevic*, her cargo and freight. The *Triton* was a steel screw tug of 173 tons gross register, manned by a crew of eight hands all told, and was of the value of 6500*l.* The *Victor* was a steel screw tug of 153 tons gross register, manned by a crew of six hands all told, and was of the value of 6000*l.* The *Marion* was a steel screw tug of 46 tons gross register, manned by a crew of four hands all told, and was of the value of 2250*l.* The *Briton* was a wooden tug of 40 tons gross register, manned by a crew of four hands all told, and of the value of 2000*l.* The *Suevic* was a steel twin screw steamship belonging to the port of Liverpool, 12,500 tons gross and 8108 tons net register, and was manned by a crew of 140 hands all told.

Shortly before midnight on the 17th March 1907 the *Suevic*, whilst on a voyage from Australia to London *via* Plymouth with a general cargo, and having 400 passengers on board, ran on the Stag Rocks under the Lizard. The weather at the time was dense fog, the wind a moderate gale from the W S.W. with a high sea and a very heavy swell.

About midnight on the 17th March 1907 the tugs, while lying at Falmouth, heard that a vessel was ashore, and at once proceeded to see if they could render any assistance.

The tug *Triton* left Falmouth at once and reached the *Suevic* about 3 a.m. on the 18th March. Attempts were made to attract the attention of those on board the *Suevic*, but they failed owing to the noise made by the surf on the rocks and the density of the fog. About 5 a.m. those on the tug saw a red light being burnt, and found it was a signal from the Cadgwith lifeboat, which, together with other lifeboats, was standing by the *Suevic*. The *Triton* at once took the lifeboat in tow, and towed her to Cadgwith, a distance of about three miles,

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

and, when the passengers on board her (about forty-two) had been safely landed, the *Triton* again towed the lifeboat back to the ship. The Cadgwith lifeboat then took on board about sixty passengers, and the *Triton* again towed her to Cadgwith and then brought her back. The *Triton* then stood by for about three hours, when a large number of passengers and crew, and between 3000*l.* and 4000*l.* worth of specie, were put on board her by the Cadgwith and Lizard lifeboats, and she then proceeded to Falmouth, which was reached in safety about 2 p.m.

The tug *Victor* left Falmouth about the same time as the *Triton*, and reached the *Suevic* about 4.45 a.m. After standing by a short time she was hailed to take the Lizard lifeboat, which was full of passengers, in tow, and towed her to Cadgwith, where the passengers were safely landed.

The *Victor* then took the lifeboat back to the *Suevic*, and afterwards took her back to Cadgwith full of passengers, and again returned to the *Suevic* with the lifeboat in tow. The *Victor* then stood by for a time, and took on board twenty-seven of the crew and some baggage, and then proceeded to Cadgwith, where she took on board about sixty passengers and more baggage and proceeded to Falmouth, which was safely reached about 5.30 p.m.

The *Briton* left Falmouth about 3 a.m. on the 18th March, and reached the *Suevic* about 5 a.m.

On her way to the steamship she was signalled by the Coverack lifeboat, and towed her to the *Suevic*.

The Coverack lifeboat was filled with ladies and children, and towed by the *Briton* to Cadgwith, where they were safely landed. The *Briton* then towed the lifeboat back to the *Suevic*, where it was again filled with passengers, and the *Briton* was again towing her to Cadgwith, and had got her round the Stag Rocks when three lifeboats belonging to the *Suevic* were sighted, one with three sailors in her and the others with one.

The *Briton* then proceeded to pick up these boats, and, as one broke adrift three times and was filling with water, the man in her was taken out and the other two boats were brought safely into Falmouth Docks about 3 p.m.

The *Marion* left Falmouth about 3 a.m. on the 18th March and reached the *Suevic* about 5.15 a.m. After standing by for some time those on board the Mullion lifeboat hailed her to tow their lifeboat back to Mullion, as they thought all the passengers had been landed. The *Marion* did this and then returned to the *Suevic*, and having taken on board about 150 passengers from the *Suevic's* lifeboats, proceeded to Falmouth Docks, where the passengers were safely landed about 3 p.m.

The plaintiffs alleged that the services were well and promptly rendered in circumstances in which promptitude was of the highest importance; that there was risk to the tugs; and that by reason of the services a large number of lives were rescued from a situation of grave peril.

The defendants denied that any lives were in danger, and alleged that the lifeboats could have, and in fact did, save all hands, and that there was no need for hurry.

While denying liability, the defendants tendered to the plaintiffs, the owners of the *Victor*, 125*l.*; the *Triton*, 150*l.*; the *Briton*, 80*l.*; the *Marion*, 65*l.*

The value of the *Suevic* was 55,000*l.* and of her cargo and freight 210,000*l.*

Laing, K.C. and *H. C. S. Dumas* for the plaintiffs.—Property having been salved, life salvage is payable:

The specie ex Sarpedon, 37 L. T. Rep. 505; 3 Asp. Mar. Law Cas. 509; 3 P. Div. 28.

And it is immaterial that the persons who saved the property are not those who saved life.

The cargo ex Schiller, 36 L. T. Rep. 714; 3 Asp. Mar. Law Cas. 226, 2 P. Div. 145.

The real question here is what is the value of the service. A life is invaluable; it cannot be assessed in figures. The determining factor is whether there is danger or a reasonable apprehension of danger or loss if the tugs had not arrived. There was always a risk that if the weather had got worse the lifeboats would not have had time to land all those on board without the saving of time which the towing of the lifeboats by the tugs effected. The court should have regard to the fact that it is good policy to encourage salvors to risk their property to save lives rather than property. Lifeboatmen get rewards in the shape of decorations and public praise, and the court should encourage to the utmost other salvors who risk their property to save life.

Aspinall, K.C. and *J. B. Aspinall.*—No salvage is due. Tugs are always ready to render salvage services, and need no special encouragement to render them as do liners or big merchantmen who have to break into their mercantile adventure in order to render assistance. These tugs are not specially kept for salvage services, so no considerations arise in this case of rewarding the keeping up of special salvage boats, as in *The Glengyle* (72 L. T. Rep. 418; 8 Asp. Mar. Law Cas. 341; (1898) P. 97).

BUCKNILL, J.—It has already been stated that cases of life salvage are of very rare occurrence in this court, and therefore one must be careful to lay down the principles upon which a salvage award may be made in such a case as this. I apprehend that it is accurate to say that the principle which lies at the bottom of life salvage may be said to be the danger, in the first instance, to the persons whose lives have been salved, or the apprehension of danger, and that seems to me to cover the whole ground. If there is no danger, or anything like danger, of course the whole thing falls to the ground. There is nothing to be saved from. The persons are in perfect safety on the ship, and may stay there until the weather becomes fine and then go ashore. When, however, there is danger in fact to the persons, or serious apprehension of such danger, and they are saved from that, it seems to me that the persons saving them are entitled to a salvage award. Of course there may be many other considerations, but that seems to me to be the principle which lies at the bottom of the matter.

The facts in this case are very simple. This splendid ship through an error of judgment, about which I know nothing whatever, and with which I have no concern, in foggy weather, got ashore at a place which may be taken to be to

the north and west of the Carligga Rock, in what is called on the chart Lead Pool, and the log may be read as representing a fair account of what happened. It is a log which appears to have been very well kept, and what it says is this:—"March 17, 10.15, sighted loom of Lizard light. 10.27, ship took ground, stopped engines. 10.33, astern full, both. 10.38, stop starboard. 10.40, stop both. All hands employed clearing away boats, firing distress signals and landing passengers until midnight. Midnight, strong wind, high ground swell, misty over land. Monday, March 18, proceeding landing passengers in ship's boats and shore lifeboats, assisted by tugs. Four o'clock, strong wind, high ground swell, misty. Eight o'clock, similar weather. Eleven o'clock (about), all passengers landed, tug *Triton* taking last and laying off ship." That states in a few words what was done on this occasion. These tugboats all hail from Falmouth. The *Triton* is said to be worth 6500*l.*, and is manned by eight hands all told; the *Victor*, 6000*l.*, with six hands; the *Marion*, 2250*l.*, with four hands; and the *Briton*, 2000*l.*, with four hands. Of course to a certain extent one has to take into consideration the value of the salving property, and that came altogether to 16,750*l.* Now, the weather being, as it was, foggy, or misty, so that the light could not be seen, but only the loom of it in the water, and the wind a strong breeze, with a ground swell, these people very properly, as the captain of the *Suevic* thought, had to be landed with the greatest expedition. Of course, if anything had happened and any life had been lost through these people not being sent ashore as quickly as possible, very severe and harsh things would have been spoken of the captain and the great company he serves. One only has to think of the great company he serves to be satisfied that the captain duly appreciated the position. He did not accurately know where he was at first; he did not know what part of the ship was afloat and what not afloat; and if very bad weather had come on—and bad weather does very often come on there—that ship might have broken her back and there might have been a great loss of life. Now, the weather being as it was, and the captain having made distress signals, which I understand to have meant, "I want assistance from any person or persons who can give it," these tugs went out from their port of Falmouth, and they went out with expedition and speed. These people know the land perfectly well, and all the dangers of the deep there—it is a rock-bound coast, and there are many sunken rocks and others which show a little above water—but it would indeed be a hard and inaccurate thing to say that for any purpose whatever any of those tugs could have gone on that night, in that weather, and to such a spot as the *Suevic* was ashore at without risks to themselves. People are fond, sometimes, of using the word danger only, but there is a great difference between danger and risk of danger; but just as the principle of salvage here applies to people on this ship who were either in danger or risk of danger, so a tug which is being navigated even by the most skilful navigator would be, I find, either in danger, or risk of danger, in going to the neighbourhood in which this ship was. I cannot accept the view put forward by those lifeboatmen, who have given their evidence with most complete honesty, that there was no danger or risk of danger to these tugs. These fine fellows who go out in the lifeboats think nothing of these things. They face the biggest storm with the greatest bravery, and do not think this or that is dangerous which other people would be unable to think of without shivering. When they talk about there being no danger one has to qualify it as a person administering justice, not because their view is unjust, but because they look upon danger in a different way to what other people do. I have to look upon the danger as an ordinary person of ordinary intelligence, acting upon certain facts, and I find as a fact that there was risk of danger to all these tugs, more or less. I do not go so far as to say that they were ever in real danger—that might very well be in consequence of the skilful way in which they were handled—but I must state with confidence that there was risk of danger to all of these tugs that went out on that particular occasion. Having found there was risk of danger—and I won't go so far as to say there was absolute existing peril—the next thing is to consider what was done. The lifeboats did very valuable work. It was the view of the master of the *Suevic* that the passengers should be got ashore as soon as possible, otherwise he would not have done what he did, putting his own lifeboats into the water and sending them to Polperro. One of the boats was, in fact, stove in, and it is to be remarked that the other lifeboat which could have returned to the *Suevic* with the crew on board her after landing passengers did not return to the *Suevic*. That is a matter of some importance, because it throws a sidelight on this case, that being that those in charge of the ship's lifeboat, having gone to Polperro and deposited there the women and children, took great care not to go back to their own ship. The shore lifeboats did their work as they ought to have done it. They took the passengers off, went out to the tugs, and the tugs towed them in and brought them back; and so I find as a fact that the work of the lifeboats was considerably expedited by the action of the tugs. I am not going to find that the lifeboats could not themselves have gone in and returned to the ship; but it would have been with considerable labour and much loss of time. So the work was done by the tugs with risk to themselves, and was performed expeditiously and skilfully and well. One of the tugboats picked up three of the ship's boats which got adrift. That work also involved risk of danger to the tug which did it. There is another matter which must be referred to, to show that the master thought the ship and the lives of the crew and himself were in danger, and that is that on the Monday he and the crew left the ship and remained by her on shore. I do not blame him. He had a duty to his crew and to himself. He knew perfectly well that his ship was not going to get off the rocks, and he did not know what might happen to her during the succeeding night. Therefore he took the proper course in going ashore with his crew and standing by. I think his conduct as a master was that which every competent master would have adopted, but it is strong evidence to show he was in doubt as to what might happen at any moment to the people on board that he took himself and crew ashore after first sending all the passengers

on shore. There is another matter. There was a red light shown by the Cadgwith lifeboat to the *Triton*. I rather gather that would not have been shown unless the lifeboat were in some difficulty and wanted assistance. All these facts tend to show there was existing danger or great apprehension of considerable danger to the persons taken ashore. I have said enough to indicate that the tender cannot be accepted. I am not moved by the huge value of the ship and her cargo—to be so would be ridiculous—but I have to ask myself what, as a juryman, I ought to award in this case, and it must be, of course, more or less a guess, I cannot have in mind the pecuniary value of the life of any one of these persons, and, therefore, it is a guess; but taking into consideration the number of persons taken off with the assistance of the tugs, I think that I should award 800*l.* in all, which I divide as follows: *Triton*, 250*l.*; *Victor*, 250*l.*; *Briton*, 150*l.*; and *Marion*, 150*l.* I have not taken into consideration at all the question of specie.

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

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

Nov. 5, 6, *and Dec.* 3, 1907.

(Before BUCKNILL and BARGRAVE DEANE, JJ.)

THE EUROPA; TOLME RUNGE *v.* OWNERS OF THE EUROPA. (*a*)

Damage to cargo — Contract of affreightment— Charter-party — Warranty of seaworthiness— Breach of warranty—Excepted perils.

Where loss of or damage to cargo is caused solely by an excepted peril in the contract of carriage and not by unseaworthiness, the shipowner is protected from liability although the ship is unseaworthy.

Sugar was shipped on board a steamship to be carried under a charter-party which excepted damage by collision. Part of the sugar was delivered in a damaged condition. In an action in the County Court by the charterers, owners of the sugar, to recover the damage they had sustained, they alleged that it was caused by the unseaworthiness of the ship. The shipowners denied that the ship was unseaworthy, and alleged that the damage was caused by an excepted peril—namely, by collision. The damage was in part caused by the unseaworthiness of the ship and in part by the excepted peril. The ship was found to be unseaworthy.

Held (varying the decision of the County Court judge), that in so far as the damage resulted from the unseaworthiness of the ship the shipowners were liable; but that they were not liable for the damage caused by the excepted peril.

Joseph Thorley Limited *v.* Orchis Steamship Company Limited (96 *L. T. Rep.* 488; 10 *Asp. Mar. Law Cas.* 431; (1907) 1 *K. B.* 660) *distinguished.*

ACTION for damage to cargo.

The plaintiffs (respondents) were the charterers of the steamship *Europa*; the defendants (appellants) were the owners of the steamship *Europa*.

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

The plaintiffs chartered the *Europa* on March the 2nd 1906 to load a cargo of sugar at Stettin, and deliver it at Liverpool.

It was a term of the charter-party that the owners were not to be held responsible for damage caused by "perils of the sea, collisions, and accidents of navigation, or latent defect in or accident to hull, and (or) machinery, even when occasioned by the negligence, default, or error in judgment of the pilot, master, mariners, or other persons employed by the shipowner, or for whose acts he is responsible."

The sugar was loaded at Stettin, and delivered at Liverpool, but part of it was delivered in a damaged condition.

It appeared that as the *Europa* was entering the dock at Liverpool she collided with the pier-head at the entrance to the dock; this caused a closet pipe on the port side of the steamship to break, and when the pipe was flushed water escaped from it into the 'tween deck and damaged the sugar. Further, four old scupper holes in the 'tween deck, from which the pipes to the bilges had been removed, were not tightly plugged, so the water escaped through them into the lower hold, and damaged the goods.

On the 19th July 1906 the plaintiffs delivered a statement of claim alleging that by reason of the broken pipe and badly plugged scupper holes the *Europa* was unseaworthy, and that the plaintiffs had suffered damage by the delivery of the sugar in a damaged condition.

On the 17th Aug. the defendants delivered a defence, denying that the vessel was unseaworthy, and alleging that she was reasonably fit to carry the sugar, and they also denied that the sugar was damaged. In the alternative they alleged that if any damage was done it was caused by an excepted peril, *inter alia* by collision.

The case was tried at the County Court at Liverpool, before his Honour Judge Shand.

On the 27th April 1907 His Honour Judge Shand delivered the following judgment:

HIS HONOUR.—It is necessary for the defendants, in order to escape from their liability under the charter-party, to satisfy me that the damage done to the cargo arose and resulted from a peril excepted in the charter-party; in other words, from the collision which the defendants allege took place between the *Europa* and the pier head when entering the dock in Liverpool. The first question I have to consider is whether such collision took place at all. Captain Nowell saw no evidence or marks conclusive of such collision upon the outside of the vessel. The evidence adduced by the defendants satisfies me that such a collision in fact did take place. Having found this fact I have to determine whether that collision was the cause of the damage to the pipe. The evidence as to the newness of the fracture was contradictory. I am satisfied the squeeze the vessel sustained was sufficient to cause the damage to the pipe, and did, in fact, do so. The damage to the cargo arose from the water having come through that crack, and, in my opinion, the flushing of the pipe after the collision was sufficient to account for the damage done. There were no pipes for the scuppers in the 'tween decks, which, in my opinion, were necessary in order to render the vessel fit to carry such a cargo from Stettin. Had such pipes been fitted the cargo in the lower hold would not have been damaged. To that extent, and to that extent only, the ship was unseaworthy for the voyage, and the plaintiffs are entitled to recover such damage as was sustained by the cargo in the lower hold from the water which found its way

down into the lower hold through the scupper holes in the 'tween decks.

The case was then adjourned for the plaintiffs to prove the damage done to the sugar in the lower hold.

On the hearing of the action being resumed on the 24th June 1907 the attention of the learned County Court judge was called to the case of *Joseph Thorley Limited* v. *Orchis Steamship Company Limited* (96 L. T. Rep. 488; 10 Asp. Mar. Law Cas. 431; (1907) 1 K. B. 660).

After hearing the arguments of counsel for the plaintiffs and the defendants, the learned County Court judge held that the decision in that case governed the case before him, and gave judgment for the plaintiffs for the whole of the damage they had sustained.

HIS HONOUR.—I think the case I have now heard applies, and therefore I must find for the plaintiffs. On the 27th April I found certain specific facts. Judgment was not then entered up because the evidence was then insufficient with respect to the amount of damage done to the sugar in the 'tween decks as distinguished from that done in the lower hold. At that time my attention was not called to the case of *Joseph Thorley Limited* v. *Orchis Steamship Company Limited*. That case in my opinion decides the point which on my findings I then thought it necessary to adjourn the hearing of for further evidence. I have come to that conclusion after hearing counsel for plaintiffs and defendants. In the charter-party in this case there is a warranty of seaworthiness, and if that condition is not complied with the failure to comply with it displaces the contract and goes to the root of the contract, and its performance is a condition precedent to the right of the shipowner to sue. Those are the words of the Master of the Rolls in *Joseph Thorley Limited* v. *Orchis Steamship Company Limited*. The fact that the *Europa* was unseaworthy in one particular means the failure to comply with the condition precedent and displaces the express contract. It is therefore immaterial to consider what amount of damage was in each hold. My judgment will be for the amount of damage which was sustained to the cargo.

Judgment was entered for the plaintiffs for 95*l*. and costs, with a stay of execution if the 95*l*. were paid into court within twenty-one days and an undertaking given to pay the plaintiffs' taxed costs and notice of appeal lodged within the same time.

On the 29th June 1907 the owners of the *Europa* delivered notice of appeal asking that the order of the County Court judge might be reversed and judgment entered for the plaintiff.

The appeal came before the Admiralty Divisional Court on the 5th and 6th Nov.

Bailhache and *R. Wright* for the appellants, the owners of the *Europa*.—The collision with the dock wall broke the pipe, and the damage to the cargo caused by the breaking of the pipe was damage caused by an excepted peril. The learned County Court judge has found that some of the damage was caused by the unseaworthiness of the ship. The unseaworthiness consisted in certain scupper holes in the 'tween decks being badly plugged, and as the pipes leading from them to the bilges had been removed the water went through the holes into the lower hold. It is admitted that the shipowner is liable for the damage in the lower hold, but the learned County Court judge has held on the authority of *Joseph Thorley Limited* v. *Orchis Steamship Company Limited* (*ubi sup.*) that the shipowner is liable for the damage in the 'tween decks as well as the damage in the lower hold on the ground that as the ship was unseaworthy the contract of carriage was put an end to or displaced, and the shipowner carried the cargo as a common carrier. It is admitted that if the ship had deviated in this case the shipowner would have been liable:

Balian v. *Joly, Victoria, and Co*, 6 Times L. Rep. 345.

There is, however, a distinction between a case of deviation and the case of an unseaworthy ship; in the former case the contemplated adventure is not being performed, and the shipowner, though he was protected if he went by a certain route, having chosen to go by a different one from that which he contracted to go, never performs his contract and becomes a common carrier. This does not hold good where the ship is unseaworthy. The law applicable to such a case is correctly laid down in Carver's Carriage by Sea (4th edit.), s. 17: "The shipowner remains responsible for loss or damage to the goods, however caused, if the ship was not in a seaworthy condition when she commenced her voyage, and if the loss would not have arisen but for that unseaworthiness." In *Kopitoff* v. *Wilson* (34 L. T. Rep. 677; 3 Asp. Mar. Law Cas. 163; 1 Q. B. Div. 377) two questions were left to the jury by Blackburn, J.: Was the vessel at the time of her sailing in a state reasonably fit to encounter the ordinary perils that might be expected on a voyage at that season? and, if the vessel was not in a fit state, was the loss that happened caused by that unfitness? If the reasoning in the deviation cases applies the first question only need have been left to the jury in that case. In all the cases where a shipowner has been held liable in respect of the unseaworthiness of his ship it has been necessary to prove that the damage was occasioned by the unseaworthiness:

Steel v. *State Line Steamship Company*, 37 L. T. Rep. 333; 3 Asp. Mar. Law Cas. 516; (1877) 3 App. Cas. 72, 88;
The Glenfruin, 52 L. T. 769; 5 Asp. Mar. Law Cas. 413 (1885); 10 P. Div. 103;
Gilroy v. *Price*, 68 L. T. Rep. 302; 7 Asp. Mar. Law Cas. 314; (1893) A. C. 56;
The Pentland, 13 Times L. Rep. 430; Shipping Gazette, May 25, 1897.

In a case of deviation there is an alteration of the voyage. Different considerations apply in the case of an unseaworthy ship, for having regard to the extended meaning given to the term unseaworthiness, and the slight defects sometimes held to constitute such a condition, it is unreasonable that a shipowner should not be able to avail himself of the excepted perils where the unseaworthiness has no connection with the damage. For instance a vessel carrying steel billets and butter in her refrigerating chambers might be unseaworthy as far as the butter was concerned if the refrigerating machinery was out of order at the beginning of the voyage, but could it be said that the whole contract was gone as regards the carriage of the steel billets and that the exceptions could not be relied upon? If the vessel was lost by a peril of the sea could the owner of the billets contend that the shipowner could not rely on the exceptions in the bill of

lading, and was a common carrier because his refrigerating machinery was out of order. It is submitted he could not.

Horridge, K.C. and *Greer* for the respondents. the cargo owners.—The holder of a bill of lading is entitled to have his cargo carried on a ship which is seaworthy in every respect. No conclusive inference can be drawn from the fact that two questions were left to the jury in *Kopitoff* v. *Wilson* (*ubi sup.*), for the loss in that case was directly attributable to the unseaworthiness complained of. The real question argued in that case was whether the warranty to provide a seaworthy ship was absolute. The cases decided show that the warranty is absolute. This case is governed by *Joseph Thorley Limited* v. *Orchis Steamship Company Limited* (*ubi sup.*), which followed and approved *Balian* v. *Joly, Victoria,* and *Co.* (*ubi sup.*). If a ship is unseaworthy the contract between the parties is at an end; the unseaworthiness vitiates the contract.

Bailhache in reply.—The cases cited on behalf of the appellants show that the learned judges who decided them did not think that unseaworthiness put an end to the contract or they would not have held it necessary in each case to prove that the loss sustained was the result of the unseaworthiness. The only authority which can be found which is supposed to be against that proposition were the observations of the Master of the Rolls in *Joseph Thorley Limited* v. *Orchis Steamship Company Limited* (*ubi sup.*), where he says: "I am unable to see any reason why the doctrine admittedly applicable in the case of a contract of insurance with respect to the warranty of seaworthiness should not, as regards the undertaking not to deviate, apply equally to a contract of affreightment." Neither of the other members of the court committed themselves to this view. The risk under a policy of insurance ceases at the moment the deviation begins; in the case of an unseaworthy ship it never attaches. It is impossible to deviate until you have begun to carry. The shipowner is bound to provide a ship fit for the cargo he has undertaken to carry, and if he does not do so and cannot make it fit within a reasonable time the charterer can refuse to load:

Stanton v. *Richardson*, 33 L. T. Rep. 193; 3 Asp. Mar. Law Cas. 23 (1875); L. Rep. 7 C. P. 421.

Judgment was reserved, and on the 3rd Dec. it was delivered by BUCKNILL, J.—The question raised on this appeal is a very important one, and we think the exact point has not yet been decided. It is whether a shipowner, whose ship was unseaworthy at the commencement of the chartered voyage, is liable in damages to the charterer, the owner of the cargo on board, not only for injury to his cargo caused directly as the result of that unseaworthiness, but also for injury caused to other portions of the cargo. not as the result of such unseaworthiness, but by a peril of the sea excepted in the bill of lading; in other words, whether seaworthiness is a condition precedent in a contract of affreightment, to the extent that if the ship be unseaworthy the shipowner is reduced to the position of a common carrier, and liable for all damages occasioned to the cargo, even if such damage be solely caused by an excepted peril, and not by the unseaworthiness. The County Court judge, from whose decision this appeal comes, held that he was, and gave judgment against the shipowner for all the damage occasioned to the cargo on the authority of *Joseph Thorley Limited* v. *Orchis Steamship Company Limited* (*ubi sup.*). We will state the facts of this case (the *Europa*) more particularly hereafter. It is contended by the appellants that the case of *Joseph Thorley Limited* v. *Orchis Steamship Company Limited* (*ubi sup.*) did not decide the question, although it must be admitted that the language of the then Master of the Rolls, now Lord Collins, is capable of being read as amounting to a direct opinion that in such a case the shipowner would be liable, although but for such unseaworthiness the exceptions in the charter-party would have protected him.

The point for decision in that case was as to the liability of the shipowner to the cargo owner where there had been a deviation from the original voyage and damage to cargo during its discharge by the negligence of the ship's stevedore, which negligence was an exception in the bill of lading. The sentence in Lord Collins' judgment on which the respondents rely is at page 667. Referring to the judgments delivered in the Court of Appeal in *Balian* v. *Joly, Victoria,* and *Co.* (6 Times L. Rep. 345), Lord Collins said:—"The principle underlying those judgments seems to be that the undertaking not to deviate has the effect of a condition, or a warranty, in the sense in which the word is used in speaking of the warranty of unseaworthiness, and, if that condition is not complied with, the failure to comply with it displaces the contract. It goes to the root of the contract, and its performance is a condition precedent to the right of the shipowner to put the contract in suit." At page 668 he continued, and apparently in the same line of thought:—"I would only add that I am unable to see any reason why the doctrine admittedly applicable in the case of a contract of insurance with respect to the warranty of seaworthiness should not, as regards the undertaking not to deviate, apply equally to a contract of affreightment. It seems to me that the same considerations apply to both cases." All the members of the Court of Appeal in the case of *Joseph Thorley Limited* v. *Orchis Steamship Company Limited* (*ubi sup.*) considered that the decision in *Balian* v. *Joly, Victoria,* and *Co.* (*ubi sup.*) governed the principle on which they gave their judgment, and that it was impossible to distinguish that case from the the case which they were deciding so as to render the reasoning upon which the earlier decision was founded inapplicable to the later one. But both were deviation cases, and the exact point decided in the case of *Joseph Thorley Limited* v. *Orchis Steamship Company Limited* (*ubi sup.*) was that as between the shipowner and cargo owner the deviation displaced the bill of lading contract altogether, so that it must now be taken that where there has been a deviation it amounts to a non-performance by the shipowner of a condition precedent, the result of which is that it displaces the original contract whether the deviation had any relation to the loss sustained by the cargo owner or not.

We have to decide whether "seaworthiness" is to be classed with non-deviation as a condition precedent, the non-performance of which voids the contract of affreightment, so that in

the case of the *Europa*, she being unseaworthy, even though she had carried all the cargo specified in the bill of lading to the proper destination, yet she could not claim exemption from liability for damage caused, not by the unseaworthiness, but by a peril of the seas or other exception in the bill of lading. Except so far as appears in the judgment of the Court of Appeal in *Joseph Thorley Limited* v. *Orchis Steamship Company Limited* (*ubi sup.*) we have not found any case where such a proposition has been enunciated, if it was, which we doubt. As between shipowner and charterer it may be that representations or promises made by the one or the other, or by both, may amount to warranties and be also conditions precedent which may give to that one who is not in default a right to treat the representation or promise of the other as a condition precedent, and to refuse to be bound to the performance of his own part of the contract. For example, if a shipowner enters into a charter-party with a merchant to go to a specified port or place and there to load a cargo, and when the ship arrives the charterer finds that the ship is not seaworthy, he may, if he be so minded, refuse to put his goods on board on the ground that the shipowner has not provided a seaworthy ship, and the shipowner could not oblige him to, because he himself had not performed on his part the condition which was precedent to his being able to oblige the charterer to load. But if the cargo was loaded and carried to its destination, even although it was damaged through the unseaworthiness, the remedy in the hands of the charterer is, in our judgment, to sue the shipowner for those damages, in answer to which the shipowner could not avail himself of the charter-party or bill of lading which, had his ship been seaworthy, would have been a protection to him. To that extent they would be useless to him. In our opinion there must be a time when the charterer or cargo owner has no longer a right to treat the promise of warranty of the shipowner as a condition precedent, but must rely on his breach of warranty and must then prove that the damage sued for has been caused by the unseaworthiness of the ship at the material time. In *Boone* v. *Eyre* (1 H. Bl. 273) Lord Mansfield said: "When mutual covenants go to the whole of the consideration on both sides, they are mutual considerations, the one precedent to the other. But where they go only to a part, where a breach may be paid for in damages, then the defendant has a remedy on his covenant, and shall not plead it as a condition precedent." That was an action by the plaintiff who had covenanted to convey to the defendant the equity of redemption of a plantation in the West Indies, together with the stock of negroes on it, in consideration of 500*l.* and an annuity of 160*l.* for his life. The plaintiff covenanted that he had a good title to the plantation and was lawfully possessed of the negroes, and that the defendant should quietly enjoy. The defendant covenanted that the plaintiff well and truly performing all and everything contained on his part to be performed, he, the defendant, would pay the annuity. Plea, that the plaintiff was not, at the time of making the deed, legally possessed of the negroes on the plantation, and so had not a good title to convey. Demurrer. Lord Mansfield, after laying down the law as above, added: "If this plea were to be allowed, any one negro not being the property of the plaintiff would bar the action." Judgment for plaintiff on the demurrer. In *Hotham* v. *East India Company* (Term Rep., 1 Durnford & East, 645) Ashhurst, J, delivering the judgment of the court, said: "There are no precise technical words required in a deed to make a stipulation a condition precedent or subsequent. . . . The merits, therefore, of the question must depend on the nature of the contract and the acts to be performed by the contracting parties." In *Ritchie* v. *Atkinson* (10 East, 309) it was laid down that the cases where acts stipulated to be done by one party have been held to be conditions precedent to the claim of the other have been where it appeared, upon the face of the contract, to have been the intention of the parties that the one thing should not be done by one party till something else had been done by the other. Having cited these cases to indicate the nature of a condition precedent according to the terms of the contract, we will now state the facts in this case.

The defendants' steamship the *Europa* was chartered by the plaintiffs to carry a cargo of sugar, in bags, from Stettin to Liverpool and there deliver it—one of the excepted perils mentioned in the charter-party being "collision." When entering the dock at Liverpool the steamship's port bow collided with the dock wall, the blow breaking a water-closet pipe so that water got through it into the 'tween deck, and many bags of sugar which were stowed there were damaged by the water. In the 'tween deck were two scupper holes (near the w.c. pipe which had been so broken). The pipes which had originally been fixed to and led from these two scupper holes for the purpose of carrying off water from the 'tween deck to the bilges had been removed, and the scupper holes had been imperfectly plugged, with the result that the water from the broken closet pipe got through the scupper holes and passed direct into the bags of sugar stowed in the lower hold and damaged several of them. It was not disputed that this imperfect plugging existed before the cargo was loaded and before the vessel started from Stettin, and that thereby the vessel was, to that extent, unseaworthy, and that the damage caused to the bags of sugar in the lower hold was caused through that unseaworthiness. The defendants, the owners of the *Europa*, did not dispute their liability for the damage to the bags of sugar in the lower hold, admitting that it was caused directly by the unseaworthiness, but they disputed their liability for the damage caused to the bags of sugar in the 'tween deck on the ground that such damage was not caused at all by the unseaworthiness but was the direct result of the collision with the dock wall, which collision was an exception in the bill of lading. The County Court judge decided, on the authority of the case of *Joseph Thorley Limited* v. *Orchis Steamship Company Limited* (*ubi sup.*) that as in the charter-party there was a warranty of seaworthiness which had been broken, there had been a non-performance of a condition precedent to the right of a shipowner to sue, displacing the express contract, and that it was immaterial to consider what amount of damage was done to the cargo in

the 'tween deck through the collision with the dock wall, and what amount was done in the lower hold through the imperfectly plugged scupper holes; and he gave judgment for the plaintiffs for 95*l.*, which represented the damage in the 'tween deck and also in the lower hold. It will be observed that he decided that the obligation to provide a seaworthy ship continued to be a condition precedent on the part of the shipowner, and that by his failure to perform it the excepted peril of collision in the charter-party was no longer a protection to him for that damage which was in no way connected with the ship's unseaworthiness, because he held the contract to have been entirely displaced. If this case was one of deviation we should consider we were bound by *Joseph Thorley Limited* v. *Orchis Steamship Company Limited* (*ubi sup.*), or if it had been a question between assured and underwriter there would have been no doubt that by reason of the unseaworthiness of the ship the insurer would not have been liable, because the warranty of seaworthiness at the material time having been broken, the contract would thereby have ceased to exist. Is it true to say that the same considerations apply in this case? We have not found any authority for such a proposition, unless *Joseph Thorley Limited* v. *Orchis Steamship Company Limited* (*ubi sup.*) is one. In Carver's Carriage by Sea (4th edit.), sect. 17, we find: "The shipowner is responsible for loss to goods, however caused, if the ship is not in a seaworthy condition when she commenced the voyage, and if the loss would not have arisen but for that unseaworthiness." Sect. 102A reads: "An exception of negligence does not relieve the shipowner from his obligation to supply a ship that is seaworthy and fit for the cargo at the commencement of the voyage. He is liable for a loss caused by unseaworthiness or unfitness, although it was caused by the negligence of the master and crew, unless there was an express exception relieving him from that unseaworthiness or want of fitness which was within the excepted perils." In Parsons on Shipping, p. 203, we find this statement: "If the owner promises that his ship shall be staunch and tight and he carries the cargo, but the ship is neither staunch nor tight, this is not a separable promise in the sense in which a promise to carry a full cargo is, for a ship must be seaworthy or not seaworthy as a whole, but it is so far separable that the effect of a breach of it does not necessarily extend to the whole cargo, and therefore may not to the compensation for carrying it." For the above opinion Mr. Parsons quotes *Havelock* v. *Giddes* (10 East, 555). In that case the shipowner had covenanted with the charterer that he would forthwith make his ship tight and strong for a voyage of twelve months, and keep her so. Lord Ellenborough, in giving judgment, said: "And to be sure, if this were a condition precedent, the neglect of putting in a single nail for a single moment after the ship ought to have been made tight, staunch, &c., would be a breach of the condition, and a defence to the whole of the plaintiff's demands." In *Steel* v. *State Line Steamship Company* (*ubi sup.*) Lord Blackburn said: "So here I think that if this failure to make the ship fit for the voyage, if she really was unfit, did exist, then the loss produced immediately by that, though it is a peril of the seas, which would have been excepted, is nevertheless a thing for which the shipowner is liable, unless by the terms of his contract he has provided against it." The *Glenfruin* (*ubi sup.*) was cited during the arguments before us. There the defendants, the owners of cargo, were sought to be made liable for salvage services rendered to the *Glenfruin*, on which the defendants' cargo was being carried, the owners of the salving ship being also the owners of the salved ship. The salvage services were rendered because the *Glenfruin's* shaft broke during the voyage. The defence was that the *Glenfruin* was unseaworthy at the time when she began her voyage, and that the bill of lading given for the defendants' cargo, which excepted accidents from machinery—her shaft broke at sea in fine weather—was, therefore, not binding on them, and that the plaintiffs, as owners of the salving and salved ships, were liable to the defendants for all damages and losses occasioned by the unseaworthiness of their ship, the *Glenfruin*, of which losses salvage was one. Butt, J. said: "I am of opinion that exceptions in the bill of lading have not the effect either of limiting the implied warranty or of otherwise excepting the shipowner from liability to the owners or cargo for damage or loss occasioned by the breaking of the shaft." A little lower down he said that the exceptions in the bill of lading had no application to the case of a ship which was unseaworthy at the time of sailing, and the unseaworthiness of which was the efficient cause of the loss or damage. *Kopitoff* v. *Wilson* (*ubi sup.*) was an action by an owner of goods shipped on board the defendant's ship, and which was lost whilst on a voyage from Hull to Cronstadt. The declaration alleged a breach of warranty of seaworthiness of the ship by the defendant, and that the goods were lost by reason of the breach, but it was not argued or suggested that if the goods had not been lost in consequence of the unseaworthiness the defendant would still have been liable or that the bill of lading would not have applied. The two questions which were left by Blackburn, J. to the jury were, first, whether the ship was seaworthy, and, secondly, whether, if she was not seaworthy, the goods were lost by her unseaworthiness. *Gilroy* v. *Price* (*ubi sup.*) was a decision on a question of fact, whether the respondent's ship was unseaworthy on sailing, and whether, if so, the bill of lading relieved them notwithstanding as to the goods which were damaged in consequence of such unseaworthiness; and it was held that, the ship being unseaworthy, the respondents lost the protection of the bill of lading as to the damage so caused.

It appears to us, therefore, that whenever a cargo owner has claimed damages from a shipowner for loss occasioned to his goods on the voyage, and the ship was in fact unseaworthy at the material time, the cargo owner has had to prove that the loss was occasioned through or in consequence of the unseaworthiness, and it has not been sufficient to say merely that the ship was unseaworthy, and therefore that he was entitled to recover the loss, although there was no relation between the unseaworthiness and the damage.

We now come to the most anxious part of our judgment, and that is, whether Lord Collins did say in *Joseph Thorley Limited* v. *Orchis Steamship Company Limited* (*ubi*

sup.) that the same considerations must apply in the case of a warranty of seaworthiness in a charter-party between shipowner and charterer as in the case of a policy of insurance on ship or goods, where such a warranty is made expressly or by implication. The conclusion to which we have come is that he neither said it, nor does it appear to us that he meant to say it. Reading his judgment as a whole, we think he had in his mind the analogy between a deviation and the warranty of seaworthiness in a policy of insurance, and that it so appears from what he said at p. 668 of the report in the Law Reports, and must be taken to refer back to what he said at p. 667, which we have already quoted. He was speaking of two classes of cases only, and not of three, and to our minds this is clear. The present Master of the Rolls (then Cozens-Hardy, L.J.), in his judgment, said nothing about the case of a warranty of seaworthiness in the case of the chartering of a ship; neither did Moulton, L.J. They confined themselves to the case of a deviation and its consequences between shipowner and the holder of the bill of lading. For these reasons we are of opinion that *Joseph Thorley Limited* v. *Orchis Steamship Company Limited* (*ubi sup.*) is not a case that can properly be relied on as an authority justifying the judgment of the County Court judge from whose decision this appeal comes, and in our judgment the plaintiffs are only entitled to recover from the defendants such damages as directly resulted from the want of seaworthiness and not for the damage caused by the water which got into the 'tween decks through the collision between the ship and the dock wall, which was covered by the excepted perils in the charter-party, and to the protection of which the shipowner was still entitled, notwithstanding the unseaworthiness of the vessel. As the damages have not been ascertained on this basis the matter must be sent back to the County Court judge to assess them. The appeal will therefore be allowed, with general costs.

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

Solicitors for the respondents, *Rawle* and *Co.*, agents for *Hill, Dickinson,* and *Co.*, Liverpool.

Nov. 20, 21, 22, 23, 25, 26, *and Dec.* 18, 1907.

(Before BUCKNILL, J. and Elder Brethren.)

THE BRUXELLESVILLE. (*a*)

Collision — Measure of damage — Temporary repairs — Subsequent foundering—Remoteness of damage.

A collision having occurred between two steamships, one of them put into a port of refuge very badly damaged. After being temporarily repaired she started for her port of discharge, but at once began to leak, and, although attempts were made to cope with the leak, they proved ineffectual.

On the hearing of the damage action the ship which put into the port of refuge was held free from blame, and her owners sought to recover the damage they had sustained by her loss, alleging that it was the result of the collision.

Held, that the repairs were insufficient; that the sinking of the vessel was not the natural and reasonable result of the defendants' negligence; and that the plaintiffs were not entitled to recover damages for the loss of their vessel.

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

ACTION OF DAMAGE.

The plaintiffs were the owners of the Norwegian steamship *Veritas*; the defendants and counter-claimants were the owners of the steamship *Bruxellesville.*

A collision between the two vessels occurred about 4 a.m. on the 22nd July 1907, in the English Channel, about fifteen miles south of Portland Bill, the wind at the time being calm, and the weather fine and clear.

The *Veritas* was on a course of W. ¼ N. magnetic, making about eight and a half knots. The *Bruxellesville* was on a course of N.E. by E. ½ E. magnetic making about twelve knots.

Those on the *Veritas* saw the *Bruxellesville* about six to seven miles off bearing about two to three points on the port bow; those on the *Bruxellesville* saw the *Veritas* about seven or eight miles off, about one point on the starboard bow. The duty of the *Bruxellesville* was therefore to keep out of the way under art. 19, and to avoid crossing ahead under art. 22, while the duty of the *Veritas* was to keep her course and speed under art. 21.

The damage action was tried on the 20th and 21st Nov. 1907 when the *Bruxellesville* was held alone to blame.

It was proved at the trial that the *Veritas* was very badly injured by the collision. After the collision the *Veritas* made her way on the day of the collision to a port of refuge—namely, Portland, and, as it was impossible to permanently repair her there, she was temporarily repaired, and on the 4th Aug. left Portland for her port of discharge, Bristol; but during the voyage she leaked, and on the 5th Aug. sank and was totally lost.

The plaintiffs claimed that the loss of the *Veritas* was due to the collision, and alleged in their statement of claim that "the *Veritas* after the collision put into Portland, where she was temporarily repaired in manner approved by the surveyors of the underwriters and the defendants, and she then proceeded on her voyage to Bristol provided with a powerful steam pump, but further damage, which had been undiscoverable by the surveyors at Portland, caused the steamer to make so much water when off the Lizard that she was obliged to anchor, and, the pumps not keeping the water under, she sank before the tugs whose assistance was obtained for the purpose could take her to a place of safety."

The defendants denied that the sinking was caused by any negligence of theirs, and alleged that it was solely caused by the negligence of the plaintiffs. They further alleged that the plaintiffs did not take any or sufficient measures to repair the *Veritas.*

The question whether the negligence of the defendants caused the loss of the *Veritas* on the 5th Aug. was argued on the 21st, 22nd, 23rd, 25th, and 26th Nov., after the liability for the collision had been determined.

Aspinall, K.C., *J. A. Hamilton,* K.C., and *Bateson* for the defendants the owners of the *Bruxellesville.*—The loss of the *Veritas,* whilst on

the voyage from the port of refuge to Bristol, her port of discharge, is not attributable to the act of the defendants. The plaintiffs cannot recover it from the defendants; it is too remote:

The Argentino, 61 L. T. Rep. 706; 6 Asp. Mar. Law Cas. 433 (1889); 14 A. C. 519.

The general principle governing the measure of damages is laid down in Mayne on Damages, 7th edit., p. 49. The first and in fact the only inquiry in all these cases is whether the damage complained of is the natural and reasonable result of the defendant's act. It will assume this character if it can be shown to be such a consequence as in the ordinary course of things would flow from the act, or in cases of contract if it appears to have been contemplated by both parties. Where neither of these elements exists the damage is said to be too remote. Again, in the case of *The Kate* (80 L. T. Rep. 423; 8 Asp. Mar. Law Cas. 539; (1899) P. 165) it is laid down that "the general principle which governs the assessment of damages is, of course, *restitutio in integrum*, qualified by the condition that the damage sought to be recovered must not be too remote—that is to say, must be the natural consequence and not merely a consequence traceable in fact to the wrongful act." In this case the collision took place on the 22nd July, but as the *Veritas* did not founder until the 5th Aug. it is highly improbable to say that the foundering was a result of the negligence of those on the *Bruxellesville*. There was time and opportunity to repair her. There can be little doubt that the *Veritas* was unseaworthy when she started for Bristol; this is the right inference to be drawn from the facts:

Ajum Goolam Hossen v. *Union Marine*, 84 L. T. Rep. 366; 9 Asp. Mar. Law Cas. 167; (1901) A. C. 362.

The master was also negligent; he had been told to put into port if he met with bad weather. The weather was fine, but the vessel leaked badly, the water was continually increasing, and to continue the voyage to Bristol instead of putting into Plymouth or Falmouth was clearly negligent. He also delayed to send for a tug, and no attempt was made to beach the ship until too late. No case can be found in which a wrongdoing ship has been held liable for the loss of a vessel when the loss has occurred after reaching a port of refuge. It is admitted that permanent repairs could not be done at Portland, but the temporary ones which were done were wholly insufficient to enable the vessel to get to Bristol. The salvage pump put on board was also insufficient, and a proper engineer was not sent in charge of it.

Laing, K.C. and *A. A. Roche* for the plaintiffs the owners of the *Veritas*.—The seaworthiness of the *Veritas* has nothing to do with this case. The real question is whether those in charge of the *Veritas* or her owners have been guilty of negligence in trying to get her to Bristol. Loss by foundering even after temporary repairs have been done has been held to be loss caused by collision:

Reischer v. *Borwick*, 71 L. T. Rep. 238; 7 Asp. Mar. Law Cas. 493; (1894) 2 Q. B. 548.

The defendants must establish a want of reasonable care and skill on the part of the plaintiffs. If the plaintiffs have exercised that they are entitled to recover:

City of Lincoln, 62 L. T. Rep. 49; 6 Asp. Mar. Law Cas. 475 (1889); 15 P. Div. 15.

If the plaintiffs have not exercised reasonable skill and care they will not recover:

The Flying Fish, 2 Asp. Mar. Law Cas. O. S. 221 (1865); Br. & Lush. 436.

It is easy to be wise after the event and say there was negligence, but the question is, Did the plaintiffs use reasonable skill and care? They employed three competent surveyors, who thought the vessel might go to Bristol. Was it negligent to follow that advice? Bristol was obviously the port to go to if it was possible, as freight would then be earned.

Aspinall, K.C. replied.

Judgment was reserved, and was given on the 18th Dec.

BUCKNILL, J.—The question I have to decide in this case is whether the defendants, the owners of the *Bruxellesville*, are responsible for the foundering on the 5th Aug. of the *Veritas*. The collision took place between these two ships on the 22nd July, about fifteen miles south of Portland Bill, and the injury inflicted by the *Bruxellesville* upon the *Veritas* was this, speaking generally: the *Bruxellesville*, struck the *Veritas* on the starboard bow, with her stem, in such a way and with such a force that she penetrated up to and even past the middle line of the ship which she was striking, and the hole which she made in the starboard bow, the rent which she made in the deck, the damage which was done by the pressure of the cargo on the bulkhead of the engine-room of the *Veritas*—all those things were considerable. The hole itself in the deck line was not less than 17ft. wide from side to side, and it went down almost to the turn of the bilge, but not quite. So, one has only to picture that hole to see at once that it was a very big wound. Also, there was a hole in the deck, and the ship being timber-laden in the forehold the displacement of the cargo aft was such that it bulged the engine-room bulkhead. The *Veritas* got to Portland in safety, and it is to be noted that it is said in the log that she got there going full speed ahead. Of course she was very much down by the head, and in that condition she was put alongside one of the coal hulks in Portland Harbour, where she remained for some little time, until visited first of all by Mr. Camps and secondly by two gentlemen to whom I will refer presently. The damage that was discovered was more particularly examined into, and was generally as I have described it. I do not propose to describe it minutely, because I have done it sufficiently for the purpose of this particular case. Portland Harbour was therefore for the time being the port of refuge for this ship. She was bound to Bristol, and the question was, on behalf of all concerned—of course the defendants were concerned very deeply—what was to be done with her—should she be temporarily repaired at Weymouth or taken to Southampton or some other place to be repaired? Mr. Camps, who gave extreme attention to the matter—and in anything that I am going to say I hope Mr. Camps will not think that I am going to say he made any professional blunder,

although I may say at once that I find the repairs were insufficient — thought he could repair the vessel sufficiently for her to go to Bristol, provided that she was carefully and cautiously navigated, and that in bad weather she put in. He devised a scheme for the temporary repair of this ship. A wooden shield, consisting of planks—of sufficient thickness as far as they were concerned —and backed up with all necessary struts and backings, was considered by Mr. Camps to be sufficient to make the ship itself stiff. Apart from this wooden shield Mr. Camps devised two longitudinal steel girders, one about the line of the deck and one below it; and those steel girders, it was thought, would keep the ship stiff. So far as the steel girders are concerned and the shield itself is concerned I have nothing to say as to the workmanship except one thing, and that is that I doubt whether it was wise to put any part of the strutting or backing of this shield up against the timber cargo, which was supposed to be almost solid. I do not say that that was wrong, but it is the opinion I have formed. The ship was so repaired when she was partly aground, because she was moved on to the beach under the advice of the surveyors, and with the consent, of course, of Mr. Camps, who was the chief man in this matter. She was aground forward, but afloat aft for some portion of her length. These repairs were done when she was on the beach, and a point was made—and one which seems to me to be a good point—that, however well you might do those repairs, as soon as you floated the ship—and this ship was floated with considerable difficulty, because it took two tugs to get her off the ground when repaired—there would be set up at once strains which would not be the same as the strains which would exist when she was repaired ashore. Although this is a point in the case, it is not one upon which one can place too much importance. The vessel was temporarily repaired in the way I have described, and then she was floated, and then pumped out, and it was found when she had been pumped out that she had a strong list to port. To rectify that, thirty tons of bunker coal were put upon her starboard side, and that part of the cargo which had been necessarily shifted from the starboard side to the port side was replaced, and the ship became upright to all intents and purposes. That having been done, the ship being upright, and those temporary repairs having been done, certain certificates of seaworthiness were given. The first is from Mr. Camps, but I need not refer to it except to say that it states that in his opinion the ship is seaworthy to continue on her voyage. The certificate which I wish to read is that given by Mr. Ayles and Captain Brander. It is in this language: "Referring to our survey report of the 22nd July last, we again this 2nd day of Aug., at the request of Richard Cox, Esq., J.P., Vice-Consul for Norway, and the master, Mr. Tollefsen, of the said steamship *Veritas*, did proceed to Portland Roads and around, alongside and on board the said steamship, and found that the water had been pumped out of the forehold, that overall patches or shields had been bolted on over the broken and damaged plates, the deck securely strapped with iron stringers or plates, and the vessel made temporarily secured and practically tight. We found that a 6in. centrifugal pump had been placed on board and efficiently connected with the vessel's engine, and we now, after conferring with the divers and others employed in effecting such temporary repairs, consider the said steamship may safely proceed under easy steam to Bristol, her port of destination, where we recommend after her cargo is discharged she should be placed in dry dock and a further and more complete survey on the damage sustained by her be held." Those two gentlemen, having given that written opinion, the vessel left Portland on the 4th Aug. Before she left a centrifugal pump had been put on board, and had been properly attached; that is to say, apparently properly attached. That pump is said to have been of a pumping power of 150 tons an hour. On the one hand it was said it was sufficient for all purposes, but one gentleman who gave evidence for the defendants said he thought it was not sufficient, and that a second ought to have been shipped as well. I make no point about that. With that pump, and repaired as she was, and with a Bristol pilot on board, she left Portland in fine weather on the 4th Aug. She had been seen by another gentleman, Mr. Hay, and he gave evidence on behalf of the *Bruxellesville*, but it was suggested that Mr. Hay had gone down and had examined the ship carefully, and had expressed certain opinions with regard to the repairs about to be done, and even went so far as to suggest an alteration which was accepted by Mr. Camps—an alteration of an unimportant character.

The ship left Portland, and when she left she was practically a tight ship, and the weather was fine. Let us see what happened to her on her voyage. She had only got nine miles on her voyage when 2ft. of water was found to be in her hold. There was a fresh breeze then, and hazy weather. Now, it is to be noted that some of the witnesses said that in their opinion the repairs as done would have been sufficient if the vessel had been going to navigate perfectly smooth water—river water or the sea where there was no swell. Of course, with a fresh breeze, there would be more or less a swell, and, apparently. almost as soon as that swell came on 2ft. of water was found in the forehold. I am now reading from the log, and I take it it gives a true history of what took place. The weather was hazy, and the wind continued fresh up to noon. Towards four o'clock there was a light breeze, and it was found necessary to put the steam pump to work. From 4 to 8 p.m. the log indicates that there was 5ft. of water in the hold, and that the pump was still pumping, although there was only a slight swell. At 11.15 the Lizard bore N. by W. about six miles off, and the wooden patch on the outside was found to be beginning to yield, and the leakage was becoming greater and greater. The captain was called, and it was then decided to proceed in to an anchorage and try to get the pump to pump better, as it was not acting satisfactorily. Upon this question of the pump I have to make this observation. I turn to the engine-room log and I find this: "Monday, Aug. 5.—At 11.30. p.m. the engines were ordered half speed. At 11.45 p.m. the chief engineer was called, and we anchored at about 12.15 o'clock. We both commenced to work at the pump on the fore-deck." We have not been told what that work was, because certainly the flange had not broken then. The

evidence is that the paper pulp in the forehold had choked the rose of the pump, and that it had to be hoisted on several occasions to be cleared, but that did not take long to do, only a few minutes, and I suspect, from this entry in the engineer's log, that there was something else wrong about that time. Anyhow, whatever they were doing, the engineer's log proceeds: "During the work on the pump a flange of the steam-pipe broke. We at once proceeded to pack it; but the leak became greater and greater and finally the ship heeled over to such an extent that the water streamed in at the upper edge of the patch." Then the ship's log proceeds: "At 12.15 a.m. anchored with the port anchor about two miles off Cadgwith and one mile from the shore. We immediately got to work in order to get the pump to act. During that work a flange of the steam-pipe broke," &c. It is said that the vessel eventually foundered simply because the pump did not act, or because there was this unforeseen accident to the flange, which delayed the pump's working. Of course if it was only the unforeseen breaking down of the pump, and if the pump would have continued to pump all the water out as fast as it came into the forehold, that would be one condition of things; but I have to ask myself whether this vessel was repaired so as to be reasonably fit to proceed upon her voyage. If she was not, if she was sent to sea when she ought not to have been sent to sea, and if she was sent to sea at a time when she was not equal to any strain that might be put by a rough sea upon this shield, causing it to work or bend and so to leak, I do not think any person would be found to say, whatever little he knew of shipping matters, that that vessel was reasonably fit to face the sea. She had to get round Land's End, and then to get as far as Bristol, and between Land's End and Bristol there is a long piece of coast where there are few ports into which she could put; and I find as a fact that this vessel was not fit to take the sea. The reasons which I have to give for that finding are the reasons generally which have been given by the witnesses called on the part of the *Bruxellesville*. Several witnesses have been called on behalf of the plaintiffs—Mr. Steele and Mr. Lewis, extremely able men, Mr. Camps, also an extremely able man, and others—all of whom gave evidence to the effect that the vessel was fit to proceed upon that voyage; but there was evidence given by Mr. Robertson. Mr. Robertson, there is no doubt about it, had a very considerable amount of practical knowledge upon matters of this description. I do not rely so much upon the fact that he spoke of another ship which he had temporarily repaired in somewhat similar circumstances, because each particular case must be decided upon its own particular facts; but the Elder Brethren and I have very carefully considered the evidence and we prefer to accept—I prefer to accept, upon their advice and my own finding, the evidence of Mr. Robertson, who stated that in this particular case there should have been a shield of a very much smaller area, and metal of a very much larger area for the stiffening of the ship than are to be found in the shield which Mr. Camps advised and the two steel girders which he put in the position I have indicated. He said that in his opinion the horizontal girders were not large enough and were not sufficiently stiffened, so as to be kept rigid in the seaway; and he thought the shield was too large for safety. Counsel very naturally put it to him, "Is it not easy to be wise after the event?" and to that extent the court discounts the evidence of witnesses who come to the conclusion that sufficient was not done—but Mr. Robertson's evidence was given in a way to convince the court that he was expressing an opinion of the greatest possible value. I think that wooden shield was of too large an area, and that the consequence was that almost immediately after she started, and directly she got clear of the Bill of Portland, there was a fresh breeze and some swell, and she could not even stand that. Two feet of water was found immediately in her hold. There is a suggestion that it was the drainage from the cargo. I reject that suggestion. She had been long enough at Portland during the time the repairs were going on to make it inconceivable that there should have been still such a drainage from the cargo as to have caused 2ft. of water to be found in the hold immediately after she started. No! The water which got into the hold got in from outside, and because the girders or shield had begun to work, and she very soon began to show that sign of weakness which finally led to her destruction. Mr. Robertson thought, and the court thinks with him, that the wooden shield was too large and the strength of the girders insufficient. Mr. Bushell corroborated Mr. Robertson, except that he would have it that the pump was not sufficiently powerful. I do not quite accept that, because I think if nothing else had happened it is possible that with the ordinary leakage which might have been expected after the ship got into the seaway, this pump, which was quite capable of pumping 100 tons an hour, would have been able to cope. Then Mr. Hay was called by the defendants, and he was treated rather roughly. It was suggested at one moment, as I understood it, that he had not been quite straightforward. I think that is rather hard. He came down from Liverpool and saw the *Veritas* the day of the collision, and it is said from a letter that it must be inferred he had thoroughly agreed with what was going to be done. I find that Mr. Hay was sent there for the purpose of seeing what was the angle of the blow, for the purpose of the collision action, and that he was never asked and did not advise, and was never responsible for Mr. Camps' scheme. The evidence of the captain of the *Veritas* is extremely important. I think he was an extremely courageous and honest man, but I am inclined to think that his courage stood in his own way. It was a matter of great importance for him that he should be successful in this trip, it not having been then decided whether he was right or wrong as regarded the collision, and he was, of course, extremely anxious to show his owners that he could at all events take the ship to her destination. But he ought to have put into Plymouth or Falmouth, and if he had put in there the very first person who would have been called in would have been Mr. Camps, and Mr. Camps would have seen where the weakness was, and what could be done. The captain, however, did not do that. He proceeded on until he found that he could proceed no longer. He then took her to an anchorage. Tugs were fetched, and finally the ship went down head first.

The conclusion which I draw from the facts that I have found is that the repairs were altogether insufficient for such a voyage. I find that the shield began to work and to leak almost immediately after the ship left Portland. I find that is the most important fact in the case. I find that the big hole in the deck was not repaired, and that was a danger which ought not to have been existent at the time the ship left Portland. Something ought to have been done to prevent water which got on the deck from getting into the ship, and nothing was done, and I find that contributed to the disaster which happened afterwards. There was evidence given on behalf of the *Bruxellesville* that with this pump there should have been sent an experienced engineer—a man who would have been able to devote his time to that salvage instrument instead of having to call the engineer of the ship when the pump was found to be working unsatisfactorily. I think that ought to have been done. What happened was this: The flange of the pump broke or gave out at a certain time. It having given out the steam escaped, and until the flange was repaired the pump could be no longer worked. The giving out was an accident for which nobody was responsible, but it took two hours to mend, and it is probable that if a special engineer had been sent to keep an eye on it something might have been done at an earlier stage than was done. Those being the facts of this case, the conclusion to which I have come is that this foundering is not a matter for which the wrongdoing ship can be made liable. The law is quite clear on the subject—so clear that the old well-worn phrase, which is to be found in Mayne on Damages, ought to be known to every person who knows anything about law. "The first, and, in fact, the only inquiry in all these cases is, whether the damage complained of is the natural and reasonable result of the defendant's act. It would assume this character if it can be shown to be such a consequence as in the ordinary course of things would flow from the act." It is quite clear on the facts that the foundering of the ship was not the natural and reasonable result of the defendants' act, that is to say, running into the *Veritas*. That being so, the judgment which I have announced follows, and there must be the usual reference to the registrar.

The plaintiffs are to have the costs of the action and the defendants the costs of this issue decided in their favour.

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

Solicitors for the defendants, *Lawrence Jones* and *Co.*, agents for *Batesons, Warr*, and *Wimshurst*.

Thursday, Dec. 5, 1907.

(Before BUCKNILL and BARGRAVE DEANE, JJ. and Elder Brethren.)

THE TURQUOISE. (*a*)

Collision — Lights — Necessity to carry—Under way—Moored or at anchor—Fairway—Collision Regulations 1897*—Preliminary Article—Arts.* 1, 2, 11*—Swansea New Cut.*

A steam trawler was lying moored outside another vessel which was moored to a quay on the bank of a river. The trawler was exhibiting no lights, and was run into and damaged by a steamship coming up the river.

Held, by the Divisional Court, affirming the decision of the County Court judge, that the trawler was neither a vessel at anchor nor aground in or near a fairway, and that the steamship was alone to blame.

APPEAL from the decision of His Honour Judge Bryn Roberts, sitting in Admiralty in the County Court of Glamorganshire holden at Swansea, by which he held the owners of the steamship *Turquoise* alone to blame for a collision which occurred between their steamship and the steam trawler *Weymouth*.

The collision between the vessels occurred about 2.30 a.m. on the 23rd June 1907, near the Ice Factory Berth in the river Tawe, the wind at the time being west a moderate breeze, the weather bright and clear, and the tide flood of no force, it being nearly high water.

The respondents, the owners of the steam trawler *Weymouth*, were the plaintiffs in the court below, and the case made by them was that about 2.30 a.m. on the 23rd June the *Weymouth*, a steam trawler of 34 tons net register, was lying outside the steamship *Devonshire*, moored by two ropes forward and one aft, alongside the East Dock Fish Wharf, river Tawe. The mate of the *Weymouth* was on deck, and, when coming out of the forecastle, saw the *Turquoise*, a few yards astern of the *Weymouth*, coming straight for her at about two or three knots. He shouted to those on board the *Turquoise* to go astern, but almost at once she struck the trawler on the port quarter with her stem, forcing her forward until her hawsers broke, and sending her about 150 yards up the river.

Those on the *Weymouth* charged the *Turquoise* with not keeping a good look-out; with failing to keep clear of the *Weymouth*; with improperly attempting to pass between a steamer swinging in the river and the *Weymouth* when there was insufficient room to do so; and with neglecting to wait until the steamship had swung clear.

The case made by the appellants, defendants in the court below, was that the *Turquoise*, a screw steamship of 1343 tons, manned by a crew of twenty-four hands all told, was, while in the course of a voyage from London to Swansea, in water ballast in the river Tawe at the entrance to the New Cut, Swansea Harbour. The *Turquoise* was on a course of N.N.E., proceeding dead slow, 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, while the *Turquoise*, which was in charge of a pilot, was proceeding up the river Tawe to the

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

Central Dry Dock, a steamship was seen swinging round the North Dock Jetty and taking up some part of the fairway, so the helm of the *Turquoise* was ported to pass under the steamship's stern. The pilot then considered he had room to pass up the river and steadied and starboarded his helm, and, when about 400 yards from the steamship, the mate, who was on the look-out, shouted to go hard astern, but the pilot, thinking he had room to pass, still continued. Before the steamship which was swinging in the river was cleared there was a further shout from forward to go astern as there was a vessel on the starboard bow. The engines of the *Turquoise* were at once stopped and put full speed astern and the ship's head canted to starboard, and, before the way was off, the *Turquoise* with her stem struck the *Weymouth* on the port side of the taffrail, breaking her adrift.

Those on the *Turquoise* charged the *Weymouth* with neglecting to carry a light, in breach of art. 11; with being moored in the fairway of the New Cut, in breach of sect. 80 of the Swansea Harbour Trust Act 1854 and rule 8 of the Swansea Harbour Rules; and with having no tide watch on deck, in breach of rule 16 of the said rules.

On the trial of the action on the 30th July 1907, it was proved that the vessel which swung in the river had sounded three blasts on her whistle, signifying that she was coming astern, on several occasions as she came out of dock.

The learned County Court judge held the *Turquoise* alone to blame for the collision, on the ground that it was brought about by the fault of her pilot. He held that the pilot should have stopped down channel when he first heard the signal that a vessel was coming astern from the North Dock Basin, and that he should have waited until the steamship coming out of the dock had swung completely round, so as to leave the channel free; that the pilot should have gone astern on the first warning given by the mate, instead of trying to pass the steamship when lying broadside across more than half of the channel, as he knew or ought to have known that vessels were often moored two or three deep along the fish wharf, and that lights were never shown by them when so moored. He further held that the *Weymouth* was not to blame for not exhibiting a light, as lights never had been exhibited by vessels moored alongside the fish wharf, even when moored three or four deep, and that this was known to the dock authorities and pilots, who never complained. He also held that the temporary absence of the mate of the *Weymouth* from the deck did not contribute to the accident, as the pilot of the *Turquoise* had been warned to go astern in sufficient time to avoid the collision.

On the 6th Aug. 1907 the defendants, the owners of the *Turquoise*, delivered a notice of appeal from the above judgment, praying that the judgment should be reversed or varied.

The appeal was heard on the 5th Dec., when the following Collision Regulations were referred to:

Preliminary.—These rules shall be followed by all vessels upon the high seas and in all waters connected therewith, navigable by sea-going vessels. . . . 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. 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.

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 ahead to two points abaft the beam on either side; and of such a character as to be visible at a distance of at least five miles.

Art. 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.

Art. 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 aground in or near a fairway shall carry the above light or . . . and the two red lights prescribed by art. 4 (*a*).

Noad for the appellants.—The *Weymouth* is to blame for carrying no lights. She is a vessel in waters connected with the high seas navigable by sea-going vessels, and, as the Collision Regulations (Preliminary Article) apply to her, she should carry some light. Lights are required on all vessels to which the regulations apply between sunset and sunrise (art. 1). She was either under way or at anchor or moored, and ought to have had some light. Probably she should have exhibited the anchor light required by art. 11 (see Marsden's Collisions at Sea, 5th edit., pp. 362 and 369), for at the time of the collision she was not aground. A vessel moored to a pontoon has been held not to be at anchor:

The Titan, 96 L. T. Rep. 93; 10 Asp. Mar. Law Cas. 350 (1906).

But the circumstances there were different. Further, she was in the fairway. The learned County Court judge did not give a decision on this point. Any clear passage-way by water in a part of a river where it is safe to navigate vessels is a fairway:

The Blue Bell, 72 L. T. Rep. 540; 7 Asp. Mar. Law Cas. 601; (1895) P. Div. 242.

When the tide ebbed she was aground, and she was then aground in or near a fairway. If aground, she should have exhibited the lights prescribed by art. 11. Wherever vessels lie in tiers, prudence demands they should carry lights unless specially exempted, as in the case of barges at barge roads under art. 30, sub-sects. (*a*) and (*b*), of the Thames Rules. And, even when a barge is at a tier, if she is swinging she should show a light:

The St. Aubyn, 95 L. T. Rep. 586; 10 Asp. Mar. Law Cas. 298; (1907) P. Div. 60.

It may be that under the rules if she took the

ground she should have shown the red lights mentioned in art. 11, and when afloat the white light, but she is to blame for showing no light.

Aspinall, K.C. and *Meager* for the respondents. —The *Weymouth* was not bound to carry any lights. She was not in the fairway; if she had been, the harbour authority would have removed her.

BUCKNILL, J.—The point raised in this case is one of law only, for it is admitted by counsel for the appellants that there is no appeal upon the facts, but one may refer to the facts for a moment to see what was in the judge's mind. The up-coming ship was being navigated by a pilot who disregarded all the reports of this trawler and the ship that was swinging, and who tried to cut in between them. Therefore the learned judge properly found that the navigation of the up-coming ship was negligent. The point of law is this, that the *Weymouth*, lying second out at the Fish Quay, was negligent in not having exhibited a white light and two red lights, or, if she ought not to have exhibited those lights, in not exhibiting an anchor light. It is said that she ought to have exhibited a white light and two red lights, because she was, under art. 11, a vessel aground in or near a fairway, and that, if not aground, she was a vessel at anchor and ought to have carried an anchor light. We think she was neither the one nor the other. The place where she was lying was part of the New Cut, a place where steam trawlers are allowed, and are directed to and have to go for the purpose of discharging their fish cargoes, and therefore this vessel was properly moored or made fast at this place where business of that nature is carried on. Was she made fast in a fairway? We are of opinion that she was not made fast in a fairway, but in an artificial place called the New Cut on a mud bank, on which there was no water for part of the tide. That does not, however, necessarily conclude the case; but when we look at the by-laws of the Swansea Harbour Trustees we find that under art. 8 no vessel is to be moored or made fast, or laid aground, in the fairway of the river or New Cut, or in the entrance to the half-tide basins or docks. We agree with counsel for the appellants that that ought to be read "or in the fairway of the New Cut"; and it is manifest that in the opinion of the authorities this vessel was not moored in the fairway of the New Cut. We have asked the Elder Brethren whether in their opinion this vessel was in the fairway of the New Cut, and in their opinion she was not. That being so, in our opinion the *Weymouth* was not bound to carry these two red lights and a white light. Also in our opinion she was not at anchor under art. 11 of the Collision Regulations, so the appeal will be dismissed.

BARGRAVE DEANE, J.—The whole question is, was she in the fairway, and it is clear that if she had been she would have been moved at once by the harbour authorities. But they directed her to go there, and that makes it clear that in the opinion of those who know the place she was not in the fairway. The word "fairway" does not apply to that part of the river at all.

Solicitors for the appellants, *Ingledew, Sons*, and *Phillips*, Swansea.

Solicitors for the respondents, *Andrew* and *Thompson*, agents for *E. Gerrish* and *Co.*, Bristol.

Dec. 11, 12, 13, *and* 16, 1907.

(Before BUCKNILL, J. and Elder Brethren.)

THE ETNA. (*a*)

Collision—Single ship and fleet of warships—Crossing rules—Special circumstances—Regulations for Preventing Collisions at Sea 1897 *—Arts* 19, 21, 22, 23, 27, *and* 29*—King's Regulations* 615 (6) (11)*—Merchant Shipping Act* 1894 (57 *&* 58 *Vict. c.* 60), *s.* 741.

A fleet of warships proceeding in divisions line ahead disposed abeam to port on a course of W. ¾ N. magnetic sighted a merchant vessel which was on a course of E. ½ S. about ahead of the starboard division of the fleet. The fleet kept its course, and the merchant vessel, in disregard of a notice to mariners issued by the Board of Trade, ported and crossed ahead of the starboard division of the fleet and proceeded to approach the port division, showing her red light on the starboard bows of the warships in that division. Those on the merchant vessel kept their course and speed in accordance with art. 21 *of the collision regulations. The second warship in the port division, instead of porting to go under the stern of the merchant vessel, kept her course and speed in order to keep her station, until it was seen that the merchant vessel did not intend to steer a course between the two divisions, but intended to pass through the port division and ahead of the warship and that a collision was imminent, when the engines of the warship were put full speed ahead and her helm was put hard-a-port, but a collision occurred.*

Held, that it was negligent of the merchant vessel to get between the divisions of the fleet; that, when the merchant vessel had got into that position, the officer on the warship was entitled to wait a reasonable time to see if the merchant vessel would steer between the divisions or persist in passing through the port division, but that the officer was negligent in waiting until a collision was imminent before doing anything to avoid it, and that, as both ships had been negligent and it had not been proved that the officer in charge of the warship could have avoided the negligence of the merchant vessel, both ships would be held to blame for the collision.

DAMAGE ACTION.

The plaintiffs were the Commissioners for executing the office of Lord High Admiral of the United Kingdom; the defendants were the owners of the steamship *Etna*.

The collision which gave rise to the action occurred about 8.10 p.m. on the 12th Jan. 1907, about four and a half miles S.E. from Beachy Head. The wind at the time was W.S.W. a light breeze; the weather was clear, but overcast and dark; and the tide was setting east of the force of about one knot.

The case made by the plaintiffs was that H.M.S. *Wear* was proceeding from Sheerness to Portsmouth on a course N. 83 degrees W. magnetic at a speed of fifteen knots, Beachy Head bearing N.W. distant about four and a half miles H.M.S. *Wear* was one of a flotilla of ten torpedo boat destroyers, which was proceeding in divisions line ahead disposed abeam to port, the divisions being three cables apart and the ships one cable.

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

The *Wear* was the second vessel in the port column, and had all the lights prescribed by the King's Regulations burning brightly, and a good look-out was being kept on board of her. In these circumstances those on board the *Wear* saw at a distance of about one mile, bearing about two points on the starboard bow, a white light, which proved to be the steaming light of the *Etna*. Shortly afterwards her red light came into view from two to three points on the starboard bow. Very shortly afterwards she showed all three lights, which were in sight for a few seconds, and then the red light was shut out. The *Etna* continued to show her green light until she was abreast of the *Ure*, the leading ship of the port column, when her outline became visible to those on board the *Wear*. As the *Etna* was passing the *Ure* she was observed by those on board the *Wear* to be altering her course rapidly to starboard, and her red again came into view. The engines of the *Wear* were at once put full speed ahead so as to pass ahead of the *Etna*, but on its being seen that a collision was inevitable, the helm of the *Wear* was put hard-a-port. Immediately afterwards the bow of the *Etna* struck the starboard quarter of the *Wear*, spinning her round. The engines of the *Wear* were at once stopped. Those on the *Etna* gave no warning on either occasion of their intention to alter their course as above stated.

The plaintiffs charged the defendants with failing to keep a proper look-out; with improperly attempting to proceed across and through a flotilla of warships steaming in company; with failing to keep her course and speed; and with improperly starboarding.

The case made by the defendants was that the *Etna*, an iron screw steamship, belonging to the port of West Hartlepool, of 703 tons net and 1159 tons gross register, manned by a crew of seventeen hands all told, was in the English Channel, in the course of a voyage from Valencia to Rotterdam, with a cargo of burnt ore. The *Etna* was proceeding on a course of E. ½ S. magnetic, and was making about seven to eight knots. Her regulation lights for a steamship under way and a fixed stern light were 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 *Etna* observed, distant about three to four miles and bearing right ahead, all three lights of a steamship coming down channel. As the said steamship approached, the helm of the *Etna* was slightly ported and one short blast was sounded on her whistle, and when the *Etna* was heading about E. by S. ½ S. her helm was steadied, the vessels being then in position to pass all clear red to red. At about the time when the helm of the *Etna* was ported those on board of her saw about two miles off and bearing about two points on their port bow the masthead and green lights of several steamships, of which the second proved to be H.M.S. *Wear*. The *Etna* kept her course and speed, and the other steamships were carefully watched. The foremost of the said steamships passed safely across the bows of the *Etna*, but H.M.S. *Wear*, still showing her masthead and green lights on the port bow of the *Etna*, approached at great speed as if attempting to cross the bows of the *Etna*, and caused danger of collision. When the vessels were so close that collision could not be avoided by the action of H.M.S. *Wear* alone, the engines of the *Etna* were stopped, and a long warning blast was sounded on her whistle, but, notwithstanding these manœuvres, H.M.S. *Wear* came on at high speed, and with her starboard quarter struck the stem and port bow of the *Etna*, a heavy blow, doing her serious damage.

The defendants charged the plaintiffs with not keeping a good look-out; with failing to keep out of the way of the *Etna*; with improperly attempting to cross ahead of the *Etna*; with not porting; and with not stopping, easing, or reversing their engines.

The following articles in the Collision Regulations 1897, which also appear in the King's Regulations, 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. 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.

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.

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.

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.

The following King's Regulation was also referred to:

Chapter XIV.—Instructions to Lieutenants.—615. When officer of the watch, he is responsible for the safety of the ship, subject, however, to any special orders he may have received from his captain. . . . (6) He is to be extremely careful to keep station with the other ships, and is to report at once to the captain if unable to do so. . . . (11) He is never to change the course without instructions from the captain, unless to avoid immediate danger.

And the following notice to shipowners and masters issued by the Marine Department, Board of Trade, in April 1897:

Single ship approaching squadrons.—The Board of Trade desire to call the attention of shipowners and masters to the danger to all concerned which is caused by single vessels approaching a squadron of warships so closely as to involve risk of collision, or attempting to pass ahead of, or through, or to break the line of, such squadrons. The board find it necessary to warn mariners that on such occasions it would be in the interests of safety for single ships to adopt timely measures to keep out of the way of, and avoid passing through, a squadron.

Sect. 741 of the Merchant Shipping Act 1894 is as follows:

This Act shall not, except where specially provided, apply to ships belonging to Her Majesty.

The *Solicitor-General* (Sir W. Robson, K.C.), *Acland*, K.C., and *William Wills* for the plaintiffs.—A King's ship is not bound by the collision regulations:

The Sans Pareil, 82 L. T. Rep. 606; 9 Asp. Mar. Law. Cas. 78; (1900) P. 267.

For the King's ship is not within the provisions of the Merchant Shipping Act 1894: (see sect. 741). The question to be considered by the court is not merely whether any particular rule has been broken, but whether the officer in charge of the King's ship has been guilty of negligence, and to ascertain that all the King's Regulations have to be considered. One of the most important of them is art. 615 (11) as to keeping station when the ship is one of a flotilla. The object of that rule is to prevent collision between vessels composing the squadron, and an officer is not to blame for keeping his course and station as long as it is safe to do so:

H.M.S. Sutlej, 21 Times L. Rep. 325.

The code of good seamanship which governed the naval officer in this case is contained in chap. xiv., art. 615, and in chap. xxvii., art. 1035, in which appear arts. 27-29 of the collision regulations. The man in charge of the *Etna* knew of the Board of Trade notice as to single ships approaching squadrons, and he ought not to have attempted to break through the line in which the *Wear* was. The officer on the *Wear* was entitled to expect him to avoid breaking the line, and was only bound to act when it became apparent that the *Etna* was disregarding the Board of Trade notice. The negligence of the *Etna* alone brought about the collision.

Laing, K.C. and *H. C. S. Dumas* for the defendants.—The questions to be considered are: Were these vessels on crossing courses? Did the *Etna* properly keep her course and speed within the meaning of art. 21? Was she negligent in getting into the way of this flotilla at all? Assuming those on board the *Etna* were negligent, could the officer on the *Wear* by the exercise of reasonable skill and care have avoided the consequences of that negligence? There is no doubt the vessels were crossing ships within the meaning of the regulations, and that the *Etna* kept her course and speed in accordance with art. 21. She was right to do so. There was nothing to show the officer in charge of her that he was meeting a squadron, for in that neighbourhood many ships are met with going down channel, and very often they are in a procession, so it was not negligent on his part to think they were merchant vessels. The result was he was bound to keep his course and speed. This case really shows that it is desirable for warships proceeding in company to carry a special signal light. As these ships were on crossing courses and the King's ships are under the regulations issued by the Admiralty and not under the collision regulations, the question is one of common law negligence. The officer in charge should have obeyed art. 615 (11), and have taken timely action to avoid immediate danger. Whether it was negligent for the merchant vessel to get into the middle of the squadron depends on circumstances, but, once there, she must follow the regulations or the warships would not know what to do, and with her powerful helm and engines the *Wear* could have kept out of the way. The collision therefore was solely due to the negligence of the officer in charge of the *Wear* in failing to take action:

The Margaret, 52 L. T. Rep. 361; 5 Asp. Mar. Law Cas. 371; 9 App. Cas. 873;
The Melampus, *Shipping Gazette*, Dec. 21, 1903.

Acland, K.C. in reply.

BUCKNILL, J.—In this case the steamer *Etna*, a vessel of 1159 tons gross register, came into collision with H.M. torpedo-boat destroyer, the *Wear*, on the evening of the 12th Jan. 1907 in the English Channel, between Beachy Head and the Royal Sovereign Lightship. The stem and port bow of the *Etna* struck the starboard quarter of the *Wear* about 40ft. from the stern, at an angle of from four to five points, leading aft, and penetrating as far as her middle line. Before, and at the time of the collision, which happened a few minutes after eight o'clock, the *Wear* and nine other torpedo-boat destroyers were proceeding down channel in two lines, or divisions, about three cables apart from each other. The northern or starboard division consisted of (1) the *Nith*, commanded by the commander of the flotilla; (2) the *Ernest*; (3) the *Panther*; (4) the *Exe*; (5) the *Griffon*. The port or southern division consisted of (1) the *Ure*, leading vessel; (2) the *Wear*; (3) the *Swale*; (4) the *Ness*; (5) the *Quail*. When the Royal Sovereign Lightship was abeam, Commander St. John, on the *Nith*, signalled the flotilla to alter course to N. 83 W. (equal to about W. ¾ N.), "leaders first and remainder in succession." That signal was answered by every vessel, and the order was obeyed, and I find that that course was being steered by the flotilla at the time of the collision between the *Wear* and the *Etna*, and that at the moment of collision the *Wear* was still heading W. ¾ N., or a very little to the north of it, if anything. This would make the *Etna* to be heading about S.S.E., or between five and six points off her up-channel course. The question is: Which of these two vessels is to blame for this collision—or whether both have materially contributed to it? The court has found it very difficult to arrive at a conclusion as to the facts, seeing that the case for the plaintiffs has been presented to it by witnesses who, whilst the court believes them to have been for the most part honest, have nevertheless been in apparent disagreement with each other on some important points, and that the case for the defendants has been blemished by statements which were incorrect, and, I must add, which I think were intentionally incorrect on material matters. The first witness called by the plaintiffs was Mr. Dudley, a gunner, who relieved Lieutenant Phillips, in command of the *Wear*, at 7.40 p.m., he having left the bridge at that time, and gone below. Mr. Dudley, a quartermaster, and a signalman, were on the bridge, and an A.B. was forward on the look-out. Mr. Dudley's evidence was that at five minutes past eight he saw the *Etna's* masthead light two points on the starboard bow, and about a mile away; that shortly afterwards her red came into view at the same bearing and distance; and the next he saw was

the green light coming into view, and the red was shut in, distance still about a mile off, but when bearing three to four points on his starboard bow, and about abreast of the *Ure*, she came round as if under a port helm, and appeared to be trying to cross ahead of the *Wear*; so he ordered his engines to be put full speed ahead to avoid being hit amidships by the *Etna*, and then, seeing that a collision was inevitable, he put his helm hard-a-port to make the blow a glancing one; but the stem and port bow of the *Etna* struck the *Wear* on the starboard side about 40ft. from the stern, at an angle of four points leading aft. Mr. Dudley said on re-examination that he kept his course until just before the collision. The *Wear* was out of station before and at the time of collision, and was probably more so than the distance Commander St. John contended her to be, which was about one cable. Her proper station was one cable between her and the *Ure*, which was ahead of her. It was stated by Mr. Dudley, I think, that a signal of reprimand had come from the *Nith* on the subject shortly before the collision. Roberts, acting quartermaster on the *Wear*, was at the wheel, and he proved that the *Etna* was close to the *Wear* when he got the order "Hard-a-port"; and on cross-examination he said that the *Wear* was crossing the *Etna's* head when thirty to fifty yards from her. Gaiger, signalman on the *Wear*, whose duty it was to look out for signals, but particularly from the *Nith*, said that he first saw the masthead light of the *Etna* two to three points on the starboard bow, and then he saw her red; that the red was shortly after shut in; and when the *Etna* was about abeam of the *Ure* she seemed to be porting, for her red light came into view again. He expressed an opinion that if the helm of the *Wear* had been ported earlier there would not have been a collision, but I do not attach much importance to this statement from a witness whose knowledge of navigation may be of no value. The evidence of the look-out on the *Wear* was generally corroborative of Mr. Dudley's evidence. The engineer of the *Wear* stated that he felt the shock of the collision immediately after he had put the engines full speed ahead. Commander Hawksley, of the *Ure*, the leading vessel of the port division, first saw the masthead light of the *Etna* half a point on his starboard bow, five miles off; then he saw the green, two points on the same bow, two miles off, and it got broader. When the *Etna* was abeam of the *Ure* he saw that she was porting, as if trying to pass between the *Ure* and the *Wear*. He soon saw the red. Commander St. John, of the *Nith*, who commanded the flotilla, stated that he first saw the masthead light of the *Etna* about five miles off, and about ahead. The next he saw was her red light, about two points on the starboard bow, and about three cables distant. He then ordered his helm to be hard-a-ported, and sounded the siren as an indication to the flotilla that he was porting. He then steadied the *Nith* on her course, having passed under the *Etna's* stern, and then saw that she seemed to be under the influence of a port helm. Lieutenant Seymour commanded the *Ernest*, the second in the starboard division. He first saw the masthead light of the *Etna* nearly ahead, and about four miles off. Then he saw her red one and a half miles off and half a point on the port bow. The helm of the *Ernest* was ported to follow the *Nith*, but at that time the *Etna* was four points on the port bow of the *Nith* and the *Ernest*, and not on the starboard bow, and he thought that the *Etna* was on an opposite course, and he could not understand why the *Nith* ported three points. Lieutenant Seymour said that he then saw the *Etna* was porting as if she was trying to cross the bows of the *Wear*. An attack was made by Commander St. John on the quality of the *Etna's* red light, as accounting for not having seen it before; but whether it was efficient or not, it was seen by Mr. Dudley, on the *Wear*, at the distance of a mile, and he made no complaint of it. The siren signal from the *Nith* was said not to have been heard by the witnesses to whom I have referred, which seems to me to be extraordinary, but I accept the evidence of Commander St. John on this point. It is extremely difficult to reconcile the evidence of Commander St. John with the evidence of Commander Hawksley, Lieutenant Seymour, Mr. Dudley, and others, as to the bearing of the *Etna's* lights with regard to the *Nith*, for it would appear that if the last-named witnesses are correct the *Etna* never could have been on the starboard bow of the *Nith*; but as I have to choose between the two statements I prefer to rely on the evidence of the commanding officer of the flotilla, who was at his post, and having in his hands the responsibility for the movements of the whole flotilla, and who is, in my opinion, more likely to be right in his recollection of what he says he saw, and for which he acted, than are those whose responsibilities were less important. It also seems to me that it would have been almost impossible for the *Etna* to have turned round as much as she did under a port helm before this collision, if she only began to do so when she was abeam of the *Ure*; whereas there is no improbability about it according to the evidence of Commander St. John. But on his evidence there is, on the other hand, this difficulty: If the *Etna* was on his starboard bow, then considering the distance between the *Etna* and the *Wear*, and the respective speeds — fifteen and eight knots—it would look as if the *Wear* would have been a crossed ship before the *Etna* could have reached her. I think it is very likely that the *Wear* was farther astern of the *Ure* than Mr. Dudley admitted. The fact still remains that wherever the *Etna* was before the acting officer on the *Wear* saw her red light the second time, he did not see it a second time until she was abreast of the *Ure*, and then she appeared to be under the influence of a port helm. What he did then was to go full speed ahead, and the reason he gave for so doing was that if he had not she would have hit him amidships. Then, seeing that the collision was unavoidable, he ordered the helm hard-a-port, but there was clearly no time for her head to alter before the collision happened. The plaintiffs' case, therefore, came to this, that the *Etna* got in between the two divisions, and then instead of steering between them, when she would have been safe, suddenly ported to get out between the *Ure* and the *Wear* —that the action of the *Etna* was so sudden and unexpected that those on the *Wear* were unable to avoid the collision, and that what was done on the *Wear* did not contribute to it, nor could they by reasonable care and skill have avoided the consequences of the initial negligence of those on the *Etna*.

Of the defendants' case it is not necessary to say much, for I disbelieve it, but I must refer to the evidence given in support of it. At 8 p.m. the *Etna's* course was E. ½ S. At 7.50, the second mate being on the bridge, the three lights of a steamship were seen right ahead, and about three miles off. The helm of the *Etna* was ported one point, and then, and before the helm was steadied, the green and masthead lights of several steamships were observed about two points on the port bow, and about two miles off. The second mate took them to be merchant ships, but they turned out to be the port division of the flotilla. He said that he kept his course of E. by S. ½ S., at which he had steadied after porting for the merchantman, and he judged that those vessels showing their green lights to him were heading S.W. or S.W. by S. When he was relieved by the chief officer at eight o'clock he said the nearest of those vessels was one to one and a half miles off, and the merchantman was abeam on his port side. It was then stated that as the *Etna* and the port division drew nearer to each other the first one (the *Ure*) crossed the *Etna's* bows safely, but the second one (the *Wear*), which was two or three ships' lengths behind the first, looked as if she was holding on her course without attempting to avoid the *Etna*, so the *Etna's* engines were stopped, and a long blast was blown on her whistle, but the vessels came into collision, the heading of the *Etna* at the moment of the collision being, it was said, still E. by S. ½ S. The second mate said he never saw any of the vessels forming the starboard division, and he believed that they were not there, or he must have seen them. The impression made on me by this witness was very unfavourable. In the first place he could not have seen the green lights of the *Ure* and *Wear* on his port bow if his vessel was heading E. by S. ½ S. and if the *Ure* and the *Wear* were heading W. ½ N., which it is admitted they were. In the second place he must have seen the vessels in the starboard division when the *Ure* crossed the bows of *Etna*, which it is admitted she did; and in the third place the so-called merchantman for which he ported could not have been there if the rest of his evidence as to distances is correct, for he ported for her when she was two to two and a half miles off, and as he ported, and before he steadied, he saw the lights of the "*Ure*" division two miles off, and yet when the merchantman was abeam of him the *Ure* was still one to one and a half miles off. I entirely disbelieve the story about the merchantman, as I do about the starboard division not being seen by the second mate of the *Etna*. The chief officer of the *Etna*, who went on the bridge at eight o'clock, said that the "*Ure*" division was heading S.W., and that the *Etna* was on an E. by S. ½ S. course, and was kept on it. He also had his attention drawn to the merchant ship when abeam, and said that the masthead and green lights of the "*Ure*" division were one to two miles away and bearing one to two points on the *Etna's* port bow; but he saw, or said he saw, what the second mate said he never saw and which he believed was not there —that is, some red lights on the port bow, which, I doubt not, were those of the "*Nith*" division. In cross-examination he admitted that he knew of the Board of Trade note of advice to single ships approaching squadrons, but said he did not know that the vessels following the *Ure* were torpedo boats until just before the collision. I cannot accept this statement, for it is inconceivable that a man in his position should have thought that five steamships carrying electric masthead lights and being in line formation were ordinary merchant vessels. The conclusion to which I have come is that the defendants' case is an untrue one, and I reject it. As to the course of the *Etna*, I accept it to have been E. ½ S. before the "*Ure*" division was first seen, but I find that after that time, and before the collision with the *Wear*, the course was altered by porting, and that just before the collision the *Etna* was heading about S.S.E., nothing to the eastward of it, and that she was under the influence of a port helm at the moment of collision. I have asked the Elder Brethren if this porting was in the circumstances negligent navigation, and their answer is in the affirmative. I have no doubt that it was, and that it contributed materially to the collision. To account for the *Etna* being so much to the southward of her course, it was suggested that her compass may have been affected by her cargo of ore, but I cannot accept that supposition. It is impossible to say with certainty what led to so much porting on that ship, but I suspect strongly that the first porting was for the *Nith*, the so-called merchant ship, which had no existence, and that the *Etna* was more or less under the influence of a port helm from that time up to the collision.

Then came the difficulty in which the officer in charge of the *Wear* found himself. His ship was already out of station by being too far astern of the *Ure*; he was bound by the Admiralty regulations not to change his course, except to avoid immediate danger, unless ordered to do so; and he was also bound, so far as good seamanship dictated it, to keep out of the way of a vessel on his starboard bow, and also to avoid crossing ahead of her if he could help it. I cannot accept the evidence that the *Etna* suddenly and when but a short distance from the *Wear* ported her helm, shutting in her green, which it was said was up to then open to the *Wear*, because from the time when the *Nith* ported for the *Etna* I find that the red and not the green was open to the *Wear*. If those on the *Wear* had ported to that red light when it could have been first seen on their starboard bow it is probable that no collision would have happened, provided the *Etna* had kept her course; but I think that in the circumstances the officer on the *Wear* was entitled to wait for a reasonable time to see if the *Etna*, which had got in between the two divisions, intended to continue, and to cross the port division, or to starboard and go between it and the starboard division. But he was also bound not to wait until a collision was imminent, and that he unfortunately did, because the *Etna* still came on as if to pass ahead of the *Wear*—that is, between the *Ure* and the *Wear*—and it was not until the officer in charge of the *Wear* thought that unless he went full speed ahead his ship would be run into by the *Etna* that he gave that order. That was waiting too late, and although he nearly cleared the *Etna* he just failed by 40ft. It having been agreed in this case, and for the reasons which were given in the *Sans Pareil*, that the rules of common law as to contributory negligence must apply, and not the penalty

clauses of the statute law as to disobedience of a statutory regulation, learned counsel for the defendants argued that even if those on board the *Etna* had been guilty of the initial negligent navigation, the result, that is the collision, could nevertheless have been avoided by the exercise of ordinary care and skill on the *Wear*. That has not been made out to my satisfaction. In some cases it is easy to determine that the negligence of the initial wrongdoer could have been avoided by the other party, but it is frequently a matter of extreme difficulty to decide, and here I am unable to do so. I am of opinion that the navigation of the *Etna* was negligent in getting in between the two divisions of the flotilla. I say I find that because I find as a fact that the *Etna* ported for a vessel which she called the merchantman, but which was, I suspect, in point of fact the *Nith*, and that she ought to have had a better look-out than she had; and not seeing, as she maintains, the starboard division at all of the flotilla, I hold that her navigation was negligent. As Romer, L.J. said in the *Sans Pareil*, prudence dictated that the tug and tow should not have attempted to cross in front of the squadron, and so here, under art. 27 of the regulations, I think that, the *Etna* having got there, a departure from arts. 19 and 21 was necessary to avoid immediate danger. But those on the *Etna* persisted in holding on and under a port helm. So also those on the *Wear* were negligent in acting too late to avoid the *Etna*, and the result was that the collision was brought about by the combined negligence of both ships, and I therefore pronounce them both to blame.

Acland, K.C. applied for leave to amend the writ by adding a claim for the effects of the officers and men on the *Wear* which were lost by reason of the collision. Leave was granted.

Solicitors for the plaintiffs, *Treasury Solicitor*.

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

Monday, Jan. 27, 1908.

(Before BARGRAVE DEANE, J.)

THE READING. (*a*)

Collision—Both to blame—Registrar and Merchants—Offer by one party to agree claim—Costs.

The owners of two vessels which had been in collision agreed that both vessels were to blame, and that the plaintiffs should recover 60 *per cent. and the defendants* 40 *per cent. of the damage they had sustained. Before the reference was held the plaintiffs' solicitors wrote to the defendants' solicitors offering to agree the defendants' damage at* 4500*l.*, *but the defendants' solicitors refused to recognise the offer unless a formal tender was made. At the reference the defendants only succeeded in proving their claim at* 4352*l. The registrar allowed the defendants the costs of proving their claim. The plaintiffs appealed.*

Held (*reversing the decision of the registrar*), *that, as the appellants* (*plaintiffs*) *offered to agree the defendants' damage at* 4500*l. for the purpose of saving the costs of the inquiry as to the amount of them and the defendants had failed to prove that the damage sustained was equal to that sum, the plaintiffs were entitled to the costs incurred by the defendants persisting in proving their claim.*

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

MOTION in objection to registrar's report.

The appellants were the owners of the steamship *Cowrie*, the plaintiffs in the action; the respondents were the owners of the steamship *Reading*, defendants and counter-claimants in the action.

The reference arose out of a collision action brought by the owners of the *Cowrie* against the owners of the *Reading* in which the owners of the *Reading* counter-claimed. The action was settled on the terms that both ships were to blame, and that the *Cowrie* was to receive 60 per cent. of her damage from the owners of the *Reading*, and that the *Reading* was to receive 40 per cent. of her damage from the owners of the *Cowrie*.

Both claims were then referred to the registrar and merchants. Before the reference was heard, the plaintiffs' solicitors wrote on the 6th Nov. 1907 to the defendants' solicitors as follows:

> With reference to our interview to-day, we write again to say that our clients are willing to agree your clients' claim at 40 per cent. of 4500*l.*, together with interest, if any. Failing your acceptance of this offer, we shall bring this letter to the registrar's notice on the hearing of the reference upon the question of costs.

The defendants' solicitors replied on the 9th Nov. as follows:

> Referring to your letter of the 6th inst., we beg to state that, if you wish to make a tender in respect of our clients' claim, we shall be prepared to accept your cheque on the same terms as if the money were paid into court by way of tender. We cannot, however, treat your letter as if it were a tender.

To that letter the plaintiffs' solicitors on the 11th Nov. sent the following reply:

> We have your letter, but, having regard to the fact that there are cross-claims in this case, and, therefore, presumably, only a small balance will be due from one side to the other, we cannot very well make a tender; but we shall submit that, under the circumstances, our letter is quite sufficient for the purpose for which it is intended.

At the reference, the *Reading* put forward a claim for 6600*l.* The registrar and merchants assessed the amount due to the *Reading* by the owners of the *Cowrie* at 4352*l.*, which was less than the amount (4500*l.*) the plaintiffs had offered to agree it at. The 40 per cent. of the sum allowed by the registrar to the owners of the *Reading* was less than the 60 per cent. of the sum found due to the owners of the *Cowrie* by 250*l.* The consequence was that, as a result of the reference, the owners of the *Reading* had to pay the owners of the *Cowrie* 250*l.*

The registrar further reported that the plaintiffs and defendants were entitled to the costs of proving their respective claims.

On the 8th Dec. the registrar published his reasons for giving the owners of the *Reading* the costs of proving their claim: "As regards the costs of the *Reading's* claim, they were allowed because no money or cheque was paid in respect of the tender; each claim is entirely separate, and, therefore, a tender should be either paid in cash or cheque, as in an ordinary case."

The owners of the *Cowrie* appealed.

A. D. Bateson for the appellants.—The appellants are entitled to the costs incurred in contest-

ing the respondents' claim as from the 9th Nov., when the appellants' offer was rejected. The court has a general discretion as to costs (Order LXV., r. 1), and it should in this case be exercised in the appellants' favour. The finding of the registrar has resulted in the appellants recovering a sum from the respondents. The settlement was on the basis of both ships being to blame, and, where both ships are to blame, each is liable for half of the other's damage, and the balance between the two sums is due to the owner of the vessel which is the more seriously damaged :

The Khedive, 47 L. T. Rep. 198 ; 4 Asp. Mar. Law Cas. 567 (1882) ; 7 A. C. 795 ;
London Steamship Owners Insurance Company v. *Grampian Steamship Company*, 62 L. T. Rep. 784 ; 6 Asp. Mar. Law. Cas. 506 (1890) ; 24 Q. B. Div. 663 ;
Marsden's Collisions at Sea, 5th edit., p. 128.

The only result of the defendants persevering with their claim was that a large amount of costs were incurred, for their damage was assessed at less than the sum which the plaintiffs offered to agree it at. It was impossible to tender any sum, for both vessels were to blame, and, when that is so, there is only one liability—namely, a liability for a sum due from the man who has suffered the lesser damage to the man who has suffered the greater—and, until the appellants had their damage assessed, it was impossible to know what that liability was. An offer made by a party to avoid costs is regarded by the court with favour, and will be given effect to if it is reasonable and one which should have been accepted by the other party :

Jenkins v. *Hope*, 73 L. T. Rep. 705 ; (1896) 1 Ch. 278.

No doubt a tender should be formally made :

The Vrouw Margaretha, 4 C. Rob. 103 ;
The Sovereign, 2 L. T. Rep. 669 ; Lush. 85 ;
The Nasmyth, 52 L. T. Rep. 392 ; 5 Asp. Mar. Law Cas. 364 ; 10 P. Div. 41.

Unless it is formally made, a defendant is, as a rule, entitled to his costs, though, even when a tender is overruled, the court may refuse to give costs :

The Hedwig, 1 Spinks, 19.

This is not a case in which a tender could, strictly speaking, be made at all.

Dawson Miller for the respondents. — The registrar has a discretion as to the costs of the reference, and he has exercised it ; the court therefore will not now interfere. The plaintiffs did not offer to pay any money into court, and did not follow the rules as to making a tender. All the cases show that when a party relies on a tender he must prove that he has followed the usual procedure. The practice as to tender is laid down by Bruce, J. in *The Mona* (71 L. T. Rep. 24 ; 7 Asp. Mar. Law. Cas. 478 ; (1894) P. 265), and the practice of other divisions has no bearing on the question. If the amount had been paid into court, it could not have been taken out by the owners of the *Reading* without an order of the judge :

Williams and Bruce, Admiralty Practice, 3rd edit., p. 408, note *f*.

BARGRAVE DEANE, J.—In this case two ships came into collision and each suffered damage, and each party admitted liability. They agreed that there should be a reference to the registrar, and that one ship would pay 40 per cent. of the damage done to the other ship, and the other 60 per cent. of the damage done to the first. The case accordingly went to a reference. I need not go into figures. On behalf of the owners of one vessel, the *Cowrie*, a letter was written offering to agree the claim of the owners of the *Reading*, the other vessel, at 40 per cent. of 4500*l*., with interest. The answer to that letter was, "We are ready to accept your cheque"—putting it as an ordinary tender. The registrar, apparently, has treated it as an ordinary tender, and said it was incomplete because it was not accompanied with the payment into court of the amount tendered. I think the registrar is perfectly right to the extent that there was not an ordinary tender, but I do not think it was intended to be an ordinary tender. The question before the registrar was this : We have got to assess the damage caused to both ships. One vessel is claiming a large sum of money as damages caused to it. Is it to be said that the other side are not entitled to say, "We are willing to agree, to save the expense of a long inquiry, that the registrar shall assess these damages at the amount which you and I agree" ? Is it to be said that no agreement may be arrived at before the registrar, short of an actual tender, with a view to saving the great costs of a reference ? It seems to me that is a mistake. The word "tender" does not apply to such an agreement, and therefore it does not come within the law as to what should constitute a tender. The appellant in this case has succeeded in showing that he offered to agree the damages at a certain figure. He was entitled to do that, and if the offer had been accepted the whole of these costs would have been saved. It was not accepted, with the result that a lesser amount was arrived at by the registrar, and therefore I think the owners of the *Cowrie* are entitled to the costs thrown away by that reference. It is not a tender. It is a question of, aye or no, has the person who offered to agree the damages at a fixed sum satisfied me that he made the offer for the purpose of saving the costs ? I think he did do it for the purpose of saving costs, and I think he is entitled to the costs thrown away by the non-acceptance of his offer. The report will be confirmed with the variation that the plaintiffs, the owners of the *Cowrie*, will have the costs in respect of the claim of the defendants, the owners of the *Reading*, subsequent to the plaintiffs' offer, and the plaintiffs will have the costs of this motion.

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

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

HOUSE OF LORDS.

Jan. 22, 23, *and Feb.* 28, 1908.

(Before the Lord Chancellor (Loreburn), Lords Macnaghten, Robertson, Atkinson, and Collins.)

Sir John Jackson Limited *v.* Owners of Steamship Blanche and others. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Collision — Limitation of liability—Owners — Right of charterer by demise to limit — Merchant Shipping Act 1894 (57 *&* 58 *Vict. c.* 60), *s.* 503.

Charterers by demise are "owners" within the meaning of sect. 503 *of the Merchant Shipping Act* 1894, *and therefore can limit their liability in respect of loss or damage caused by the improper navigation of the chartered ship by their servants.*

Judgment of the courts below reversed.

Appeal from a judgment of the Court of Appeal (Sir J. Gorell Barnes, P., Moulton and Kennedy, L.JJ.) reported 10 Asp. Mar. Law Cas. 492 (1907); 97 L. T. Rep. 360; (1907) P. 254 under the name of *The Hopper No.* 66, affirming a judgment of Deane, J. reported 10 Asp. Mar. Law Cas. 203; 94 L. T. Rep. 344; (1906) P. 34.

The action was brought in the Admiralty Division for a declaration of limitation of liability for damages consequent on a collision which occurred in Liverpool Bay between the steam hopper No. 66 and the *Blanche* on the 30th Nov. 1904. The collision was caused by the negligent navigation of the steam hopper by the appellants' servants, but without the actual fault or privity of the appellants. The appellants were charterers by demise of the steam hopper under an agreement dated the 9th June 1903, made between the London and Tilbury Lighterage Contracting and Dredging Company Limited, the then owners of the hopper, and the appellants, and the question was whether the appellants were entitled to a declaration limiting their liability under sects. 503 and 504 of the Merchant Shipping Act 1894.

Deane, J. held that the word "owners" in sect. 503 of the Act did not extend to charterers by demise, and his judgment was affirmed by the Court of Appeal.

J. A. Hamilton, K.C. and *Dawson Miller* appeared for the appellants, and argued that the object of the legislation was to impose a limitation on the amount which might have to be paid by a person who was not himself actually in fault, and the principle applied to a charterer by demise as well as to the actual owner. The question of the property in the ship is not the point. "Owner" is used in the Act in various senses, and the true test is to be found in looking at the object of the particular part of the Act under consideration to see whether the "owner" in a business sense is intended, or only the owner "in fee" so to speak. In many cases, such as for instance the sections framed for the protection of seamen, it is evident that the chartered owner must be intended. See

Colvin v. *Newberry*, 1 Cl. & F. 283;
Baumvoll v. *Furness*, 7 Asp. Mar. Law Cas. 263; 68 L. T. Rep. 1; (1893) A. C. 8.

In many sections "owner" is used in the popular sense not in the strict sense. See

Hughes v. *Sutherland*, 4 Asp. Mar. Law Cas. 459 (1881); 45 L. T. Rep. 287; 7 Q. B. Div. 160;
Meiklereid v. *West*, 3 Asp. Mar. Law Cas. 129 (1876); 34 L. T. Rep. 353; 1 Q. B. Div. 428;
Five Steel Barges, 6 Asp. Mar. Law Cas. 580 (1890); 63 L. T. Rep. 499; 15 P. Div. 142;
The Louisa, Br. & L. 59.

Limitation of liability was first introduced by the Act 7 Geo. 2, c. 15, but this point appears never to have been raised before, and it is decided for the future by the Merchant Shipping Act 1906 (6 Edw. 7, c. 48), s. 71, which makes "owner" include chartered owner. The Regulation of Railways Act 1871 (34 & 35 Vict. c. 78), s. 12, does not affect the present question, for in such a case the railway company is not the "owner" in any sense. See also *The Spirit of the Ocean* (2 Mar. Law Cas. O. S. 192 (1865); 12 L. T. Rep. 39; Br. & L. 336), *Lister* v. *Lobley* (7 A. & E. 124), and *Chauntler* v. *Robinson* (4 Ex. 163), which show that "owner" is to be understood in a popular sense. See also

The Leamington, 2 Asp. Mar. Law Cas. 475 (1874); 32 L. T. Rep. 69;
Trinity House v. *Clark*, 4 M. & S. 288.

Butler Aspinall, K.C. and *A. D. Bateson*, for the respondents, contended that in the earlier Acts "owner" meant actual owner. In all the legislation from 1733 downwards the registered owner is the person dealt with, except that in some cases the beneficial owner is also made liable. Where charterers are included they are mentioned. The sections referred to, which relate to wages and salvage, deal with cases in which there is a maritime lien, and the owner's ship remains liable. See the judgment of Barnes, J. in *The Ripon City* (8 Asp. Mar. Law Cas. 304; 77 L. T. Rep. 98; (1897) P. 226) which reconciles previous conflicting authorities. The Act is a code dealing with owners or part owners. A charterer is only an owner in a very limited sense, and he has been held liable in salvage cases under special circumstances. If he is the "owner," as the appellants contend, then if a foreigner charters a British ship he becomes owner, and yet it is forbidden by statute that a foreigner should be owner of a British ship. This is a consolidating Act, and it may be that words are used in different senses in different sections. In some sections "owner" in a business sense may include charterer. A statute should not be construed to take away rights unless such a construction is necessary. See

Commissioner of Public Works v. *Logan*, 88 L. T. Rep. 779; (1903) A. C. 335.

Here, if the appellants are right, the common law right of compensation is taken away, and the Act should be construed strictly. See

Cope v. *Doherty*, 27 L. J. 600, Ch.;
The Andalusian, 4 Asp. Mar. Law Cas. 22 (1878); 39 L. T. Rep. 204; 3 P. Div. 182.

Where the Legislature intended to extend the meaning of the word "owner" they did it in

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

express terms. The registered owner is the person dealt with by this section.

Dawson Miller was heard in reply.

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

Feb. 28.—Their Lordships gave judgment as follows:—

The Lord Chancellor (Loreburn).—My Lords: There is only one question in this case, namely, whether or not charterers to whom a ship is demised can claim the limitation of liability prescribed by sect. 503 of the Merchant Shipping Act 1894. The appellants so chartered a ship, and, in course of her navigation by a master and crew in the charterers' service, she was negligently handled, and injured another vessel. Both the judge of first instance and the Court of Appeal have decided that the statutory limitation of liability does not apply, because the charterers were not "owners" within the meaning of the section. It is a singular thing that, so far as can be learned, this question has never been raised before. Since 1813 there has been, in one form or another, a limitation expressly applicable to this class of liability. Whether the point has not been raised because no ship under such a charter has been to blame for a collision, or because no one thought in such case the limitation could apply, or because no one doubted that in such case the limitation would apply, cannot be known, and, as soon as the decision now under appeal was first given by Deane, J., Parliament interposed.(*a*) However, the case must be decided without regard to these reflections. In my opinion this appeal ought to be allowed. If this very elaborate Act of Parliament be examined, I find it impossible to resist the conclusion urged upon your Lordships by the learned counsel for the appellants. The word "owner" is used in very many sections. Sometimes it means registered owner, which is indeed the primary sense. Sometimes it must also include beneficial owner; and in other parts it seems to me that it must, of necessity, also include a charterer by demise, who has control of the ship and navigates her with his own master and crew; otherwise the operation of the Act becomes impracticable. For example, the salutary provision that wages shall continue to run if not duly paid—sect. 134 (*c*)—would not apply at all where the ship is chartered by demise, for the "owner" could not be in default. Or, again, the provisions for notice to the owner and enforcement of charge, contained in sect. 183, would be futile unless the word "owner" there referred to some one paying wages. Similar instances might be multiplied almost indefinitely, but it is unnecessary to enlarge upon this point, for it does not really admit of dispute. It being thus ascertained that the word "owner" does in some parts of the Merchant Shipping Act 1894 include the charterers by demise, is it so in sect. 503? I do not know how the proper meaning of this word in each section is to be determined, except by considering the object of the section itself. When limitations were first introduced the policy declared in the preamble was the encouragement of shipbuilding in Great Britain. Subsequently a like limitation was applied to foreign ships also. And we must, I think, conclude that the policy of the present section was simply to prevent ruinous damages from being inflicted upon an innocent principal as the consequence of an error of judgment in a difficult and dangerous business by his agents in charge of a vessel. I can perceive no reason why the present appellants should be subject to an unlimited liability that does not apply equally to a registered owner. I cannot doubt that if charterers by demise are to be so subject there will be an end of such charters, and it is difficult to suppose that Parliament desired this. It seems to me that the mischief against which sect. 503 was intended to provide is not met by construing the word "owners" in the narrow sense, and that, therefore, the broader interpretation which the word undoubtedly bears in many other parts of the Act ought to be applied here. Accordingly I respectfully advise your Lordships that this order be reversed, and a declaration made as desired by the appellants.

Lords Macnaghten and Robertson concurred.

Lord Atkinson.—My Lords: The net question for decision in this appeal is new. It is this, Whether the charterer of a ship demised to him under a charter-party such as existed in this case is entitled, should damages be recovered against him by persons damnified by the negligent navigation of the ship over which he has control, to limit his liability under sects. 503 and 504 of the Merchant Shipping Act 1894 in the same manner and to the same extent as if he were the registered owner. Bargrave Deane, J. decided that the charterer not being included in the word "owner" did not come within the terms of these sections, and was not entitled to the benefits which they confer, and the Court of Appeal upheld his decision. With all respect to the learned judge and to the learned Lords Justices who followed him, I think that the construction which they put on these sections was somewhat narrow, and the conclusion at which they arrived erroneous. The following sections of the statute, seventeen in number—namely, Nos. 111, 127, 134, 143, 175, 183 (1), 187, 189 (3 and 4), 195 (2), 197 (5 and 6), 198 (4), 207, 221 (*a*), 224, 226, 235, 253 (3), in addition to some others not necessary to enumerate—deal with the position of the owner with regard to the master and crew of his ship, and regulate their respective rights and obligations. If these sections are to apply to a ship chartered under a charter-party such as that above mentioned, and it has not been suggested that they do not, then in order that their requirements should not lead to absurd and ridiculous results, the word "owner," as used in them, must be construed to include a charterer by demise having the entire control of the ship, as had the charterers in this case; and in *Meiklereid* v. *West* (*ubi sup.*) it was accordingly decided, as indeed might have been expected, that in the construction of the 169th section of the Merchant Shipping Act of 1854, which corresponds with the 143rd section of the Act of 1894, the word "owner" must be held to include a charterer by demise, who for the time being had, under a contract with the registered owner, possession and con-

(*a*) See the Merchant Shipping Act 1906 (6 Edw. 7, c. 48), s. 71.

trol of the ship and hired and employed the master and crew. Again, for stores ordered by the master of a ship chartered by demise, or for damage done to goods shipped in such a ship under bills of lading signed by him, the charterer is liable "as owner": (*Fraser* v. *Marsh*, 13 East, 238; *Colvin* v. *Newberry*, 1 Cl. & Fin. 283). In *Baumvoll* v. *Furness* (*ubi sup.*) Lord Herschell, L.C. is reported to have expressed himself as follows: "The person who has the absolute right to the ship who is the registered owner, the owner (to borrow an expression from real property law) in fee simple may be properly spoken of no doubt as the owner; but at the same time he may have so dealt with the vessel as to have given all the rights of ownership for a limited time to some other person who may with equal propriety be spoken of as the owner." It is obvious, therefore, that in sect. 78 (3), imposing a penalty on an owner who stores goods in a space measured for propelling power, and in sects. 446 and 448, dealing with the loading of dangerous goods, the word "owner" must be construed to include charterer, even though the last-named section confers a privilege upon him instead of imposing an obligation, as, indeed, do many of the sections first mentioned. The same principle of construction must apply to sect. 451, which deals with deck cargoes; sects. 452 and 453, which provide for the precautions to be taken to prevent the shifting of grain cargoes; sect. 458, which imposes on the owner an obligation to use all reasonable means to ensure the seaworthiness of the ship; sect. 460, which confers on the owner the right to recover from the Board of Trade damages for the detention, without reasonable or probable cause, of a ship alleged to be unseaworthy; sect. 472, which deals with the removal of the master by the High Court in England or Ireland, by the Court of Session in Scotland, and elsewhere in the King's dominions by courts of Admiralty, and confers on the owner the privilege of making the application for his removal, or in certain circumstances by refusing his consent of preventing it. Sect. 442, which imposes a penalty on the owner who permits his vessel to be overloaded so as to submerge in salt water the centre of the disc indicating the load line; sect. 483, which provides for compensation to be paid to the owner out of the wages due to a seaman who is discharged; sects. 591 and 633, which deal with pilotage—the last-mentioned section conferring the privilege of exemption from liability for damage caused by the fault or incapacity of a qualified pilot while in charge; and last of all, and most important of all, sect. 418, which requires that all owners and masters of ships shall obey the Collision Regulations and shall not carry or exhibit any other lights, or use any other fog signals, than such as are required by those regulations, and provides (1) that any infringement of these regulations by the wilful default of the master or owner shall make the person offending in respect of such offence guilty of a misdemeanour, and (2) that in a case of collision, where the regulations have been infringed, the ship which has infringed them shall, unless it be proved that the departure from them was necessary, be deemed to have been in fault. If, therefore, in these numerous sections, it is necessary to construe the word "owner" so as to include the charterer, it would seem but natural to conclude that the same construction should be given to the word "owner" in sects. 503 and 504, and the privilege which these sections confer be extended to him. It is contended, and apparently has been decided, that this cannot be done for three reasons: (1) Because in sect. 289, and the following sections dealing with emigrant ships, the words "owner or charterer" are used, showing that when the Legislature wished to deal with the case of a charterer it knew how to select words apt for the purpose. This being a consolidating statute, it may well be that the language of the Acts whose provisions were consolidated was copied; but, however that may be, there is no force in the argument, since it is apparent that the same Legislature, on the same occasion and in the same statute, must be held to have intended to include the charterer in the description "owner" in the several sections already referred to. (2) Because of the history of this legislation limiting liability and the recitals and provisions contained in some of the earlier statutes. That history is given in Marsden on Collision (ch. 7, p. 145, 5th edit.). The earliest Act, 7 Geo. 2, c. 15, appeared to have been passed in consequence of the decision in *Boucher* v. *Lawson* (H. 8 Geo. 2), see per Buller, J. in *Yates* v. *Hall* (1 T. R. 73), in which the shipowner was held liable for the loss of a case of bullion put on board his ship and stolen by his servant, the master. It was followed by 26 Geo. 3, c. 86; then by 53 Geo. 3, c. 159; and ultimately by 17 & 18 Vict. c. 104. It is quite true that the object of these statutes, as expressed in their preambles, was to increase the number of British ships and cause merchants and others to be interested in them, but I should think that few things would tend more to encourage men to build ships than to secure them facilities for hiring them out under charter-parties, and few things would tend more to induce charterers to hire them than that the protection from serious or overwhelming loss which the registered owner enjoys should be extended to them. To extend that protection to charterers would, therefore, forward the policy of these Acts, not thwart it; and I see nothing in them to necessitate the conclusion that charterers by demise may not be well treated as coming within the description of "owners" within the meaning of these statutes.

Besides, it must be borne in mind that the protection is now extended to the owners of foreign ships. I therefore think that there is nothing in this contention. But it is said that because the words "the owner of a British sea-going ship or any share therein" are used in the 502nd section, and the words "the owner of any sea-going ship or any share therein" used in the 503rd, the use of the words "or any share therein," shows, in the language of Moulton, L.J., that "the Legislature were thinking of the real owners and not the lessee." But it would have been necessary to introduce the words "any share therein" whether the word "owner" includes a charterer by demise or not, because each part-owner, where there are more owners than one, being one of the joint employers of the actual wrongdoers, is liable for the entire damage done, and if the damage was caused through the "actual fault" or with "the privity" of one or more of the part-owners sued, then, since all were not blameless, the liability of none of them could be limited but

for those words, though some of them were blameless and came within the equity of the statute. The words "or any share therein" were introduced, in my opinion, for the protection of such meritorious persons. I am quite unable, however, to see how their presence in these sections shows that the Legislature never meant to protect a person with the special and temporary ownership possessed by a charterer by demise, who was, moreover, as meritorious an object of protection as the registered owner. The actual "fee simple" owner becomes liable, not only because he is owner, but because he is the master or employer of the persons whose negligence causes the damage: (Lord Cairns, L.C. in *River Wear Commissioners* v. *Adamson* (3 Asp. Mar. Law Cas. 521 (1877); 37 L. T. Rep. 543; 2 App. Cas. 743; Lord Blackburn in *Simpson* v. *Thomson* 3 Asp. Mar. Law Cas. 567 (1877); 38 L. T. Rep. 1; 3 App. Cas. 279). The charterer by demise becomes liable precisely for the same reason and on the same ground, and I see no reason why the word "owner" or "owners," when used in sects. 503 and 504, should not be construed, as it must be construed in many other sections, so as to include a charterer by demise. I therefore think that the decisions of Deane, J. and the Court of Appeal were wrong and should be reversed, and that this appeal should be allowed, with costs appropriate to the circumstances of the case.

Lord COLLINS concurred.

Judgment appealed from reversed. Cause remitted to the Admiralty Division with a declaration, and a direction as to costs.

Solicitors for the appellants, *Thomas Cooper* and *Sons*, for *Hill, Dickinson*, and *Co.*, Liverpool.

Solicitors for the respondents, *Pritchard* and *Sons*, for *Batesons, Warr*, and *Wimshurst*, Liverpool.

Supreme Court of Judicature.

COURT OF APPEAL.

Dec. 12 *and* 13, 1907.

(Before Lord ALVERSTONE, C.J., BUCKLEY and KENNEDY, L.JJ.)

YUILL AND CO. *v.* SCOTT-ROBSON. (*a*)

Sale of goods—Insurance—Contract for sale of cattle at price including cost, freight, and insurance—Insurance to be "against all risks"—Delivery of policy containing warranty against capture, seizure, and detention—Prohibition by Government against landing — Slaughter of cattle—Liability of seller.

A contract was made at Buenos Ayres for the sale and shipment of cattle from Buenos Ayres to Durban at a price which included cost, freight, and insurance, the insurance to be "against all risks." The seller obtained and delivered to the purchasers an ordinary Lloyd's "all risks live stock" policy, which contained the clause "Warranted free of capture, seizure, and detention, and the consequences thereof." During the voyage foot-and-mouth disease broke out amongst the cattle, and the authorities at Durban refused to allow the vessel to enter the port, with the result that the cattle were slaughtered on board and sold at a considerable loss. The underwriters refused to pay upon the policy (except for losses by death during the voyage) on the ground that they were protected by the free of capture and seizure clause. In an action by the purchasers against the seller:

Held, that the seller, in procuring an insurance which did not protect the purchaser against the risk of the landing of the cattle being prohibited by the authorities, had broken his contract to procure an insurance "against all risks," and was liable for the loss; and, further, that evidence was not admissible to show that a policy containing the free of capture and seizure clause was a performance of the contract to procure an insurance against all risks.

Judgment of Channell, J. (10 *Asp. Mar. Law Cas.* 453; 96 *L. T. Rep.* 842; (1907) 1 *K. B.* 685) *affirmed.*

APPEAL from a judgment of Channell, J. in an action tried by him without a jury.

The action was brought to recover damages for breach of contract for the sale of bullocks.

The contract was made at Buenos Ayres and was contained in two letters between one Herbert Miskin, the plaintiffs' agent, and the defendant, both letters being dated the 4th April 1903. By this contract 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 steamship *Abbey Holme* to Durban.

In pursuance of this contract the defendant shipped 275 bullocks, and the plaintiffs paid him the contract price.

The plaintiffs alleged that the defendant, in breach of his contract, did not procure and had never supplied the plaintiffs with a policy against all risks. The policy which was effected by the defendant and delivered to the plaintiffs was a Lloyd's policy with clauses attached. Printed in italics in the policy was the following clause (which, according to a note printed in the margin, was to be construed as if it were written):

Warranted nevertheless free of capture, seizure, and detention, and the consequences thereof, or of any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations whether before or after declaration of war.

Attached to the policy were typewritten clauses headed, "'All risks' Live Stock Clauses," which (*inter alia*) contained the following clause:

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 in consequence the authorities at Durban refused to allow the vessel to enter the port, and the 275 bullocks (except some which had died on the

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

voyage) were slaughtered on board and their carcases sold at 5*l.* each.

On the 20th May 1903 the plaintiffs gave notice of abandonment as for a constructive total loss of the bullocks to the underwriters of the policy procured for them by the defendant, and they brought an action against the underwriters on the policy to recover the sum of 3829*l.* 18*s.* 6*d.*, as representing their loss.

In this action against the underwriters the underwriters relied, as to the greater part of the plaintiffs' claim, upon the exception of losses occasioned by "capture, seizure, and detention, and the consequences thereof," and the plaintiffs alleged that they were in consequence compelled to and did in fact compromise their claim against the underwriters for the sum of 990*l.*

The plaintiffs alleged that if the policy had been in accordance with the contract, they would have recovered from the underwriters the above sum of 3829*l.* 18*s.* 6*d.*, but that the policy was in fact not in accordance with the contract, inasmuch as it excluded losses "by capture, seizure, and detention, and the consequences thereof," and that by reason of the defendant's breach of contract they had suffered damage to the extent of the difference, between the sum of 3829*l.* 18*s.* 6*d.*, which they would otherwise have recovered from the underwriters, and the 990*l.* which they actually did receive from the underwriters. This difference—namely, the sum of 2839*l.* 18*s.* 6*d.*—they claimed to recover in the present action, together with certain costs incurred by them in their action against the underwriters.

The defendant alleged that there was no breach of contract by him; that he had effected an insurance in accordance with the terms of the contract, and had delivered to the plaintiffs a policy which they accepted; that the form of the policy was submitted to and approved by the plaintiffs' agent, Miskin; that it was at the time in question usual in a policy of insurance against all risks to include the warranty "free of capture, seizure, and detention," in the absence of special instructions, as the plaintiffs well knew or ought to have known. Alternatively, the defendant pleaded that a policy to cover all risks did not include the risk of Government prohibition, as the words "all risks" meant all risks covered by the usual full form of marine insurance policy on the subject-matter of the insurance with the warranty against capture and seizure.

Evidence was given on behalf of the defendant by underwriters and insurance brokers to show that an 'all risks" policy included the free of capture, seizure, and detention clause, unless there were special instructions to the contrary, and that the risk of a prohibition to land cattle was always separately insured. It also appeared that the plaintiffs' agent, Miskin, asked to see the form of the policy, and that a policy was shown to him containing the free of capture clause.

An application was made by summons on behalf of the defendant for a commission to be issued to take evidence at Buenos Ayres for the purpose of showing that the clause in the contract "insurance against all risks," as understood by persons in the cattle trade, meant that a policy should be delivered in the terms in which the policy in question was delivered by the defendant—that is, that such a policy should be given as was in fact given. This application was ordered to stand over until the trial, to enable the judge at the trial to say whether the commission should be granted or not. At the trial Channell, J. refused to grant the commission. Channell, J. gave judgment for the plaintiffs, holding that the policy, with the clause "warranted free of capture, seizure, and detention, and the consequences thereof" included, did not comply with the terms of the contract of sale, and that under that contract the plaintiffs were entitled to get a policy protecting them against the risk of the cattle not being allowed to land by reason of Government regulations prohibiting them from being landed (reported 10 Asp. Mar. Law Cas. 453; 96 L. T. Rep. 842; (1907) 1 K. B. 685).

The defendant appealed.

J. A. Hamilton, K.C. and *Lewis Noad* for the defendant.—In accordance with a resolution passed by underwriters in London in the year 1898, a policy asked for in this form of an "all risks" cattle policy, is always issued with a free of capture and seizure clause, unless there is an express instruction to the contrary. Channell, J. was of opinion that that did not apply in the present case, as the words in the contract "insurance against all risks" were plain English words, and that the plain meaning of those words ought not to be qualified by any evidence as to what those words in such a policy meant. It is clear that the words "insurance against all risks" cannot be taken absolutely in their literal meaning; they must have some limitation placed upon them, because no insurance is given to cover absolutely all risks. Every policy contains some exceptions, such as, for example, inherent vice, or free of particular average under 3 per cent.; and if the words "insurance against all risks" were to be read in their widest sense they would include loss from inherent vice. The contract was to procure an insurance against all risks—that is, an "all risks" policy; and the policy given to the plaintiffs was an "all risks" policy, as such form of policy is known to men conversant with that kind of business. The words cannot be read absolutely, as in an Act of Parliament, and the result is that we must either take the interpretation of the words from those who constitute the market in that class of business, in London, or we must take them as subject to some other limitations as would be imposed in Buenos Ayres. In either case the defendant's evidence would have entitled him to judgment, as that evidence proved that an "all risks" policy on cattle is always understood amongst insurers in London as one which includes the warranty free of capture, seizure, and detention, unless express instructions are given to omit those words, in which case an additional premium is paid. But if the contract is to be construed with reference to the meaning that would be given to those words by those engaged in the cattle trade in Buenos Ayres, then the learned judge was wrong in refusing to grant the commission to take that evidence in Buenos Ayres. Again, the evidence shows that the policy that was tendered was actually shown to the plaintiffs' agent, and that he expressed himself as satisfied with it. There was thus either an acceptance of the policy tendered as being in satisfaction or performance of the contract, or else the agent's conduct was an estoppel against

the plaintiffs, because the transaction really meant that the defendant need not give a better policy; and the plaintiffs are estopped from saying that they ought to have had a different policy. Upon these grounds the judgment for the plaintiffs cannot stand, and judgment ought to be entered for the defendant. [They referred to *Miller* v. *Law Accident Insurance Company*, 9 Asp. Mar. Law Cas. 386; 88 L. T. Rep. 370; (1903) 1 K. B. 712).]

Scrutton, K.C. and *F. D. Mackinnon* for the plaintiffs.—The judgment for the plaintiffs was right. The contract was to give an insurance covering all risks, and therefore covering, as the judge said, so obvious a risk as the risk of the cattle not being allowed to land through disease having broken out amongst them. The words are perfectly plain in their meaning, and according to their plain meaning the words "all risks" would include this risk. There was the contract to give the plaintiffs a policy covering this risk, but the policy given did not cover this risk. There was thus a breach of the contract. If the defendant had performed his contract he would have had the free of capture and seizure clause struck out of the policy, which he could have done by paying a higher premium. Both parties thought they were insuring against this risk, though they may have been wrong in their reasons. Again, as to the evidence tendered with the object of limiting the words, all such evidence was clearly inadmissible. The contract was not to give an "all risks" cattle policy, in which case the evidence might have been admissible; but it was to procure an insurance against all risks, words which require no evidence to explain their meaning. They referred to

Miller v. *Law Accident Insurance Company* (*ubi sup.*);
Schloss Brothers v. *Stevens*, 10 Asp. Mar. Law Cas. 331; 96 L. T. Rep. 205; (1906) 2 K. B. 665.

J. A. Hamilton, K.C. in reply.

Lord Alverstone, C.J.—In my judgment the conclusion arrived at by Channell, J. is perfectly correct. These parties made a contract in April 1903 by a document which said that the defendant was to sell for a specified price certain cattle, cost, freight, and insurance, insurance against all risks for shipment by the steamship *Abbey Holme*. It is contended, and it is the main argument for the defendant, that those words "insurance against all risks" must be subject to some limitation. Speaking for myself, I do not think it necessary to say whether that proposition may not be in some cases correct. I can imagine a state of things arising, or a loss occurring, by some cause which was of such a character that it might be necessary to consider whether it came even within the words "insurance against all risks." I think, however, so far as this part of the argument is concerned, that I cannot do better than to adopt the language of my brother Channell, in which I entirely concur (10 Asp. Mar. Law Cas. 455; 96 L. T. Rep, at p. 843): "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." That is the kind of case I had in my mind when I said it was quite possible that there might be some loss which would not be within the policy, even although the words were "insurance against all risks," taking the state of things at the time when the contract was effected, or the policy was tendered. Then he says: "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 from 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, I think, and as the one witness whom I have had called before me, who was experienced in this cattle dealing business, said distinctly it was a very well known risk and one that they always must have in their contemplation." In so far as any evidence beyond that has been referred to, it seems to me most unquestionably to bear out that view, because, whatever the effect of the conversation at Buenos Ayres may have been, at least it is clear that the question of what might happen if foot-and-mouth disease broke out was discussed. It is said that that only referred to foot-and-mouth disease causing death upon the voyage. I do not myself see why it should. It seems to me that, as Channell, J. has put it, this was a very common cause of landing being prevented, and the discussion might very well have had reference to that; but, be that as it may, taking the contract as it stands, it is a contract as to which, in my opinion, a policy ought to have been tendered which would protect the assured against that which Channell, J. has found—and I agree—to be a very well known and obvious risk, and a risk which the cattle dealer or the cattle purchaser must always have had in his mind.

Now, it is said that the words "insurance against all risks," which are in addition to the words "cost, freight, and insurance," and are something to indicate the character of the insurance, in the cattle trade as between South America and Africa, or, I suppose, between any other places, have acquired a commercial or secondary meaning, known, it is said, to people in the London insurance market, and that therefore these two people contracting at Buenos Ayres must be supposed to have known that the words "insurance against all risks" did not mean what they said even in the general sense, but that they meant to exclude this particular risk—namely, the very possible contingency of the cattle not being allowed to be landed by some order of the Government of the country to which they were going. During the argument I have asked myself this: What question could have been put and how could it have been properly framed to allege or to establish this custom and to show that these words "insurance against all risks" have in such a contract as this received some recognised secondary meaning. The question must have been in some such form as this: In a contract for the sale of cattle, do the words "insurance against all risks" include a policy in which there is a "free of capture and seizure" clause? But on the evidence which was tendered it is not disputed that there are really two kinds of policies in use, and that for an extra premium this "free of capture" clause is not inserted. We were told by Mr. Hamilton that by some kind of agreement or resolution of the underwriters unless "no warranty free from capture clause" is put upon the slip, the practice is to put it into

the policy. To my mind, the statement that that was the resolution of the underwriters and the practice which has followed upon it, negatives conclusively the suggestion that there is a binding secondary meaning attached to those words "insurance against all risks," which the parties to the contract are obliged to be bound by, that binding secondary meaning being insurance against all risks, but subject to the "free of capture, seizure, and detention" clause, in cases where the slip does not put in "no warranty against capture and seizure." I am unable to see how Mr. Hamilton could have framed any questions which could properly have been put to establish what he calls a secondary or limited meaning to these words. He presses us to say that the words must have some limitation; that at any rate they must have the limitation of not covering a loss due to inherent vice. I fail to see why that is so. Insurance against all risks in this particular case was assumed by the parties to be an insurance which would include the mortality clause, and therefore the policy which was tendered seems to me to show that those words have not that suggested limitation. Then it is said that they must have some limitation, because otherwise that would not include the limitation "free of particular average under 3 per cent." I do not know why that special limitation is to be applied to a contract for the sale of cattle which provides for "insurance against all risks." It may be that in such contracts the clause "free of particular average under 3 per cent." is a clause which never has any application at all; that the cattle are so wounded that they cannot be carried forward, or else that there is no particular average. However that may be, the instances which Mr. Hamilton gave do not satisfy me that these words must be subject to some limitation. That being so, I think the words are to be taken in their natural sense, and I agree with Channell, J. that at any rate they are to be taken to import a policy being tendered under a contract of sale, which would protect the assured against the possibility of the whole adventure being frustrated, and—it being a *c.i.f.* contract to take the beasts from South America to Durban—which would at least protect the assured against the risk of the cattle not being allowed to land. The matter then stands in this way: There being these two forms of policy in use, the policy tendered by the defendant contained the warranty against capture, seizure, and detention. The case of *Miller* v. *Law Accident Insurance Company* (*ubi sup.*) decides that detention or preventing the cattle from landing by the order of the authorities of the country to which the cattle are going was a restraint of princes within the earlier words of the policy in that case, which would have protected the assured, but the policy also contained the warranty against capture, seizure, and detention, and the court held that the warranty operated and that the policy was not such as the underwriters were bound to pay under. It seems to me that the only result of Mr. Hamilton's argument on that case is that the underwriters ought to have paid, which he does not seriously contend having regard to the decision in that case. That case does not support his contention. Therefore on the main point I am of opinion that the policy tendered was not a policy which the purchasers were bound to accept.

Counsel for the defendant also argued that the seller could have forced this policy upon the purchasers on the ground that there was of necessity a secondary or limited meaning to be given to the words "insurance against all risks," and that evidence was admissible for the purpose of showing that, but I think that proposition also must be answered against him. For the reasons I have indicated, that evidence was not properly admissible for the purpose of showing that secondary meaning, and I am unable to see on what ground we could direct such evidence to be taken, having regard to the view that, in my opinion, it cannot be said that those words "insurance against all risks" are words which can only be understood by the market meaning being applied to them. There remains one other point which was raised on behalf of the defendant. It was contended for him that because this form of policy was shown to Mr. Miskin, the agent for the purchasers, a few days before the cattle were shipped, the purchasers cannot now object to it. Even as the evidence stood it would have certainly satisfied me that that point was not open to the defendant. I think the very conversation in which the plaintiffs' agent (Miskin)—and I will assume that he had the policy before him—asked the defendant if it covered foot-and-mouth disease would, to my mind, clearly show that he (Miskin) had not examined the terms of the policy from the point of view of saying that he was satisfied with those terms. In fact, he seems to have acted on the assurance given to him by the defendant that it was so, because we are told that the defendant telephoned back to the persons through whom he was making the insurance, and, upon their telling him that the assured was protected against the risk of foot-and-mouth disease, the defendant said that it was all right, and then Mr. Miskin took the policy. It seems to me quite impossible, in view of the evidence, to suggest that Mr. Miskin, as agent for the purchasers, so acted as to estop his principals from setting up their point, or so misled the defendant as to prevent his principals from being able to say that the policy was not in accordance with the contract. It is said that if Miskin had called the defendant's attention to the matter, the defendant could have telephoned back to the persons who were effecting the insurance, and, instead of saying to Miskin that he was bound to take the policy tendered because it was in accordance with an insurance against all risks, the defendant could have protected himself against the further risk by paying an additional premium. It seems to me quite impossible to say that in this case Miskin so conducted himself that his principals ought not to be allowed to say that the policy tendered was not in accordance with the contract. For these reasons I think the judgment of Channell, J. was right, and this appeal must be dismissed.

Buckley, L.J.—I agree that the judgment of Channell, J. was right, and I cannot usefully add anything to his judgment.

Kennedy, L.J.—I am of opinion that Channell, J. was right upon both points. With regard to the principal question—namely, what was the contract between the parties—it is

clear from the letter, which is undisputed, that the defendant undertook to give under the *c.i.f.* contract a proper policy of insurance. He further expressly contracted that that policy—it being a policy on cattle to be carried to Durban—should be a policy which covered the assured against all risks. That is put as an ordinary expression in the letter. It is not a case in which a phrase or term of art is used, as it might have been had the words been freight and insurance under an "all risks" policy, because it does appear that there is a clause which underwriters have treated as what is called the "'all risks' live stock clause." If it had used an expression which showed that that clause was fairly to be taken as that for which the plaintiffs were stipulating it would have been a different thing, because that clause is contained in the policy with the retention of the free of capture and seizure clause. The plaintiffs were therefore *primâ facie* entitled, when they got their contract, to be insured against all risks, and, in fact, they got a policy which did not insure them against this risk, which is an obvious and well-known risk and one which it has been decided is not covered by a policy containing the free of capture, seizure, and detention clause. It seems to me that Channell, J. was perfectly right in saying upon the facts as they then stood that there was not in the evidence of the London underwriters sufficient to nullify the effect of the words which have a plain, simple, and perfectly natural meaning, having regard to the special nature of the contract; and, simply dealing with the evidence as it stood, it is impossible to treat the subsequent conversation between the plaintiffs' agent and the defendant as in any way affecting the rights under the contract as the contract stood. The effect of the conversation between Miskin and the defendant, fairly interpreted, is rather the other way. Miskin was anxious to know whether he was protected against all risks, and he especially refers to the risk of foot-and-mouth disease, which it is said may be explained as meaning: "Am I protected in case of mortality on board through disease?" I should not myself have so understood it. It seems to me that the foot-and-mouth disease has no more significance than any other disease in the mind of the person who is interested, so far as mortality is concerned, but it has a special and well-known meaning to shippers of cattle in regard to the prohibition, either by special or by general law, which the owner of the cattle may encounter at the proposed port of debarkation. That was, in fact, the serious thing which happened in the case of *Miller* v. *Law Accident Insurance Company* (*ubi sup.*), and which has happened in this, and, to my knowledge from sitting in these courts, in other cases. It is quite clear that the effect of the conversation is not what the defendant must contend that it was as regards the true meaning of the contract. It does not seem to me to matter whether Mr. Miskin thought that the policy protected him against this risk when he saw the form of it, or not. There had been an absolute contract to give an insurance against all risks, and the fact that the person to whom the policy was shown thought that it would do so, and that the person who showed him the policy thought it would do so, could not affect the binding nature of the contract, because unless both parties must be taken to have known exactly what the effect of the policy was there could be no waiver, and where there is, as here, an express contract to do a thing, unless there is some waiver which can be construed to exist from the fact of the apparent satisfaction with what is tendered, the contract stands for all purposes; and there is certainly no ground for saying that the plaintiffs' agent knowingly said that he would accept a policy which would give the plaintiffs less protection than they were entitled to under the contract.

Then comes the question, to which I have given careful consideration, as to whether or not some evidence to be obtained from Buenos Ayres could be tendered, and ought therefore to be allowed to be tendered, relevant to the contract, and admissible upon the issues between the parties. It cannot be contended with success that the evidence of what the London underwriters would do in such circumstances is at all effective. It really comes to this, when we understand the business of the matter, that when the London underwriter is simply asked for an "all risks" policy, and nothing more is on the slip, it may be that as a rule he would give a policy containing in it, and therefore undeleted, the free of capture and seizure clause. That, however, is not the question with which we have now to deal. It is equally clear that if on the slip it is expressed that there is to be no free of capture and seizure clause, that clause will be struck out, and then there will be a higher premium to be paid for the insurance. But it is said that at Buenos Ayres a different and more effective class of evidence could be obtained, which could only be got by a commission. What is the class of evidence which it was proposed to get? We have the affidavit of a member of the firm of solicitors acting for the defendant, and he tells us what he proposes to prove by means of this commission. He proposes to prove that the "all risks" cattle policies at Buenos Ayres in fact always do contain the free of capture and seizure clause. In my opinion, Channell, J. was perfectly right in saying that that evidence was not relevant. It may be—and I will for the moment assume—that "all risks" cattle policies in Buenos Ayres do contain the free of capture and seizure clause, but that begs the whole question as to whether or not this was a contract between the parties for an "all risks" cattle policy in that sense. That, however, does not mean that if the person having contracted and bound himself to protect against all risks were to say to the insurance company that he wanted a policy which would cover him against all risks, not a policy which simply contained the "all risks" cattle protection against mortality, jettison, and matters of that kind, there would be anything impossible in carrying that out, or that it would be unusual, for the proper premium, for the insurance agent or broker to obtain and for the insurance company to give such a policy. If it had been shown, taking that evidence at the highest, that the contract was that the parties were contracting to give the usual form of a Buenos Ayres "all risks" cattle policy, that evidence would have been relevant; but where the contract is not to give the usual form of an "all risks" policy for cattle, but a contract for an insurance which shall protect against all risks, it appears to me that

such evidence is really not relevant. Therefore it seems to me that that evidence if got would not be relevant, because the question did not arise on a contract to give another person an "all risks" cattle policy as it is usually given at Buenos Ayres, in which case the evidence would be relevant, but it arose on a contract which without reference to any particular form or place of insurance gave him an undertaking to cover all risks. The conversation between the plaintiffs' agent and the defendant bears out that view, because what was discussed was, not whether the defendant had given an "all risks" cattle policy, but whether the policy which he had actually given really protected the plaintiffs against all risks. For these reasons I think the judgment of Channell, J. was right, and that the refusal to grant the commission was equally right.

Appeal dismissed.

Solicitors for the plaintiffs, *Parker, Garrett Holman,* and *Howden.*

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

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Wednesday, Dec. 18, 1907.

(Before Walton, J.)

Anglo-Algerian Steamship Company Lim. (1896) *v.* Houlder Line Limited. (*a*)

Dock—Obstruction of entrance—Negligent navigation—Detention of another vessel arriving during continuance of obstruction—Dock gates closed for repairs—Remoteness of damage—Alexandra (Newport and South Wales) Docks and Railway Act 1882 (45 *&* 46 *Vict. c. ccli.*)—*Harbours, Docks, and Piers Clauses Act* 1847 (10 *&* 11 *Vict. c.* 27).

The defendants' vessel negligently damaged the gates of a dock, and the gates were closed for repairs. The plaintiffs' vessel arrived outside the dock, and was prevented from entering the dock to load a cargo then waiting therein.

By statute the dock company were obliged upon payment of certain rates and subject to certain conditions to keep the dock "open to all persons for the shipping and unshipping of goods, and the embarking and landing of passengers."

In an action by the plaintiffs against the defendants to recover damages for the detention of the vessel so caused by the defendants:

Held, that, the defendants' negligence was too indirectly related to the alleged interference with the plaintiffs' rights and their loss to constitute a good cause of action by the plaintiffs against the defendants.

Semble: *Where a shipowner has been obstructed in the exercise of his right to navigate his ship in a public navigable channel—a highway for ships—and has thereby suffered actual loss and damage by detention of the ship an action lies.*

Commercial list.

Action tried before Walton, J. sitting without a jury.

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

The plaintiffs claimed for damages, being the loss sustained through the detention of the plaintiffs' vessel outside the South Alexandra Dock at Newport, Monmouth, caused by the alleged negligence of the defendants' steamship.

The plaintiffs were the owners of the steamship *Tangistan,* and the defendants the owners of the steamship *Royston Grange.*

On the 28th March 1907 the dock gates were damaged by the negligent navigation of the *Royston Grange.* The dock, notwithstanding the damage, was open on the 29th, 30th, and 31st March.

On the 1st April the gates were closed for repairs, and remained closed for several days.

On the 1st April the *Tangistan* arrived outside the dock, desiring to enter in order to load a cargo then awaiting her therein. By reason of the gates being closed the *Tangistan* was detained for two and a half days, there being no other dock and perhaps no other place where she could load. For that detention her owners claimed damages from the owners of the *Royston Grange.*

The dock, belonging to the Alexandra (Newport and South Wales) Docks and Railway Company, is subject to the provisions of the Harbours, Docks, and Piers Clauses Act 1847 (10 & 11 Vict. c. 27).

Sect. 33 of that Act provides that:

> Upon payment of the rates made payable by this and the special Act, and subject to the other provisions thereof, the harbour, dock, and pier shall be open to all persons for the shipping and unshipping of goods and the embarking and landing of passengers.

Bailhache for the plaintiffs.—The question is whether the *Royston Grange,* which by its negligence blocked the dock to the plaintiffs' vessel which had business inside the dock, is liable in damages to the latter. Did the *Royston Grange* owe any duty to a vessel which arrived after the damage was done to the dock gates, and, if so, was the damage suffered by the plaintiffs' vessel too remote? The plaintiffs had a statutory right to enter the dock:

> Alexandra (Newport and South Wales) Docks and Railway Act 1882 (45 & 46 Vict. c. ccli.);
> Harbours, Docks, and Piers Clauses Act 1847 (10 & 11 Vict. c. 27).

There was an obstruction of either a statutory public right or a statutory private right. If the right was a public right, then the plaintiffs must prove special damage, but not if the right was a private right. If the right obstructed was a public right, which is the correct view, the plaintiffs have suffered special damage sufficient to give them a good cause of action. The case is analogous to the obstruction of a public highway. The principle has never been in dispute, but the difficulty is in the application thereof. In *Beckett* v. *Midland Railway Company* (17 L. T. Rep. 449; L. Rep. 3 C. P. 82, at p. 97) Willes, J., quoting from Comyns' Digest, Action upon the Case (A), vol. 1, p. 278, says: "In all cases where a man has a temporary loss or damage by the wrong of another, he may have an action upon the case to be repaired in damages. As, if A. has a colliery, and B. stops up a highway near it, whereby nothing can pass to such colliery, an action upon the case lies, for he ought to be remedied in particular, though it was a highway for all." If that is sound, that substantiates the plaintiffs' contention.

In *Allen* v. *Flood* (77 L. T. Rep. 717; (1898) A. C. 1, at p. 92) Lord Watson says: "Any invasion of the civil rights of another person is in itself a legal wrong, carrying with it liability to repair its necessary or natural consequences, in so far as these are injurious to the person whose right is infringed, whether the motive which prompted it be good, bad, or indifferent. But the existence of a bad motive, in the case of an act which is not in itself illegal, will not convert that act into a civil wrong for which reparation is due." If a right is obstructed which is a private right, every person injured has a right to sue. The distinction between obstructions to public and private rights is stated by Fry, J. in *Fritz* v. *Hobson* (42 L. T. Rep. 225; 14 Ch. Div. 542, at p. 553, *et seq.*) The distinction between public and private rights is only important because of the necessity of proving special damage in the case of the former. If the right obstructed was a private right, then the case of *Fritz* v. *Hobson* (*sup.*) is conclusive. Assuming that the right obstructed was a public right, what special damage have the plaintiffs suffered? What constitutes special damage is clear from the following passages.. In *Winterbottom* v. *Earl of Derby* (16 L. T. Rep. 771; L. Rep. 2 Ex. 316) Kelly, C.B. says, at p. 196 in 36 L. J., Ex.: "Now, I think the rule of law to be deduced from the cases from the very earliest in the books down to that recently decided in the House of Lords is, that in order to enable the plaintiff to maintain an action of this nature, he must show a particular damage resulting to him, not the mere damage naturally and necessarily arising to all Her Majesty's subjects entitled to use the way"; and in L. Rep. 2 Ex., at p. 322: "I am of opinion that the true principle is that he, and he only, can maintain an action for an obstruction who has sustained some damage peculiar to himself, his trade, or calling." The authorities show that where the damage suffered by a man is by way of his business or trade, that is sufficient special damage. The plaintiffs have suffered in regard to their "trade or calling." The dock company could sue the defendants (1) for damage to the dock gates, and perhaps (2) for loss of tolls. In *Rose* v. *Miles* (4 M. & S. 101) (see *Rose* v. *Groves*, 5 M. & G. 613) the plaintiff was obstructed in his use of navigable water, and was damaged by being obliged to unload his barge and carry the goods overland. That case is directly in point. In *Greasly* v. *Codling* (2 Bing. 263), where a coal-higgler by reason of an obstruction was obliged to drive his laden asses by a very circuitous route, and thereby prevented from making as many journeys as he would otherwise have made, Best, C.J. says: "The question, therefore, is whether a man travelling along the high road can maintain an action (not, if he is stopped by the road being casually out of repair, but) if he is stopped by the hand of the defendant . . . can he maintain an action for this obstruction? It has been contended he cannot, unless he proves special damage . . . I cannot distinguish *Rose* v. *Miles* from the present case." So here, if the plaintiffs' property, which is profit-earning, is detained, the plaintiffs can recover. In *Rose* v. *Groves* (*sup.*), at p. 620, Tindal, C.J. said: "I cannot distinguish the present case from *Iveson* v. *Moore* and *Wilkes* v. *Hungerford Market Company*; nor from *Rose* v. *Miles*." If the present case is within *Rose* v. *Miles* (*sup.*), then the plaintiffs must prove special damage. [WALTON, J.—The entrance to a dock is scarcely a highway?] In *Corby* v. *Hill* (27 L. J. 318, C. P.) a person being about to build received leave to place materials in a private road, and in pursuance thereof placed his materials in such a way as to obstruct the private road, along which persons had been accustomed to pass by the leave of the owners, and were likely to continue to pass, and to make it dangerous to persons using it. No notice was given to such persons by signal or otherwise, and injury was caused by the obstruction to a horse which was being driven by night along the road. It was held that an action lay. That applies *à fortiori* to the present case. It matters not as to liability whether it is a highway or a private way over which people are in the habit of passing, provided there is a right to pass. If not a highway, the entrance to the dock is a private way over which the plaintiffs, as one of a class, have a statutory right to pass. The difficulty in relation to the obstruction of a public right is to bring the case within the special damage category. The plaintiffs, however, have clearly done so. The plaintiffs' vessel was detained, consuming coal outside the dock, losing the profit she would otherwise have been making in carrying cargo which was waiting inside the dock for her.

As regards remoteness of damage, *Smith* v. *London and South-Western Railway Company* (21 L. T. Rep. 669; L. Rep. 6 C. P. 14) decides that no damage is too remote, provided it is the direct result of the negligent act. On the principle of the highway cases, there was a duty, not to obstruct the dock, owed by the defendants to all shipowners, who had the statutory right to enter, coming to the dock, and the breaking of the gates was an obstruction, and, if the requisite special damage resulting to them can be proved, then they, like the plaintiffs, can sue, provided the damage is not too remote. The plaintiffs suffered special damage—viz., two and a half days' detention—and not a mere inconvenience which could be obviated by going another route—for this was the only available dock. The damage, being the necessary consequence of the blocking of the dock by the defendants' negligence, is not too remote. There is another class of case where contractual rights between two persons are interfered with by a third party — but that class of case has no application to the present contention. On the authorities, the plaintiffs are entitled to recover.

Scrutton, K.C. and *Dawson Miller* for the defendants.—No case has been cited which decides that where a person has been delayed either on a public or private way damages can be recovered for loss of temporary use. Take the case of a common carrier, to whom goods have been tendered for carriage, being assaulted by a third person and so prevented from carrying the goods so tendered (as he in common law is bound to do), and thereby interfering with the right of the person tendering to have his goods so carried—the latter cannot recover damages from the third person. On the 28th March, when by the defendants' negligence the dock gates were damaged, the plaintiffs' vessel was nowhere near. On the 1st, 2nd, and 3rd April the dock company chose to close and repair the gates, and on

the 1st April it so happened that the plaintiffs' vessel arrived; had the dock company chosen any other day no damage would have been suffered. The gates were used on the 29th, 30th, and 31st March, and on the 4th, 5th, and 6th April. The vessel did not lose her cargo awaiting her, nor was she obliged to tranship her cargo then on board. This case is not like where a person leaves a thing on a highway or allows it to continue there. The principle is that where a person or property is not permanently damaged by interference with public rights no action lies; temporary interference with user, or temporary injury to trade, or temporary delay of person or property, is not actionable. If the defendant is creating or continuing a public nuisance it might be otherwise. The question has been discussed in *Ricket* v. *Metropolitan Railway Company* (16 L. T. Rep. 542; L. Rep. 2 H. L. 175). In that case Lord Chelmsford, at p. 187, says: "I think that the criterion of a party's right to damages under the clauses of the Railway and Canal Companies Acts . . . is correctly stated by Lord Campbell in *Re Penny and South-Eastern Railway Company* (7 E. & B. 660) . . . 'unless the particular injury would have been actionable before the company had acquired their statutory powers it is not an injury for which compensation can be claimed.'" In the present case, apart from statute, could an action have lain at common law? [Walton, J.—Lord Chelmsford, at p. 196, in *Ricket* v. *Metropolitan Railway Company* (*sup.*) says: "Upon a review of all the authorities, and upon a consideration of the sections of the statutes relating to this subject, I have satisfied myself that the temporary obstruction of the highway which prevented the free passage of persons along it, and so incidentally interrupted the resort to the plaintiff's public-house, would not have been the subject of an action at common law, as an individual injury sustained by the plaintiff in error, distinguishing his case from that of the rest of the public."] In that case no compensation was allowed, but in *Beckett* v. *Midland Railway Company* (*sup.*) compensation was given. Special damage must be in respect of the person or thing; loss through mere delay is not sufficient. Persons obstructed on a highway cannot recover for mere loss of time. If the obstruction is temporary there are no grounds for recovery, but otherwise if the obstruction is permanent. [Walton, J.—Lord Cranworth says, at p. 198, in *Ricket* v. *Metropolitan Railway Company* (*sup.*): "Both principle and authority seem to me to show that no case comes within the purview of the statute, unless where some damage has been occasioned to the land itself, in respect of which, but for the statute, the complaining party might have maintained an action. The injury must be an actual injury to the land itself. . . ."] "There must be some injury to the corpus of the property, and not merely an abridgment of the convenient user of it": (*Beckett* v. *Midland Railway Company*, L. Rep. 3 C. P., at p. 85, per Willes, J.). It is true that those cases are concerned with compensation Acts, but in *Ricket* v. *Metropolitan Railway Company* (*sup.*) the principle is treated as being the same. Damages for mere delay are not recoverable. That is clear from *Winterbottom* v. *Earl of Derby* (*sup.*). If that is so, it can make no difference whether the person delayed came on foot or in a vehicle. When the defendants did the negligent act complained of, the plaintiffs' vessel was far off. Suppose the dock company had not repaired the gates until six months later, surely a vessel then arriving could not sue the defendants? The delay so caused would be, not a consequence of the defendants' act, but in consequence of the time fixed by the dock company. No case has been cited in which loss of hire has been claimed in respect of either truck, carriage, ship, barge, &c. The nearest case is *Rose* v. *Miles* (*sup.*), but there there was an intention to injure another by mooring a barge across a creek, and expense was thereby incurred in discharging and carrying cargo overland. Here there was no intent to injure on the one hand, nor any expense incurred on the other. At the most there was only loss of profit through the delay. In *Winterbottom* v. *Earl of Derby* (*sup.*, per Kelly, C.B., at p. 321, L. Rep. 2 Ex.) it is stated: "With regard to the cases cited for the other side, and to the law as to the cases where an action has been held to be not maintainable, it may, perhaps, be difficult to reconcile them. But it is impossible to look at the case of *Ricket* v. *Metropolitan Railway Company* (*sup.*), and at the observations in the judgments of the learned Law Lords on it, without seeing that they thought the law had been too far extended in the direction of allowing this description of action to be brought. In this case, therefore, where there was no pecuniary damage—where the plaintiff merely, on one or more occasions, went up to the obstruction and returned, and on other occasions went and removed the obstruction—that is to say, where he suffered an inconvenience common to all who happened to pass that way—I think that to hold the action maintainable would be equivalent to saying it is impossible to imagine circumstances in which such an action could not be maintained." [Walton, J.—There must be a public right and a damage peculiar to the person affected.] To recover, a person must suffer something more than mere delay, and something more than what everyone else must suffer using that road. [Walton, J.—Does it make any difference that the entrance to the dock was not a highway? Most of the cases cited refer to highways.] This dock under the Harbours, Docks, and Piers Clauses Act 1847 is open to all, not a particular class, on payment of dues. The right of entrance here is a statutory right; but the entrance is not a highway. On the authorities, the mere delay causing temporary loss to the thing or person delayed—being common to all who may come—is not a ground for damages recoverable as for an injury to a public right. Assuming the defendants have injured property with regard to which a statute has conferred on the plaintiffs a right in the nature of a contractual right, then the damage is too remote. If this case is analogous to the highway cases, then there was no special damage suffered entitling the plaintiffs to sue. The result of *Ricket* v. *Metropolitan Railway Company* (*sup.*) is that where there is a nuisance or breach of a public right, there is a right to sue only where there is physical damage to the person or property. This is not analogous to the highway cases. In the highway case there is a breach of public duty. In the present case the defendants' vessel was under no duty to the plaintiffs not to damage the property of a third person. The fact that a statute gives the plaintiffs a right to go into the

dock makes no difference. The dock is not a public highway, though the public are allowed to use it on certain conditions. If the plaintiffs' loss was caused by an infringement of a right in the nature of a contractual right, then they cannot sue:

Cattle v. *Stockton Waterworks Company*, 33 L. T. Rep. 475; L. Rep. 10 Q. B. 453;
Simpson v. *Thompson*, 3 Asp. Mar. Law Cas. 567 (1877); 3 App. Cas. 279, at p. 289, per Lord Penzance.

A person is under no obligation to the outside public not to injure the property of a third person:

Dickson v. *Reuter's Telegraph Company*, 35 L. T. Rep. 842; 2 C. P. Div. 62.

In any event, the damages are too remote, for what really happened was that the dockmaster closed the gates under his statutory powers, and it was that which caused the plaintiffs' vessel to be detained.

Bailhache in reply.—If the plaintiffs' loss was incurred by the infringement of a right in the nature of a contractual right, then they have no remedy:

Cattle v. *Stockton Waterworks Company* (*sup.*).

The instance of highways was used because the infringement of a public right must be the same whether on a highway or elsewhere, for there is a duty which all owe to the public not to infringe public rights. If this was a public right, the plaintiffs must prove special damage that is peculiar to themselves. That they have done. The defendants' vessel interfered with the plaintiffs' public right; a duty was owed to them as one of the people who had a public right to enter that dock. The case of *Ricket* v. *Metropolitan Railway Company* (*sup.*), which refers to compensation, was not cited, because it is submitted that that case is not conclusive. How far so is seen from what Fry, J. says in *Fritz* v. *Hobson* (*sup.*). The former case decides that no compensation would arise unless there was trespass to the person, or goods, or lands. The plaintiffs come within the principle, as stated by Kelly, C.B. in *Winterbottom* v. *Earl of Derby* (L. Rep. 2 Ex. 316, at p. 322). The plaintiffs suffered damage in respect to their "trade or calling" as shipowners—viz., deprivation of profitable use of their ship for two and a half days; that is special damage. The expenses incurred in *Rose* v. *Miles* (*sup.*) were no more special damage than what the plaintiffs here suffered. The earlier cases are not struck out by *Ricket* v. *Metropolitan Railway Company* (*sup.*), for Fry, J. in *Fritz* v. *Hobson* (14 Ch. Div., at p. 555) says: "The case of *Iveson* v. *Moore* (*sup.*) is one of great authority . . . and was cited with approval in *Ricket* v. *Metropolitan Railway Company* (*sup.*)." The case of *Fritz* v. *Hobson* (*sup.*) is an authority of great weight in the plaintiff's favour. Though that case dealt with a private right, Fry, J., at p. 554, considers the question of a public right; "But I will consider the case further on the ground of the private injury resulting from the public nuisance. . . . Brett, L.J. . . . in *Benjamin* v. *Storr* (*sup.*) . . . said . . . 'The cases referred to upon this subject show that there are three things which the plaintiff must substantiate, beyond the existence of the mere public nuisance, before he can be entitled to recover. In the first place, he must show a particular injury to himself beyond that which is suffered by the rest of the public.' . . ." The words of Lord Ellenborough in *Rose* v. *Miles* (4 M. & S. 101, at p. 103) apply to the present case—viz.: "This is substantially more injurious to this person than to the public at large, who might only have it in contemplation to use it. And he has been impeded in his progress by the defendants wrongfully mooring their barge across, and has been compelled to unload and to carry his goods overland, by which he has incurred expense, and that expense caused by the act of the defendants. If a man's time or his money are of any value, it seems to me that this plaintiff has shown a particular damage." That case is indistinguishable from the present. *Rose* v. *Miles* (*sup*), has never been doubted. Reliance is put on the fact that the plaintiffs had a statutory public right which was interfered with, and special damage, which was not too remote, was suffered.

The following authorities were cited:

Wilkinson v. *Downton*, 76 L. T. Rep. 493; (1897) 2 Q. B. 57; 66 L. J. 493, Q. B. (citing *Smith* v. *Johnson*, unreported);
Penley v. *Barber*, (1893) 2 Ch. 447; 62 L. J. 623, Ch.;
Lumley v. *Gye*, 2 E. & B. 216; 22 L. J. 463, Q. B.;
Langridge v. *Levy*, 4 M. & W. 337; 7 L. J. 387, Ex.;
Hubert v. *Groves*, 1 Esp. 148;
Atkinson v. *Newcastle and Gateshead Waterworks Company*, 36 L. T. Rep. 761; 2 Ex Div. 441;
Smith v. *Wilson*, (1903) 2 Ir. Rep. 45;
Chaplin and Co. Limited v. *Westminster Corporation*, 85 L. T. Rep. 88; (1901) 2 Ch. 329;
Maynell v. *Saltmarsh*, 1 Keb. 847;
The Ratata, 8 Asp. Mar. Law Cas. 427; 76 L. T. Rep. 224; (1897) P. 118;
Wilkes v. *Hungerford Market Company*, 2 Bing. N. C. 281;
Benjamin v. *Storr*, 30 L. T. Rep. 362; L. Rep. 9 C. P. 400;
Chichester v. *Lethbridge*, Willes, 71;
Iveson v. *Moore*, 1 Lord Raym. 486; 1 Salk. 15;
Hart v. *Basset*, 2 T. Jones, 156; 4 Vin. Abr. 519.

Cur. adv. vult.

Walton, J.—In this case the plaintiffs are the Anglo-Algerian Steamship Company Limited, and the action is brought against the defendants, who are the Houlder Line Limited. The plaintiffs are the owners of the steamship *Tangistan*, and the defendants are the owners of the steamship *Royston Grange*. The facts of the case are admitted. The defendants admit that on the 28th March 1907 the outer gates of the lock leading to the Alexandra Dock, a private dock at Newport, were damaged by the negligent navigation of the *Royston Grange*. Notwithstanding this damage to the gates of the lock, the dock appears to have been opened on the 29th, the 30th, and the 31st March; but, for the purpose of repairing the damage, it was found necessary to close the dock on the 1st April, and keep it closed for several days. The plaintiffs' vessel, the *Tangistan*, arrived outside the dock on the 1st April. There was a cargo ready in the dock for her to load, and if the dock had been open no doubt she would have been received into the dock and have loaded her cargo; but as it was, in consequence of the dock being closed, the vessel was

kept waiting outside the dock for two and a half days. The plaintiffs claim from the defendants damages for that detention. The claim is at the rate of 40*l.* a day. So far as I can gather, on account of the dimensions of the plaintiffs' vessel there was no other dock, and perhaps no other place, at Newport where she could have loaded her cargo. The dock, which belongs to the Alexandra (Newport and South Wales) Docks and Railway Company, is subject to the provisions of the Harbours Act of 1847, and to sect. 33 of that Act. That is 10 Vict. c. 27. Sect. 33 is in these words: "Upon payment of the rates made payable by this and the special Act, and subject to the other provisions thereof, the harbour, dock, and pier shall be open to all persons for the shipping and unshipping of goods and the embarking and landing of passengers." Therefore, the Alexandra Dock, in accordance with the terms of that section, has to be open to all persons for the shipping and unshipping of goods. Those are the facts of the case about which, as I have said, there is no dispute. The argument in support of the plaintiffs' case was that, under sect. 33, which I have just read, they had a right to take their vessel into the dock, that they were obstructed in the exercise of this right by the negligent act of the defendants, and that they suffered thereby actual loss and damage. The plaintiffs contend that the case is not distinguishable in principle from that of an obstruction of a public highway by which a particular person has suffered actual damage peculiar to himself.

For the defendants it was contended that this analogy was false, and that the rules of law applicable in the case of an obstruction of a public highway do not apply in the present case; and, further, they contended that, even if the acts complained of amounted to something equivalent to an obstruction of a highway by the defendants, the plaintiffs had no cause of action. In support of the latter contention the defendants rely mainly upon the judgment of Lord Chelmsford in *Ricket* v. *Metropolitan Railway Company*, which is reported in the Law Reports (2 E. & I. App., at p. 186). The question decided in that case was as to the right of the plaintiff to compensation under the Lands Clauses Act and the Railways Clauses Act. Different considerations, of course, apply in a case where compensation is claimed under the Lands Clauses Act and the Railways Clauses Act and in an action on the case for damages. But as compensation cannot be recovered under those Acts where no action at law would lie for the damage in respect of which the compensation is claimed if the act causing such damage had been committed without the authority of Parliament, the question as to the right of action at common law may arise in compensation cases; and it did arise, and was considered, both in the Exchequer Chamber and in the House of Lords in the case of *Ricket* v. *Metropolitan Railway Company*. Lord Chelmsford, in that case, certainly held, adopting and approving the reasoning of Earle, C.J. in the Exchequer Chamber, that the plaintiff, Ricket, could not have recovered damages at law for the obstruction and injury of which he complained and in respect to which he claimed compensation. The true meaning and effect of what Lord Chelmsford said on this point is, I venture to think, made quite clear by reference to the reasoning of Earle, C.J. which Lord Chelmsford followed and which is to be found in 5 B. & S., at pp. 159 to 162. It there appears that the grounds upon which the Chief Justice held that the plaintiff could not have recovered in an action at law on the case were, that he had not been, in the language of the Chief Justice, obstructed in the exercise of any right vested in him; and that the damage of which he complained was damage to his business in consequence of other persons being obstructed in the exercise of their rights on the public highway in question; and that this damage was too remote. The Chief Justice pointed out that in all the reported cases in which damage had been recovered for the obstruction of a highway except *Wilkes* v. *Hungerford Market Company*, which is reported in 2 Bing. N. C., p. 281, "the plaintiff"—I am now quoting the words of Earle, C.J.—"was exercising his right of way, and the defendant obstructed that exercise and caused particular damage thereby directly and immediately to the plaintiff." He thought that the decision in *Wilkes* v. *Hungerford Market Company* was wrong, and in this opinion Lord Chelmsford agreed with Earle, C.J. The ground of the decision on this point in *Ricket's* case was, as Lord Chelmsford says at the bottom of p. 188 of the report, that the damage was too remote. It seems to me that this decision would have no bearing in a case in which the owner of a ship had been obstructed in the exercise of his right to navigate his ship in a public navigable channel—that is to say, a highway for ships—and who had thereby suffered actual loss and damage by the detention of his ship. For reasons which I am about to state, it is not necessary for me to decide where and upon what conditions in such a case an action could be successfully maintained. Having regard, however, to the course which the argument took at the trial, I think it right to say that I am not prepared to hold that in such a case an action would not lie. I do not think that there is anything in *Ricket's* case to impair the authority of *Rose* v. *Miles*, reported in 4 M. & S., at p. 101. Assuming, however, that such an action would lie, it does not follow that the plaintiffs are entitled to succeed in the present case. The defendants contend that there is no true analogy between the two cases; and it appears to me that to speak of the plaintiffs' right to have their vessel admitted into the dock upon payment of the dock dues as if it were similar in its legal character and incidence to the right to navigate a vessel along a public channel is misleading. The dock company carry on a business which is, amongst other things, perhaps, that of providing certain accommodation for ships in their dock and rendering certain services to shipowners in and about the docking and undocking and loading and discharging of their ships. They enjoy, for this purpose, certain statutory rights and privileges, and are under a statutory obligation to allow all persons to use the docks for the purposes of loading or discharging vessels upon payment of the dock dues. They are not allowed to grant any preference by affording the accommodation of their dock to certain persons and refusing it to others; but this obligation does

not, in my opinion, make the entrance to the dock a public highway. The obligation of the dock company is similar to that of the common carrier who must carry goods offered to him for carriage, or of the innkeeper who must receive guests. If by the tortious act of a wrongdoer the inn is rendered unfit for the reception of guests, and, in consequence of this, some person is prevented from obtaining accommodation as a guest at the inn, and is thereby put to expense, is there any authority for saying that such a person could recover damages from the wrongdoer? I have been unable to find one. The tortious act in the present case, as in the hypothetical case of the inn, is very different in its relation to the plaintiffs and their loss from the tortious act of obstructing a highway by which a person desiring to use the highway is directly prevented from exercising his right. The wrongful act of the defendants in the present case was in their negligence by which the dock gates were injured; in consequence of this it became necessary to repair the gates, and, for the purpose of repairing them, it became necessary to close the dock. Whilst the dock was closed, the plaintiffs' vessel arrived, and she was detained outside the dock for two and a half days waiting to be admitted, and the plaintiffs thereby suffered the loss of which they complain. In my judgment the negligence of the defendants was too indirectly related to the alleged interference with the plaintiffs' rights and to their loss to constitute a good cause of action by the plaintiffs against the defendants. Upon these grounds I think that there must be judgment for the defendants with costs.

Judgment for the defendants.

Solicitors for the plaintiffs, *Downing, Handcock, Middleton*, and *Lewis*, for *Vachell* and *Co.*, Cardiff.

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

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Feb. 11 *and* 12, 1908.

(Before BARGRAVE DEANE, J. and Elder Brethren.)

THE COCKATRICE. (*a*)

Collision — Lights — "Fishing with nets" — "Engaged in trawling" — "Under way" — Collision Regulations 1897, *art.* 9 (*b*) (*d*).

A steam drifter was heading to the S.E. attached to her nets, which were ahead of her. Those on board her sighted about one and a half miles off and about two points on the starboard bow the lights of a vessel which were seen to get ahead of the drifter and then remain stationary. Thinking that the vessel was entangled in their gear, those on board the drifter cast off and buoyed their nets and proceeded towards the other vessel, leaving their nets on their starboard hand. While steaming towards the other vessel, those on the drifter exhibited the lights mentioned in art. 9 (*b*). *The other vessel, which was a steam trawler, was trawling to the N.N.W., and, when raising her trawl, exhibited the lights mentioned in art.* 9 (*d*). *A collision occurred between the two vessels, the stem of the trawler striking the starboard side of the drifter.*

Held, that the drifter was to blame for not keeping a good look-out, as those on board her had never seen the red light of the trawler; that she was also to blame for not exhibiting under-way lights when proceeding towards the trawler, for, after casting off and buoying her gear, she was no longer engaged in fishing with drift nets.

Held, further, that the trawler was not to blame for exhibiting the lights mentioned in art. 9 (*d*) *when getting in her trawl, as she was then still engaged in trawling.*

DAMAGE ACTION.

The plaintiffs were the owners of the steam drifter *Rival* and her master and crew suing for their effects; the defendants and counter-claimants were the owners of the steam trawler *Cockatrice.*

The collision occurred about 12.30 a.m. on the 1st Oct. 1907 in the North Sea, about fifty-three miles E.S.E. of the *Spurn* light vessel, the wind at the time being S.S.E, a light breeze, the weather fine and clear, and the tide flood of the force of one to two knots.

The case made by the plaintiffs was that the *Rival*, a wooden steam drifter of 35 tons net and 60 tons gross register, manned by a crew of ten hands all told, was in the North Sea, engaged in fishing with drift nets.

The *Rival*, which had about six hours before shot her nets with the usual gear, was laid away heading to the wind, with about 2560 yards of gear out ahead. Her proper white drifting lights were duly exhibited as required by the regulations and were burning brightly, and a good look-out was being kept on board of her.

In these circumstances those on the *Rival* observed, distant about one and a half miles and bearing about two points on the starboard bow, a red light, which was apparently the side light of a vessel. The red light was carefully watched, and it drew ahead of the *Rival*, and then disappeared, and two white lights, one high and the other low, which appeared to be the masthead and quarter lights of a vessel, came into view, and remained stationary right ahead of the *Rival*, on whose gear the vessel carrying them appeared to be entangled. The lights were carefully watched, and shortly afterwards a green light was made out higher up than the white lights, but apparently on the same vessel, which proved to be the *Cockatrice*. As the bearing of the said lights did not alter, the nets of the *Rival* were cast off and buoyed with four or five bowls, and the *Rival* steamed up towards the *Cockatrice* at a speed of about two to three knots, leaving her nets on the starboard side. The green light of the *Cockatrice* remained visible, and the *Rival* continued on her course, shaping to pass under the stern of the *Cockatrice*, which, from the position of her lights, appeared to be heading about south-west, and, when she was about a length and a half distant, the engines of the *Rival* were stopped, in order that the number of the other vessel might be obtained. Those on board the *Rival* then observed that the *Cockatrice*, whose loom was made out, was, in fact, heading about north-east, with her light showing green on the wrong side, and that she was coming ahead, involving

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

imminent danger of collision. As the only chance of averting collision, the engines of the *Rival* were ordered full speed ahead, and her helm was put hard-a-port, in order, if possible, to throw her quarter clear, but the *Cockatrice*, continuing to come ahead at considerable speed, with her stem struck the *Rival* on the starboard side, just abaft amidships, a very heavy blow, cutting right into her, and doing her such damage that she immediately began to settle down, and sank in a few minutes with everything on board of her.

Those on the *Rival* charged those on the *Cockatrice* with not keeping a good look-out; with improperly putting and keeping their engines working ahead; with improperly exhibiting their trawling lights; with improperly failing to exhibit their under-way lights when under way; with not easing, stopping, or reversing their engines; and with failing to indicate their course by whistle signal.

The case made by the defendants was that the *Cockatrice*, a steam trawler of 115 tons gross and 50 tons net register, was in the course of a fishing voyage from Grimsby, manned by a crew of nine hands all told. The *Cockatrice*, after shooting her trawl at midnight, was trawling N.N.W., and making about one and a half miles an hour over the ground. Her regulation trawling lights—namely, tri-coloured lantern on foremast, together with an all-round white light below the triplex 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 *Cockatrice* saw (as well as the lights of other vessels) the drift fishing lights of the *Rival*—namely, two white lights—which latter were about a mile distant, bearing about W.N.W. A short time afterwards those on the *Cockatrice* saw that the *Rival* was moving and then approaching the *Cockatrice*. When close to, however, she was seen to be attempting to cross the bows of the *Cockatrice*, and, though the engines of the *Cockatrice* were stopped, the *Rival* came on, crossing the bows of the *Cockatrice*, and with her starboard side struck the stem of the *Cockatrice*, doing her damage.

Those on the *Cockatrice* charged those on the *Rival* with not keeping a good look-out; with neglecting to carry and exhibit lights in accordance with the regulations; with neglecting to keep clear of the *Cockatrice*; with negligently attempting to cross ahead of the *Cockatrice*; with neglecting to indicate her course by whistle signal; and with failing to ease, stop, or reverse her engines or to do so in due time.

The material parts of art. 9(*a*) of the Collision Regulations which were referred to during the course of the case are as follows:

Art. 9. Fishing vessels and fishing boats, when under way and when not required by this article to carry or show the lights hereinafter specified, shall carry or show the lights prescribed for vessels of their tonnage under way. . . . (*b*) Vessels and boats, except open boats as defined in subdivision(*a*), when fishing with drift nets, shall, so long as the nets are wholly or partly in the water, carry two white lights where they can best be seen. Such lights shall be placed so that the vertical distance between them shall not be less than six feet and not more than fifteen feet, and so that the horizontal distance between them, measured in a line with the keel, shall be not less than five feet and not more than ten feet. The lower of these two lights shall be in the direction of the nets, and both of them shall be of such a character as to show all round the horizon, and to be visible at a distance of not less than three miles. . . . (*d*) Vessels when engaged in trawling, by which is meant the dragging of an apparatus along the bottom of the sea—1. If steam vessels, shall carry in the same position as the white light mentioned in art. 2 (*a*), a tri-coloured lantern so constructed and fixed as to show a white light from right ahead to two points on each bow, and a green light and a red light over an arc of the horizon from two points on each bow to two points abaft the beam on the starboard and port sides respectively; and, not less than six nor more than twelve feet below the tri-coloured lantern, a white light in a lantern, so constructed as to show a clear uniform and unbroken light all round the horizon and visible at a distance of at least two miles.

Laing, K.C. and *H. C. S. Dumas* for the plaintiffs.

Batten, K.C. and *A. D. Bateson* for the defendants.

BARGRAVE DEANE, J.—This is an action brought by the owners of the steam drifter *Rival* against the steam trawler *Cockatrice* for damage caused on the 1st Oct. last, somewhere about half-past twelve o'clock at night. The main point in the pleadings is that the trawler had not got her lights up properly—that whereas she should have shown by her tri-coloured light her green light on the starboard side and the red light on the port side, by some accident or injury to her light gear she was showing a green light upon her port side. That, the plaintiffs say, was the sole cause of this collision, because they say we came down upon that green light, and thought by reason of it that we were passing under her stern, whereas we were passing under her bows, and we noticed that she was then steaming ahead, and in order to avoid a collision we put our engines full speed ahead to get out of the way, but she struck us on the starboard side about amidships, and we sank. When once you get rid of the question of the lights on board the trawler—that is to say, when once the court is satisfied she was showing a green light to starboard and a red light to port—then the case of the drifter is hopeless, because not a single man on board the drifter, apparently, ever saw the trawler's red light. How was that? If she was showing a red light on her port side and a green light on her starboard side, how is it that not a single man on board the drifter ever saw the red light? On the other hand, I can understand how it was that they saw this green light, and how it was that, seeing the green light, they may have come to the conclusion that the green light of the trawler was unpleasantly near the drifter's nets, because we are told that shooting the nets at half-past eight the *Cockatrice* trawled south for an hour and north for an hour, and then south again for an hour. Therefore, at the end of the third hour's trawling she would be steaming south, and that would be showing the green light to the drifter; and she had to stop her engines in order to lift the trawl, and she would be showing

(*a*) This article appears in the *London Gazette* of the 10th April 1906, p. 2511, and was made under powers conferred by sect. 418 of the Merchant Shipping Act 1894 by Order in Council dated the 4th April 1906. It is to be read as part of the Regulations contained in sched. 1 to the Order in Council under sect. 418 of the Merchant Shipping Act 1894 made the 27th Nov. 1896.

her green light until in the course of the operations she had to go round under port helm and get her net to windward. Then she would haul her net. That is what she did, and undoubtedly she got down pretty near to the end of those nets. It is not suggested now that she did foul them, but there might have been reason in the mind of the skipper of the drifter for thinking she had fouled them or might foul them, and therefore it might be a reasonable thing to go down and get her name. All the nets have been recovered, and it is not suggested that they had been fouled or damaged in any way. I only mention it because it is a reason for the drifter acting as she did.

Now, the operation of hauling the trawl and shooting it again takes about twenty minutes we are told, and she began to haul the trawl at 11.30. Therefore it would be ten minutes to twelve when she again shot her trawl. She would be showing her red light all that time to the drifter. It is said by everybody that the collision took place at about half-past twelve. How comes it that there is that interval of time unaccounted for by the drifter? She had to buoy her nets, get steam up, and then steam away to the eastward to clear her nets before she came down, and that is what the trawler saw her do—steam away to the eastward and then come down on the port side. Undoubtedly, this drifter was, before the collision, on the port side of the trawler, because she was sunk by a blow on the starboard midships, she crossing from port to starboard. It is incredible that the people on board the drifter, if they had looked for it, did not see the trawler's red light. It is impossible to believe the evidence from the drifter. It is incredible that they should have seen nothing but the green light until immediately before the collision. The evidence from the trawler is perfectly conclusive, and I believe the evidence of the engineer that he was steaming ahead for some considerable time before the collision, and that he only stopped the engines immediately before the collision under order from the skipper, because the collision was imminent. For these reasons I think no case has been made out at all against the *Cockatrice*. I am afraid I cannot say the same with regard to the drifter. Counsel for the plaintiffs has to admit that his vessel was in fault with regard to lights, because, having left her nets, then the rule does not apply, and she has to exhibit, not fishing lights, but steaming lights. She seems to have left her nets a considerable distance, but still had the ordinary fishing lights up, and I think she was wrong in that. I cannot excuse her for it. It must not be supposed for one moment that fishing vessels must not abide by the rule. Counsel for the plaintiffs, however, says that what is sauce for the goose is sauce for the gander, and that the same rule applies to the trawler. The rule is clear—that a trawler when trawling must have fishing lights up, and when not trawling must have up steaming lights. How am I to construe that rule? Is it to be said that a trawler is to shift her lights directly the trawl is off the bottom and put up steaming lights, and then, directly she shoots her nets, alter her lights again? As far as my own knowledge goes, it does not take very long to untie, let out your catch, tie up again, and shoot the trawl again. I do not suppose it would take more than five or ten minutes to do the whole. As I read the rule it means this, that you are fishing when you have your trawl down, or are hauling up your trawl, or shooting it, but that if, having hauled your trawl up, you do not shoot it at once, but steam off to some other spot to trawl, then, as I said in the case of *The Upton Castle* (93 L. T. Rep. 814; 10 Asp. Mar. Law Cas. 153; (1906) P. 147), you cease to be fishing and you must put up steaming lights. I think a distinction has to be drawn. If a trawler, immediately after hauling her net, without going to any other ground, shoots her trawl, then she is still fishing during the interval, but if she changes her ground then she must change her lights. I do not think in this case that the trawler did infringe art. 9, sub-sect. (*d*), and therefore I do not think she was to blame. The general result of the case is that we believe the evidence of the trawler and we do not believe we have had the whole story told by the drifter, for the simple reason that it is incredible that those men who have been called—I think eight or nine of them out of ten—from the drifter should none of them have seen that red light. The red light has been suppressed for reasons which I need not trouble myself about. I believe the evidence from the trawler in preference to that from the drifter, and I find the drifter alone to blame.

Solicitors for the plaintiffs, *Dubois* and *Co.*, agents for *Chamberlin* and *Talbot*, Great Yarmouth.

Solicitors for the defendants, *Deacon* and *Co.*, agents for *Grange* and *Wintringham*, Great Grimsby.

HOUSE OF LORDS.

Feb. 11, 13, *and March* 6, 1908.

(Before the LORD CHANCELLOR (Loreburn), Lords ROBERTSON and COLLINS.)

MACBETH AND CO. *v.* MARITIME INSURANCE COMPANY. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Marine insurance—Constructive total loss—Cost of repairs—Value of wreck.

In deciding whether a ship seriously damaged is a constructive total loss, the test is whether, having regard to all the circumstances, a prudent uninsured owner would sell her or repair her. In determining this he is entitled to take into account the break-up value of the ship.

Judgment of the Court of Appeal reversed.

Angel *v.* Merchants' Marine Insurance Company (9 *Asp. Mar. Law Cas.* 406; 88 *L. T. Rep.* 717; (1903) 1 *K. B.* 811) *overruled.*

Young *v.* Turing (2 *M. & G.* 593) *discussed.*

APPEAL from a judgment of the Court of Appeal (Lord Alverstone, C.J., Buckley and Kennedy, L.JJ.), who had affirmed a judgment of Walton, J. in favour of the respondents, the defendants below, at the trial of the action before him without a jury.

The action was brought by the appellants, as owners of the steamship *Araucania*, against the

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

respondents on policies of insurance, and the question was whether the ship was to be taken as a "constructive total loss" for the purposes of the policies effected with the respondents.

The respondents by their points of defence referred to the policies for their terms, denied that notice of abandonment was given in due time or at all, and denied that the *Araucania* ever became or was a total or constructive total loss.

The policies sued on were dated the 3rd July 1905, for 1059*l.*, and the 10th July 1905, for 1060*l.*, both on the steamship *Araucania*, valued as follows: On hull and materials; on machinery and boilers and everything connected therewith—one valuation, 12,000*l.*

The policies were time policies for twelve calendar months commencing 5 a.m. on the 27th June 1905 and ending 5 a.m. on the 27th June 1906. They contained the following clause: "The insured value shall be taken as the repaired value in ascertaining whether the vessel is a constructive total loss." They were expressed to be free of particular average and absolutely covered all usual risks.

The following facts were proved or admitted:—The *Araucania* left Ardrossan on the evening of the 25th Oct. 1905 bound for Savona with a cargo of coals. Owing to a breakdown of her engines, she was compelled to anchor for the night in the neighbourhood of Ardrossan, where during a heavy gale her anchors failed to hold her, and she drove on to the rocks early on the morning of the 26th Oct., and her crew were obliged to leave her owing to the violence of the weather, and for the same reason salvors could not board her until the 30th Oct.

On or about the 27th Oct. 1905 notice of abandonment was given on behalf of the appellants to the respondents, who refused to accept it.

On the 2nd Nov. 1905 the vessel was refloated and towed to Greenock in her damaged condition, but was not repaired.

Walton, J. found on the evidence that the cost of the repairs necessary to make the vessel as good as she was immediately before the casualty would not have amounted to more than about 11,000*l.*, and that, if the value of the wreck was to be taken into consideration, there was undoubtedly a constructive total loss, but, holding himself bound by the decision of the Court of Appeal in *Angel* v. *Merchants' Marine Insurance Company* (*ubi sup.*), he decided that the value of the wreck was not to be taken into account, and accordingly gave judgment for the respondents with costs. His judgment was affirmed by the Court of Appeal upon the authority of the same case.

The shipowners appealed.

Scrutton, K.C., *Bailhache*, and *D. Stephens*, for the appellants, argued that the case was really an appeal from *Angel* v. *Merchants' Marine Insurance Company* (*ubi sup.*), by which the courts below thought that they were bound, but that decision was wrong. The test is, What would a prudent uninsured owner do? If the value of the wreck as it lay is to be taken into consideration there was a constructive total loss, but, according to *Angel's* case, it is not to be taken into account. If a ship on shore was worth 500*l.* to break up and would cost 5000*l.* to repair, and then be worth 5200*l.*, a prudent owner would not spend 5000*l.* to increase her value by 4700*l.* The test of the action of the "prudent uninsured owner" was first laid down by Lord Abinger, C.B. in

Young v. *Turing*, 2 M. & G. 593.

See also

Irving v. *Manning*, 1 H. L. Cas. 287;
Fleming v. *Smith*, 1 H. L. Cas. 513;
Benson v. *Chapman*, 2 H. L. Cas. 696; 6 M. & G. 792.

Moss v. *Smith* (9 C. B. 94 is said to have altered the law, and is the foundation of the respondents' argument. But see also

Scottish Marine Insurance Company v. *Turner*, 1 Macq. 334;
Grainger v. *Martin*, 8 L. T. Rep. 796; 4 B. & S. 9;
Kemp v. *Halliday*, 14 L. T. Rep. 762; L. Rep. 1 Q. B. 520;
Rankin v. *Potter*, 2 Asp. Mar. Law Cas. 65 (1873); 29 L. T. Rep. 142; L. Rep. 6 H. L. 83;
Kaltenbach v. *McKenzie*, 4 Asp. Mar. Law Cas. 15, 39 (1878); 39 L. T. Rep. 215; 3 C. P. Div. 467;
Aitchison v. *Lohre*, 4 Asp. Mar. Law Cas. 11, 168 (1879); 41 L. T. Rep. 323; 4 App. Cas. 755;
Sailing Ship Blairmore Company v. *Macredie*, 8 Asp. Mar. Law Cas. 429 (1898); 79 L. T. Rep. 217; (1898) A. C. 593;
Marten v. *Sydney Lloyd's* (*The Madrid*), a case before Barnes J., reported in the *Times*, Dec. 19, 1896;
Beaver Line v. *London and Provincial Marine Insurance Company*, 5 Com. Cas. 269;
Wild Rose Steamship Company v. *Jupe*, 19 Times L. Rep. 289.

Up to *Angel's* case all the authorities are one way, that the conduct of the prudent uninsured owner is to be the test, and that the value of the wreck may be taken into consideration. A prudent owner would take into consideration all the circumstances of the case, of which the present value of the ship is one.

J. A. Hamilton, K.C. and *F. P. Mackinnon*, for the respondents, contended that *Angel* v. *Merchants' Marine Insurance Company* (*ubi sup.*) and *Lambert Brothers* v. *Fyser* (*coram* Phillimore, J. not reported), which followed it, were rightly decided. They were acquiesced in while the matter was of general interest, and this appeal is brought after the Marine Insurance Act 1906 (6 Edw. 7, c. 41) has in sect. 60 laid down the law in accordance with those decisions. The rule as laid down by them is consistent with the principles of law and with business convenience. The case of *Beaver Line* v. *London and Provincial Marine Insurance Company* (*ubi sup.*) was the first case in which the point was definitely raised, and it was not necessary for the decision of that case. All the earlier authorities which have been referred to were only dicta. The true test is not that suggested by the appellants, but a comparison between the cost of the repairs and the value of the ship when repaired. A contract of insurance is for indemnity only, not for profit. The insured has the option of claiming for a partial loss or for a constructive total loss, and the underwriter cannot compel him to do one or the other. The value of the wreck may vary very greatly, according to the locality in which it happens to be, and, according to the appellants' argument, the less the damage, and therefore the higher the present value, the more certainly is it a total loss. The dictum as to the "prudent uninsured owner" appeared originally as a direc-

tion to the jury. An owner is only concerned with the cost of the repairs, which cannot include the value of the existing wreck. See

Cambridge v. *Anderton*, 2 B. & C. 691;
Somes v. *Sugrue*, 4 C. & P. 276.

In *Young* v. *Turing* (*ubi sup.*) the circumstance to be considered did not raise the present point, and the words of Lord Abinger were only dicta. In *Moss* v. *Smith* (*ubi sup.*) the matter was first put in the true light—namely, that the comparison of the cost of the repairs with the value of the ship when repaired and the "opinion of the prudent owner" are equivalent expressions. The question for the owner to consider is, Is the ship worth repairing? not How can I make a profit out of this event? In *Aitchison* v. *Lohre* (*ubi sup.*) Lord Blackburn did not go as far as is contended for by the appellants. See also

Assicurazioni Generali v. *Steamship Bessie Morris Company*, 7 Asp. Mar. Law Cas. 217 (1892); 67 L. T. Rep. 218; (1892) 2 Q. B. 652;
Reimer v. *Ringrose*, 6 Ex. 263.

They also referred to the cases of *Irving* v. *Manning*, *Fleming* v. *Smith*, *Grainger* v. *Martin*, *Rankin* v. *Potter*, *Kaltenbach* v. *McKenzie*, and *Sailing Ship Blairmore Company* v. *Macredie*, cited on behalf of the appellants.

Scrutton, K.C. in reply.—The Marine Insurance Act 1906 does not affect the case.

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

March 6.—Their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Loreburn). — My Lords: In this case the steamship *Araucania* was insured by the respondents in a valued policy for 12,000*l.*, free of particular average, and with a condition that in reckoning whether or not there should be a constructive total loss the repaired value should be taken at the valuation of 12,000*l.* She went ashore. The learned judge has found, and it is not disputed, that the cost of repairing was 11,000*l.* So, if that alone is to be considered, she was not a constructive total loss. But she would be so if to the cost of repairing, the selling value of the wreck were to be added. Whether or not it ought to be added is the question before the House. The learned judges, both in the court of first instance and in the Court of Appeal, answered that question in the negative, not upon any view of their own, but in deference to the decision of *Angel* v. *Merchants' Marine Insurance Company* (*ubi sup.*), pronounced by the Court of Appeal in 1903. In *Angel's* case one of the Lords Justices expressed himself on this point in terms of dissent from his colleagues.

This question admits of ready answer as soon as it is ascertained what is the true test by which a court is to be guided. Really the choice lies between two tests. One is that a ship has become a constructive total loss if the cost of repairing her would exceed her value when repaired. The other is that she has become so when a prudent uninsured owner would not repair her having regard to all the circumstances. If the former test be adopted, then this appeal must be dismissed, because the cost of repairs here is 11,000*l.*, and the repaired value is 12,000*l.* If the latter test be adopted, then the appeal must be allowed, for no sensible man would have repaired this ship if he could have made a better thing of it by selling her as a wreck, and it is found that he could have done so. If this were an open question, there seems to me ground for arguing that the former is the sound view. But I think that this is not really an open question, notwithstanding the recent decision in *Angel's* case. I will not enter upon a criticism of the authorities. I have had the advantage of seeing in print the opinion of Lord Collins, who fully discusses them, and I agree in his conclusion. When once the test of what a prudent uninsured owner would do, whether he would sell the ship where she lies or repair her, is admitted, it follows that the value of the ship where she lies must enter into the calculation, and this test has been laid down repeatedly by many high authorities over a long period of time. I think that it was too late to disturb it in 1903. I will merely add that, in my opinion, the rule can only apply where there has been a wreck or something equivalent to a wreck. If an owner tried to treat as a constructive total loss such a case as was put in argument, of a vessel worth 5000*l.* as she lay damaged in harbour after a storm, which would cost 6000*l.* to make her fit to take the sea, and would then be worth only 10,000*l.* as repaired, he would fail. Among other reasons, the loss would not be by perils of the sea. Accordingly, I am of opinion that the appeal should be allowed.

Lord ROBERTSON.—My Lords: I find it impossible to refuse the demand of the appellants. When a ship has been damaged during a voyage the practical question is, Shall she be repaired or abandoned? The *pros* and *cons* on this question are, as it seems to me, necessarily of a commercial and pecuniary nature, and necessarily looked at from the standpoint of the person whose pocket is affected. It follows that a balance-sheet has to be drawn up, showing what is gained and what is lost by repairing on the one hand and by abandoning on the other. Now, I am unable to see how such a balance-sheet can be accurate unless it includes the *corpus* of the damaged ship. The curious part of the respondents' case is that they do include it, but only on one side of the account, for it is part of the value of the ship, if repaired. I can see no reason why it should not enter the account on the opposite hypothesis—that the ship is not repaired—and it would unquestionably do so, as matter of business, in determining the decision of any rational man who had to consider the question. It was urged, however, that, in a contract of insurance, what is insured is the ship as a thing, and not in its relation to the commercial enterprises of its owner. While, as presented, this sounds plausible, it is fallacious. What is insured is the life of the ship as a living instrument of commerce; and the owner is not credited with any romantic attachment to the ship, so that he will keep life in her at all costs even to the sacrifice of the commerce of which she is an instrument. Again, there is nothing in the argument that the wrecked ship, if abandoned, may, after all, be bought and resuscitated and resume activity in other hands. This merely means that a wrong judgment was come to on the question of fact, and that the cost of repair was well-spent money instead of, as was thought, ill-spent money. But, whichever view be taken of the present contro-

versy, some conclusion must be come to in each case on the question whether it is worth while to repair, and the argument necessarily assumes, in any case in hand, that the conclusion come to is right. In what I have said I have proceeded on the assumption that, in ascertaining whether there is a constructive total loss, one has to hold an inquest, as it were, and consider whether the ship shall be repaired or shall be abandoned. I do so, first of all, because I do not see how there can be such a thing as a constructive total loss without this being done; and, secondly, because it has for long been laid down by very high authorities that the criterion is the presumable judgment of the owner, on the footing of his being uninsured and acting in his own interests. I desire to say that my judgment is given on principle, and not merely on authority.

Lord COLLINS.—My Lords: This is virtually an appeal from the judgment of the Court of Appeal in *Angel* v. *Merchants' Marine Insurance Company* (*ubi sup.*), and raises the question whether, in determining whether a ship seriously damaged by perils insured against can be treated as a constructive total loss, the owner is entitled to add the break-up value of the wreck to the estimated cost of repairs. The circumstances which will justify an owner in abandoning his vessel when he elects not to repair her are thus stated in Arnould on Marine Insurance, 5th edit., p. 1003: "On that question the rule of law is clearly established, but variously expressed. By Blackburn, J. it is said 'the question between the assured and the underwriters on a ship is whether the damage sustained may be so far repaired as to keep it a ship, though not perhaps so good a ship as it was before, without expending on it more than it would be worth': (*Rankin* v. *Potter, ubi sup.*). By Tindal, C.J. it is said to be that 'where the damage to the ship is so great from the perils insured against as that the owner cannot put her in a state of repair necessary for the pursuing of the voyage insured, except at an expense greater than the value of the ship, he is not bound to incur that expense, but is at liberty to abandon, and treat the loss as a total loss': (*Benson* v. *Chapman*, 6 M. & G. 792). The same thing as more briefly expressed by Patteson, J. (*Irving* v. *Manning, ubi sup.*) is thus: 'Would a prudent owner uninsured repair?' or rather, as Wilde, B. said (*Grainger* v. *Martin, ubi sup.*), 'Would he sell unrepaired?'"

On the same subject Blackburn, J. thus expresses himself in *Kemp* v. *Halliday* (*ubi sup.*): "The question whether it is practicable to save the subject-matter within the meaning of the phrase as explained by Maule, J. in *Moss* v. *Smith* (*ubi sup.*) has been differently left to the jury. In *Gardner* v. *Salvador* (1 Moo. & R. 116) Bayley, B. left it to the jury to say whether by means within the reach of the captain, which he could reasonably use, the ship could be saved. The mode of putting the question generally adopted has been to ask whether a prudent uninsured owner would have done it. In *Rosetto* v. *Gurney* (11 C. B. 176) the court, approving of what has been said by Maule, J. in *Moss* v. *Smith* (*ubi sup.*), state the rule thus: 'If the damage is repairable, the loss is total or partial according to circumstances. If the damage cannot be repaired without laying out more money than the thing is worth, the reparation is impracticable, and therefore, as between the underwriters and the assured, impossible.' The three modes of expression all seem to me to convey the same idea. No means which would cost more than the object is worth can be considered reasonable, and a prudent uninsured owner would not adopt them. But if the means within his reach would cost less than the object is worth, a prudent uninsured owner would adopt them rather than suffer the thing to perish; though a prudent insured owner, especially if insured in a valued policy, would probably act otherwise if the law permitted him by doing so to recover from the underwriters for a total loss." A few lines further on he continues: "In considering whether it was reasonable to raise the ship and cargo in the present case, I think that every circumstance tending to increase or diminish the necessary outlay, and every circumstance tending to increase or diminish the benefit to be derived from that outlay ought to be taken into account; and amongst those the fact that cargo would be saved by the operation and would contribute to the expense seems to me a very important element." As appears then from the passages cited, the test usually applied at that time (1865) was what would a prudent uninsured owner do in the circumstances, and the same test has continued to be applied ever since, and was approved by the House of Lords as lately as 1898 in *Sailing Ship Blairmore Company* v. *Macredie* (*ubi sup.*).

First, then, dealing with the specific issue raised on this appeal, apart from authority, what part, if any, ought the break-up value of the hull to have as a factor in the calculation of the cost of turning the wreck into a navigable ship as compared with the value of the ship when so made navigable? Suppose that the owner, finding himself in possession of a ship which, as the result of a sea peril, can be sold only at a break-up price, sells it, and suppose that the purchaser elects to try the experiment of repairing her, and then reckons up the cost at which he has completed the whole operation. Obviously he would have to count the cost at which he had bought the wreck. Why is not the owner in the like position if, instead of selling the wreck, he has applied the materials to be used in bringing into existence a navigable ship? He owned materials which had a certain saleable value, and he was free to dispose of them as he chose; instead of realising their value he has utilised them in the process of turning the wreck into a navigable ship. Why is the saleable value of those materials not equally a factor in the calculation of the cost at which he brought into being a navigable ship? It seems to me that no prudent uninsured owner could be expected to leave out of his calculation the realisable value of the wreck. The above reasoning assumes throughout that only the break-up value of the wreck can be introduced into the calculation.

Lord Campbell so treats it in *Fleming* v. *Smith* (*ubi sup.*) when he says: "If a prudent person uninsured would not have repaired the vessel, but would have sold it to be broken up, that amounts to a total loss." To assume that the wreck has a saleable value as a ship would be to accept a hypothesis inconsistent with the assumption on which a constructive total loss is based, for the existence of such a market value is inconsistent with the hypothesis

that no prudent uninsured owner would repair, since we cannot assume that purchasers are less prudent than the hypothetical uninsured owner; and, since they are prepared to give more than a break-up price for the wreck, it may be presumed that it is because they see their way to making it navigable at a cost which it will be worth their while to incur. These being the general considerations underlying the case, it remains to consider the state of the authorities when *Angel* v. *Merchants' Marine Insuranee Company* (*ubi sup.*) was decided. There are very few instances in which the precise point which has been raised here is discussed. The most important is the case of *Young* v. *Turing* (*ubi sup.*), which contains a clear expression of opinion directly in point. There, on a claim as for a total loss, Tindal, C.J., who tried the case, in summing up told the jury that in considering whether the loss was partial or total they ought to look at "all the circumstances attending the ship," and to judge whether under all those circumstances a prudent owner, if uninsured, would have declined to repair the ship. It was proved that the ship as she lay "to sell for the purpose of being broken up" was worth 700*l.* On a bill of exceptions to this direction Lord Abinger, C.B., in delivering the unanimous judgment of the Court of Exchequer Chamber, thus expressed himself: "The Lord Chief Justice has laid down the usual and recognised rule, that the jury ought to consider whether, under all the circumstances attending the ship, a prudent owner, if uninsured, would have repaired the vessel. Now, to the value of the repairs must be added her value as she lay in the dock; that is to say, to 4615*l.*"—the estimated cost of the repairs—"must be added 700*l.*, making 5315*l.* as the cost"—that is to say, the cost of the repairs. He therefore clearly treats the break-up value of the wreck as one of the factors to be reckoned in the estimated cost of reparation by the uninsured owner. This weighty utterance was put aside in *Angel's* case as a mere dictum of Lord Abinger, and the same view was pressed upon us here. But whether it be a dictum or a decision, it has the authority, not of Lord Abinger alone, but of the Exchequer Chamber, which must have consisted of at least five, and probably of seven, judges drawn from the Courts of Queen's Bench and Exchequer, not to mention Tindal, C.J., whose direction was upheld. Their names do not appear in the report. But is it fair to say that this pronouncement in its context was merely an *obiter dictum?* I think not. The learned Chief Baron has begun by overruling the first exception, which complained of the direction that the value of the policy was immaterial and might be disregarded. He then addresses himself to what, later on, he describes as the "substantial fact"—that is, that "her value when repaired is less than the cost." It is in the process of ascertaining this fact that he addresses himself at the outset to sifting the evidence as to the cost of repairs in view of the direction of the Chief Justice which was excepted to, that the jury should take into their consideration "all the circumstances that affected the ship," and that evidence as to the break-up value of the ship was before them, as to which, apparently, there was no conflict. It must be remembered that the cost of repairs was not an agreed figure, but had been put variously by the English witnesses as 3530*l.* and 4615*l.*, as the learned Chief Baron points out. On the other hand, the value of the ship when repaired was not an agreed figure, though the Dutch witnesses had put it at 2915*l.* The English evidence did not fix a definite sum, but put it that if the ship could have got a British register it would have been worth more than the repairs. The jury had given a general verdict, not ascertaining the figures, and the contention of the defendants that the loss was partial only rendered an examination of the figures on either side of the account desirable. It seems to me impossible, in these circumstances, to say that the break-up value of the wreck was immaterial to the calculation. Clearly the learned judges who agreed in the judgment must have regarded it as material to the decision, and so likewise must the counsel in the case who caused the figure to be set out in the bill of exceptions. The decision as to the effect of the value being named in the policy was affirmed in the House of Lords in *Irving* v. *Manning* (*ubi sup.*), and the test there applied of the prudent uninsured owner was approved. No adverse comment seems to have come from any source upon the passage here in question. If any such criticism had been made or thought applicable, it is very strange that in the unanimous opinion of the advising judges, said to have been prepared by Parke, B., where the test question is restated, having the expressions used in the judgment in *Young* v. *Turing* necessarily and specially before them, they should not have drawn attention to the flaw, if such they deemed it, in the statement of what factors should be taken into consideration on the question "what a prudent uninsured owner would have done in the state in which the vessel was placed by the perils insured against."

There are two other important expressions of judicial opinion directly in point—namely, that of Martin, B. in advising the House of Lords in *Rankin* v. *Potter* (*ubi sup.*), and that of Bramwell, B. on the same occasion. Both these statements are important, not merely as expressions of opinion by specially competent authorities, but as evidence of what was regarded as settled law at that time. They state the proposition, which is that involved in this case, as though it stood outside controversy, needing no argument or exposition, and they might well do so, as the law laid down on this subject in *Young* v. *Turing* had, so far as appears, never been judicially questioned up to that time. Nor is it fair in this case either to dismiss these statements as mere *obiter dicta.* It is true that the learned judges were only advising the House, and not deciding the question before it, but it was essential to their argument to establish a total loss of the ship as bringing about a total loss of the freight, as to which the question of abandonment was raised for decision in the House of Lords, and on the figures quoted the proposition affirmed was vital to their conclusion. I do not think it necessary to refer to the observations of Lord Blackburn in *Aitchison* v. *Lohre* (*ubi sup.*), on which both sides relied equally, but they do not appear to me to form a safe ground for an inference either way. Since then, and before the decision of *Angel's* case in 1903, Barnes, J. in *The Thornhill* (not reported) and in *Marten* v. *Sydney Lloyd's* (*ubi sup.*) and Phillimore, J. in *Beaver Line* v. *London and Provincial Marine Insurance Company* (*ubi*

sup.) and Walton, J. in *Wild Rose Steamship Company* v. *Jupe* (*ubi sup.*) have expressed opinions in favour of the contention of the appellants in this case: (see Arnould on Marine Insurance, 7th edit., p. 1268). An attempt was made in the argument to suggest that the judgment of Maule, J. in *Moss* v. *Smith* (*ubi sup.*) had somehow altered the law as received up to that time, and that the test of what the prudent uninsured owner would do was no longer applicable since that decision, but this contention is quite inconsistent with the opinion of Blackburn, J. in *Kemp* v. *Halliday* to which I have already referred, as well as with a series of later authorities in which the old test has been treated as still applicable. Neither does there seem to be any force in the observation of Mathew, L.J. that the increased facilities of communication in more modern times have made the test no longer applicable. No doubt the prudent uninsured owner now has probably more complete information at his disposal than he might have had formerly, but it is difficult to see what possible bearing this fact can have upon the principle involved. The more complete the information at his disposal the more accurate is his decision likely to be. No case has been cited before *Angel's* case which in terms threw any doubt upon the proposition affirmed in *Young* v. *Turing* and in the other judicial opinions above cited, and the fact is that on investigation it will be found that the attack upon them rests not on any judicial pronouncement with respect to them, but upon the views put forward in Mr. McArthur's book on Marine Insurance, first published in 1885. These views have been adopted by the editors of the seventh edition of Arnould on Marine Insurance, and found favour with the learned judges who formed the majority in *Angel's* case. The works of average adjusters are no doubt sometimes referred to in cases of this class, but Mr. McArthur's views are not, apparently, universally accepted by average adjusters, and, as he himself admits, are strongly opposed by an authority among them no less eminent than himself, Mr. Lowndes, in his work on Marine Insurance, as well as by Mr. Gow: (see McArthur, 2nd edit. 1890, p. 149, note *g*; Lowndes, 2nd edit., s. 135; Gow on Marine Insurance, 2nd edit., p. 150, note). It is to be noted that Mr. McArthur himself, as well as Mr. Lowndes, treat *Young* v. *Turing* as a decision on the point. His chief arguments against the rule contended for are: (1) That it might apply where the ship as it stood could be sold for more than the break-up value, an hypothesis which is excluded, as has already been pointed out, by the terms of the rule itself; (2) the analogy of the practice in cases of constructive total loss of cargo. But, as pointed out by Mr. Scrutton in argument, and by Mr. Lowndes in his book (2nd edit., sect. 133, note), the analogy between ship and cargo cannot for special reasons be made good. It remains to consider the passage inserted by the present editors in the seventh edition of Arnould on Marine Insurance (see sect. 1124). This is really an expansion of Mr. McArthur's view, but they are undoubtedly the originators of the notion that the passage cited from *Young* v. *Turing* was "a dictum of Lord Abinger."

But underlying the whole position is the fallacy that where in the statement of the uninsured owner test the break-up value of the ship is not expressly mentioned it must be deemed to be excluded. In this way they claim as authorities in their favour every case in which the proposition is stated in general terms, as, for instance, where Lord Watson, whom they quote, says, in *Sailing Ship Blairmore Company* v. *Macredie* (*ubi sup.*), "in order to instruct a total constructive loss . . . it must be shown that a shipowner of ordinary prudence and uninsured would not have gone to the expense of raising and repairing the vessel, but would have left her at the bottom of the sea, because her market value when raised and repaired would probably be less than the cost of restoration and repair." They treat this as an authority inconsistent with the so-called dictum in *Young* v. *Turing*. But what is there in the language there used to exclude the break-up value of the hull as a factor in the "cost of reparation and repair," to the carrying out of which it is by hypothesis applied? They likewise treat as an authority in their favour the direction of Tindal, C.J. in *Benson* v. *Chapman* (*ubi sup.*) that "where the damage to the ship is so great from the perils insured against as that the owner cannot put her in a state of repair necessary for the pursuing of the voyage insured except at an expense greater than the value of the ship, he is not bound to incur that expense, but is at liberty to abandon, and treat the loss as a total loss." We are dealing, be it observed, with an owner deemed to be uninsured, whose vessel, which has never ceased to be his property, is lying at the bottom of the sea. She is a necessary factor in the formation of the repaired ship which it is proposed to bring into being; at whose cost, it may be asked, except that of her owner is she contributed to the new entity which is to be formed by the process of reparation?

It seems to me that the direction of Tindal, C.J., so far from asserting that the value of a necessary factor in the reparation is to be excluded from the computation of the cost of that operation, throws the onus of making it good upon those who contend for such an inference. It is perhaps worth noting that, though the last edition of Arnould for which he was himself responsible was published as late as 1857, that is more than fifteen years after *Young* v. *Turing* was decided, the decision remained unquestioned in that work through all editions up to the seventh, the first by the present editors, published sixty years after the case was decided. May it not be possible that "the misconception which has," according to these learned editors, "been allowed to find its way into the minds of more than one of our learned judges," and is "partly due to an *obiter dictum* of Lord Abinger," may in truth have found its way elsewhere? With regard to the decision in *Angel's* case I should perhaps add one word. Though Vaughan Williams, L.J. did not formally differ, it was because he thought that the facts were not sufficiently ascertained to warrant him in differing from the learned judge in the court below. But the whole train of reasoning in his judgment is directed to combating the proposition for which the respondents in this case contend. Stirling, L.J. seems also to have felt some misgiving as to whether the question was really raised upon the facts, but no doubt, on the assumption that it was, he, as well as Mathew, L.J., answered it in favour of the

present respondents. With the greatest possible respect for these learned judges, and for the reasons which I have given, I feel compelled to differ from them. In my opinion the judgment should be for the appellants.

Judgment appealed from reversed. Respondents to pay to the appellants their costs in this House and below.

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

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

Tuesday, April 7, 1908.

(Before the LORD CHANCELLOR (Loreburn), Lords ASHBOURNE, MACNAGHTEN, ROBERTSON, ATKINSON, and COLLINS, with Nautical Assessors.)

OWNERS OF THE GUILDHALL *v.* GENERAL STEAM NAVIGATION COMPANY; THE GUILDHALL. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Collision—Steam vessels meeting in Thames——Risk of collision—Cuckold's Point—Thames By-laws 1898, *art.* 46.

By art. 46 *of the Thames By-laws* 1898, "*When two steam vessels 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.*"

Two steam vessels were meeting in the Thames in broad daylight, the tide at the time being flood. The vessel coming up the river was under a starboard helm to round Cuckold Point, and was a little to the southward of mid-channel, when those on board her saw the other vessel with her starboard side open to them about 400 *yards off and half a point on their starboard bow. The vessel coming up the river sounded two short blasts on her whistle, to which the other vessel replied with one, and ported her helm, whereupon the engines of the vessel coming up were reversed, and, although the engines of the vessel coming down were also reversed, a collision took place, the vessels meeting nearly end on.*

Held, that the vessel coming down was solely to blame for the collision, as she was not justified in porting, for if she had kept her course they would have passed clear, starboard side to starboard side, and they were not, when they first saw each other, approaching "so as to involve risk of collision," and art. 46 *of the Thames By-laws did not apply.*

Judgment of the court below reversed on the facts.

APPEAL from a judgment of the Court of Appeal (Lord Alverstone, C.J., Buckley and Kennedy, L.JJ.), sitting with nautical assessors, who had reversed a decision of Bucknill, J. sitting in the Admiralty Division with nautical assessors.

The case is reported 10 Asp. Mar. Law Cas. 585; 98 L. T. Rep. 7; (1908) 1 P. 29.

The action was brought by the General Steam Navigation Company, the owners of the steamship *Leeuwarden,* against the owners of the steamship *Guildhall* to recover damages in respect of a collision which took place in the river Thames on the 16th Dec. 1906, about midday, between the two vessels, when the *Leeuwarden* was going down and the *Guildhall* coming up the river.

The defendants, the owners of the *Guildhall,* counter-claimed for damages.

The facts appear sufficiently from the head-note above, and are fully set out in the report in the courts below.

Bucknill, J. found the *Leeuwarden* alone to blame, but this decision was reversed by the Court of Appeal, who held the *Guildhall* alone to blame.

The owners of the *Guildhall* appealed.

Laing, K.C. and *Dawson Miller,* for the appellants, argued that it was a pure question of fact for the judge at the trial. When the vessels first saw each other there was no risk of collision if each had kept her course, and the *Guildhall* acted quite rightly under the circumstances. In any case both vessels must be held to blame. The cases of *The Cleopatra* (Swabey, 135) and *The Odessa* (46 L. T. Rep. 77; 4 Asp. Mar. Law Cas. 93), which were cited in the court below, have no bearing on this case. See also

The Lady Wodehouse, 2 Times L. Rep. 252.

Butler Aspinall, K.C. and *A. D. Bateson,* for the respondents, contended that the *Leeuwarden* was not to blame, and was right in porting her helm. The vessels were approaching so as to involve risk of collision within the meaning of art. 46 of the Thames By-laws. They were nearly end on to each other, and if the *Guildhall* had obeyed the rule and ported a very little they would have passed port side to port side in perfect safety.

Laing, K.C. was heard in reply.

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

The LORD CHANCELLOR (Loreburn).—My Lords: In my opinion this appeal ought to prevail. I will not advert to the peculiar circumstance that in this case the vessel whose evidence was entirely disbelieved by the judge of first instance nevertheless prevailed in the Court of Appeal. I think that the real point is whether, when these two ships first saw one another, there was risk of collision, and accordingly, whether rule 46 applies. In my opinion there was not risk of collision, and rule 46 does not apply. I think that it was an ordinary case of two ships meeting while they were rounding a bend in the river. It seems to me that if the *Leeuwarden* had proceeded on a steady down river course, keeping a little north of the centre of the river, which was her position, and the *Guildhall* had steered the course which she actually did steer, there would have been no collision, and there was no risk of any collision. What happened was that as soon as the *Guildhall* saw the *Leeuwarden* she signalled to her that she was under a starboard helm. The *Leeuwarden* at that time had stopped her engines, and she immediately proceeded to port her helm and to go ahead. That was the manœuvre which, in my opinion, brought about the collision, for which I think that the *Leeuwarden* was solely to blame, and I cannot myself doubt that Bucknill, J. with the assessors who sat with him and saw the witnesses, heard the evidence, and observed the course of the

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

trial, had the best opportunity of forming an accurate conclusion upon this, which was simply a question of fact.

Lord Ashbourne.—My Lords: I entirely agree with the Lord Chancellor that this appeal should be allowed. I can see no difficulty, nor any suggestion of any point of law. It seems to me to be purely a question of fact. In the court of first instance Bucknill, J. appears to have tried out the case fully and fairly, giving due weight to, and dealing with, all the evidence which was adduced before him, and he arrived at a conclusion, and expressed no shadow of doubt as to its correctness. He submitted to the gentlemen who were advising him as nautical assessors certain questions which they answered without hesitation, and the answer was this, that the ship of the respondents was in fault, and was not justified in porting, and that if that had not been done there would have been no accident or catastrophe, and the ships would have proceeded in safety. Under these circumstances I do not think it necessary to say more than this, that I think that the cases should be very rare indeed—I can conceive few cases in which I would do it myself—in which an appeal should be encouraged or sanctioned on questions of fact which have been fully thought out and examined by the court of first instance, and on which opinions have been given without hesitation, after full consideration, and with full knowledge by others who were assisting the learned judge in hearing cases of this kind.

Lord Macnaghten.—My Lords: I agree.

Lord Robertson.—My Lords: I confess that I have read the judgment of Lord Alverstone, C.J. with some surprise, because he accounts for the judgment which he proceeded to reverse by the circumstance that the court had wholly disbelieved the case which the then appellants brought into court. Now, I must confess that I have the greatest difficulty in seeing how a case can survive and be given effect to by a Court of Appeal when the whole of the material evidence upon which it is based was disbelieved by the court which heard it, and that disbelief was agreed in by the court which reversed. It seems to me that the points upon which the case of the then appellants was disbelieved are essential to its success. They include, to begin with, the position of the *Guildhall*. If the position of the *Guildhall* is to be treated as an open question, it seems to me that the case goes by the board. The position of the two vessels must first be ascertained in order to know whether they were approaching one another with reasonable risk of collision; and accordingly I find in the judgments which are immediately under review sufficient ground for the reversal which your Lordship has proposed.

Lord Atkinson.—My Lords: I concur. I am clearly of opinion that when the vessels first came in sight of each other there was no risk of collision whatever; that they might have proceeded on their respective courses, and passed with perfect safety; and that the collision was brought about by a rather ill-judged and unintelligent attempt of the captain of the *Leeuwarden* to pass port side to port side notwithstanding that he had got a distinct warning from the *Guildhall* that that vessel intended to continue under a starboard helm. I therefore think that the judgment of Bucknill, J. was right and should be restored.

Lord Collins.—My Lords: I agree.

Order appealed from reversed. Decree of Bucknill, J. restored. Respondents to pay the appellants their costs here and below.

Solicitors: for the appellants, *Downing, Handcock, Middleton*, and *Lewis*, for *Bolam, Middleton*, and *Co.*, Sunderland; for the respondents, *William Batham* and *Son*.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Feb. 12, 13, *and April* 2, 1908.

(Present: The Right Hons. the Earl of Halsbury, Lords Macnaghten and Atkinson, and Sir Arthur Wilson.)

East London Harbour Board *v.* Caledonia Shipping Company; Same *v.* Colonial Fisheries Company (Consolidated Appeals). (*a*)

ON APPEAL FROM THE SUPREME COURT OF THE CAPE OF GOOD HOPE.

Authority of harbourmaster — Mooring — Negligence — Abnormal flood—Liability of harbour authority.

A harbourmaster ordered two vessels to be removed from their moorings in a river for a temporary purpose, and to be moored in a less secure position. While they were in this position an abnormal and unprecedented flood occurred, and the vessels were driven from their moorings and sustained damage. There was evidence that the vessels might have been moved back to their original position before the occurrence of the flood.

Held, that the harbourmaster acted within the scope of his authority, and that the harbour authority were liable for the damage to the vessels.

Judgment of the court below affirmed.

Consolidated appeals from a judgment of the Supreme Court of the Colony of the Cape of Good Hope, dated the 6th Sept. 1906.

The appellants (defendants in the action) were the East London Harbour Board constituted under the provisions of Act No. 36 of 1896 of the Colony of the Cape of Good Hope, and had the control and management of the harbour of East London in the colony. The respondents the Caledonia Landing, Shipping, and Salvage Company Limited, were a joint stock company incorporated at Edinburgh under the Companies Acts 1862 to 1900 and carrying on business in the colony and elsewhere, and at the time hereinafter referred to were the owners of the steamtug *Caledonia*. The respondents the Colonial Fisheries Company Limited, were a limited liability company incorporated under the Companies Act No. 25 of 1892 of the colony and having their registered office at East London, and were the owners of the wooden coal hulk *Nini*.

In the month of Oct. 1905 the *Caledonia* and the *Nini*, which were lying moored in the Buffalo River at East London, were moved from

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

their moorings and remoored alongside a Government hulk called the *Alpha*, which was herself moored ahead and astern in the river heading up stream. The removal of the vessels from their former berths and their remooring alongside the *Alpha* was carried out under the superintendence of a duly licensed pilot for the port of East London, on the instructions of the port captain, an official in the employment of the appellants, and was done for the purpose of clearing the course for the annual regatta which was about to be held at East London. The regatta was concluded by the afternoon of the 9th Oct. On the evening of the 10th Oct., owing to an abnormal and unprecedented flood or freshet which came down the river in consequence of heavy rains, the *Alpha* dragged her anchors and the *Nini* and *Caledonia* broke from their moorings, the *Nini* going ashore and suffering damage, and the *Caledonia* being driven out to sea and lost. The question to be determined in this appeal was whether the appellants, in the circumstances, were responsible to the respondents for the said damage and loss.

On the 21st May 1906 the respondents the Caledonia Landing, Shipping, and Salvage Company Limited instituted an action in the Supreme Court against the appellants as defendants claiming (1) the sum of 4000*l.* as damages sustained by reason of the wrongful and unlawful conduct and negligence of the appellants in removing from her berth and fastening improperly and without sufficient care to a certain hulk, the *Alpha*, the respondents' tug *Caledonia*, whereby the said tug broke adrift, and with her appurtenances was wholly lost; (2) interest *a tempore morae*; (3) alternative relief; and (4) costs of suit. On the same day the respondents the Colonial Fisheries Company Limited instituted an action against the appellants as defendants claiming in similar terms 345*l.* as damages for the damage and loss occasioned to the *Nini*. The appellants appeared in both actions, and duly filed their pleas in answer thereto.

The actions came on for trial before De Villiers, C.J. and Hopley, J., when evidence, both oral and documentary, relating to the matters in issue was given on behalf of the appellants and each of the respondents.

It was contended on behalf of the respondents at the trial that the *Caledonia* and *Nini* were voluntarily removed and placed alongside the *Alpha* by the appellants' servant, the port captain, acting within the scope of his authority, and that the risk of damage arising in consequence thereof fell upon the appellants; that in the circumstances the onus of proving that they were not negligent was on the appellants, who had failed to satisfy such onus. It was further contended that the vessels were moored by the appellants in an improper and negligent manner, and that the damage and loss complained of were due to such negligence.

It was contended on behalf of the appellants (*inter alia*) that there was no negligence in the manner in which the vessels were moored; that the act of the port captain in removing and remooring the vessels was outside the scope of his authority; that if the port captain had any authority in the matter, such authority was merely to order the removal of the vessels by the owners thereof, in default of which the removal would be at owners' risk, and that the removal and remooring were not in fact done by anyone acting on behalf of the appellants.

On the 6th Sept. 1906 judgment was delivered in favour of the respondents the Caledonia Landing, Shipping, and Salvage Company Limited for 3000*l.* with costs, and for the respondents the Colonial Fisheries Company Limited for 250*l.* with costs.

The learned Chief Justice found that the vessels were moored in a negligent manner; that the port captain was acting within the scope of his authority, and that the removal and remooring of the vessels was done by the servants of the appellants. He was further of opinion that the vessels ought to have been moved back to their original moorings before the night of the 10th Oct. Hopley, J. concurred in the judgment of the learned Chief Justice. He was of opinion that great blame was not attributable to the appellants' servants, since the circumstances which took place were unexpected and probably unexampled in contemporary human memory, and they had provided for an ordinary and normal state of things, but thought that to moor three vessels together in the manner adopted in a river liable to be affected by sudden freshets and floods was a negligent act liable to cause damage in the event of anything unexpected or abnormal occurring.

The appellants obtained special leave to appeal from this judgment.

Scrutton, K.C. and *Dawson Miller*, for the appellants, contended that there was no evidence of negligence on the part of the appellants or their servants, the vessels being safely moored under ordinary circumstances, and the flood which did the damage being unexpected and unprecedented. See

Nicholls v. *Marsland*, 35 L. T. Rep. 725; 2 Ex. Div. 1.

The port captain was acting outside the scope of his authority in moving the vessels, and the moving was carried out by a licensed pilot.

Sir *R. Finlay*, K.C. and *Mackarness*, for the respondents, supported the judgment of the court below.

Scrutton, K.C. was heard in reply.

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

April 2.—Their Lordships' judgment was delivered by

The Earl of HALSBURY.—These are consolidated appeals from a judgment of the Supreme Court of the Colony of the Cape of Good Hope. The appellants are the East London Harbour Board, constituted under the Act No. 36 of 1896 of the colony, and have the control and management of the harbour of East London. The respondents in the first appeal are the owners of the steam-tug *Caledonia*; the other respondents are the owners of a coal hulk called the *Nini*. There were originally two actions. The action by the owners of the *Caledonia* was an action claiming 4000*l.* as damages sustained by reason of the alleged negligence of the appellants in removing from her berth and fastening improperly the *Caledonia* to a certain hulk called the *Alpha*, whereby the tug broke adrift and was

lost. The owners of the *Nini* also brought an action, claiming 345*l.* for the damage occasioned to that vessel. By consent the actions were consolidated and heard together. The action was tried before De Villiers, C.J. and Hopley, J. in the months of Aug. and Sept. 1906. It appeared that the steam-tug *Caledonia* was sent by her owners to be laid up at East London on the 30th Aug. 1905, and the *Nini*, a wooden hulk used for coals, was moored to the satisfaction of the harbour authorities somewhat lower down the river than the *Caledonia*. There is no dispute that these two vessels were properly and securely moored in their original positions, but by the authority of the harbourmaster or port captain, as he is sometimes called, they were removed from their original positions, and (as is found by the Chief Justice and assented to by Hopley, J.) they were not properly or securely moored in their new positions. They were moved in order to make a clear course for a regatta which was to be held on the 9th Oct. In view of the temporary purpose for which the removal took place, less attention seems to have been paid to the moorings than if it had been intended to moor them permanently. The regatta took place. It was over at 4.15 on the afternoon of Monday, the 9th. It is found as a fact by the court below that there would have been time to restore the *Caledonia* to her original moorings on this day, but neither then nor on the 10th were any steps taken to remove either of the vessels to her original moorings. At about 9.30 on the night of the 10th Oct. an extraordinary freshet occurred. The *Caledonia* was driven out to sea at about 3.30 on the morning of the 11th, with her caretaker on board, and was never seen again. The *Nini* was sunk on the west bank of the river. Upon the question of fact, the court below finds that the two vessels were lost by reason of the negligence of the harbour board officials. Their Lordships entirely concur with that finding.

It would be difficult for them to differ upon such a question of fact as is here involved from the learned judges who saw and heard the witnesses—an advantage which their Lordships, of course, have not had. The responsibility of the defendants for the acts of their officers is hardly susceptible of argument. It would be perilous to navigation in any port, if the authority of the port captain or harbourmaster could be questioned. In more than one case it has been pointed out how dangerous a principle would be involved if such a question as the place of mooring or the method of mooring were not, in the first instance at all events, absolutely within his authority: (*Reney* v. *Magistrates of Kirkcudbright*, 7 Asp. Mar. Law Cas. 221; 67 L. T. Rep. 474; (1892) A. C. 264). Their Lordships do not disagree with the reasoning of the Chief Justice, or with the view that a regatta was a legitimate use of the river. The motive of the harbourmaster in ordering the shifting of the berths of the two vessels certainly does not make his act one outside the scope of his employment. The defence attempted to the action that the moving and the re-mooring were done under the orders of a competent pilot, one Barrie, and were part of his duties as done under the compulsory pilotage provisions of the 87th section of the Act No. 36 of 1896, is sufficiently answered by the fact that Barrie neither professed to act, nor, as a fact, did act, as a pilot at all. That he was a pilot was an accident. He was in the regular employment of the board, and was simply acting as their servant in what he did. The most plausible defence was the extraordinary and unusual flood which occasioned the accident. But the circumstance that the vessels were moved from a much less dangerous position, and the fact that insufficient precautions were taken, while there was yet time (as both the learned judges find) to make better provision for their safety, notwithstanding the warnings given by the state of the weather and the gradual increase of the flood, are fatal to such a defence. Their Lordships will therefore humbly recommend His Majesty to dismiss the appeals. The appellants will pay the costs.

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

Solicitors for the respondents, *Boxall* and *Boxall*.

Feb. 14, 24, *and April* 2, 1908.

(Present: The Right Hons. the Earl of HALSBURY, Lords MACNAGHTEN and ATKINSON, and Sir ARTHUR WILSON.)

HOULDER BROTHERS AND CO. *v.* COMMISSIONER OF PUBLIC WORKS; COMMISSIONER OF PUBLIC WORKS *v.* HOULDER BROTHERS AND CO. (Consolidated Appeals). (*a*)

ON APPEAL FROM THE SUPREME COURT OF THE CAPE OF GOOD HOPE.

Contract — Demurrage — Charter-party rate — Breach of contract — Damages — C.i.f. contract.

There is no rule of law that a vendor in a c.i.f. contract may not secure for himself a profit under a demurrage clause.

A firm agreed to supply a large quantity of coal at a fixed price per ton c.i.f. "on monthly shipments for six months," delivery to be accepted immediately on arrival "at the rate of 120 *tons per day for sailers and* 250 *tons per day for steamers, or the authorities to be liable for demurrage at 4d. per net registered ton per day for sailers, and 6d. per net registered ton per day for steamers." The firm chartered various ships in order to enable them to fulfil their contract. The rates of demurrage in the charter-parties were in some cases lower than those specified in the contract:*

Held (reversing the judgment of the court below), that in the case of ships detained upon demurrage the consignee was liable to pay demurrage in conformity with the provisions of the contract irrespective of the terms of any charter-party into which the firm had entered.

The coals were not delivered in equal monthly instalments, but very irregularly:

Held (affirming the judgment of the court below), that the irregular deliveries of certain cargoes did not preclude the firm from recovering demurrage for the detention of the ships carrying those cargoes, the coals having been accepted by the consignee. The consignee's remedy, if any, would be damages for breach of contract.

CONSOLIDATED cross-appeals from a judgment (Nov. 27, 1906) of the Supreme Court of the

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

Colony of the Cape of Good Hope (De Villiers, C.J., Maasdorp and Hopley, JJ.) varying a judgment of Buchanan, J. at the trial.

The action was brought by Houlder Brothers and Co. Limited against the Commissioner of Public Works, as representing the Colonial Government, to recover demurrage in respect of eight sailing vessels chartered by the plaintiffs to carry coal to Table Bay for the Colonial Government.

The facts appear sufficiently from the headnote above, and from the judgment of their Lordships.

J. A. Hamilton, K.C., *Bailhache*, K.C., and *G. Hay Morgan* appeared for Houlder Brothers.

Sir *Robert Finlay*, K.C., *Scrutton*, K.C., and *D. C. Leck* for the Commissioner of Public Works.

Tregelles v. *Sewell* (7 H. & N. 574); *Ireland* v. *Livingston* (1 Asp. Mar. Law Cas. 389 (1871); 27 L. T. Rep. 79; L. Rep. 5 H. L. 395); *Dupont* v. *British South Africa Company* (18 Times L. Rep. 24) were referred to in the course of the argument; also a judgment of the Court of Appeal in England (Lord Alverstone, C.J., Buckley and Kennedy, L.JJ.) in an action arising out of the same contract (*Smartt* v. *Houlder Brothers and Co.*, Nov. 21, 1907, not reported); also *Nelson* v. *Nelson Line Limited* (10 Asp. Mar. Law Cas. 544).

J. A. Hamilton, K.C. was heard in reply.

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

April 2. — Their Lordships' judgment was delivered by

Lord ATKINSON.—In these consolidated appeals from a judgment of the Supreme Court of the Cape of Good Hope, sitting as a Court of Appeal, dated the 27th Nov. 1906, varying, as therein appears, the judgment of Buchanan, J., dated the 1st March 1906, two questions are raised for decision, namely, (1) whether Houlder Brothers and Co. Limited (who will be referred to as the appellants) are entitled to demurrage upon certain sailing ships chartered by them to fulfil a contract made by them with the Commissioner of Public Works (who will be referred to as the respondent) for the sale and delivery of coal to the respondent at Cape Town, and, if so, upon what principle such demurrage is to be calculated; and (2) what (if anything) ought to be allowed to the respondent in reduction of demurrage, or by way of damages, by reason of the arrival at Cape Town of several of these ships within the same month at intervals of only a few days. The decision of the first question turns wholly, that of the second question mainly, upon the construction of the contract in writing into which the parties entered. That contract is contained in the appellants' letter to the respondent, dated the 7th Aug. 1901, accepted by the respondent by letter of the next day. The former letter is in the terms following:

> London, 7th Aug. 1901.—To the Agent-General for the Cape of Good Hope, 100, Victoria-street, Westminster.—Requisition, Cape Town, 7685.—Requisition, Algoa Bay 7686.—Sir,—We have the honour to acknowledge the receipt of your favour of the 2nd inst., inclosing us copy of cable received by you from the Hon. the Commissioner of Public Works, in which our terms and prices as cabled out by you for the supply of coal has been accepted. You ask us for a copy of a tender, evidently under a misapprehension, as the only offer we made was the cable just referred to; and, although that was for a twelve months' supply at the rate named, we are willing to accept in our turn six months' supply, on the following detailed terms: (1) That we are to supply 54,000 tons of Welsh coal for Cape Town at 1*l.* 16*s.* 5*d.* per ton c.i.f. and 60,000 tons for Port Elizabeth at 1*l.* 17*s.* 5*d.* per ton c.i.f. on monthly shipments for six months, such shipments to commence to Cape Town in Feb. 1902, and to Port Elizabeth in Oct. 1901. (2) That the railway authorities are to accept delivery immediately on arrival in Table and Algoa Bay respectively, at the rate of 120 tons per day for sailers, and 250 tons per day by steamers, or the authorities to be liable for demurrage at 4*d.* per net registered ton per day for sailers and 6*d.* per net registered ton per day for steamers. (3) Payment to be made two-thirds in cash by you within seven days of the receipt of policies, &c., and the remainder within seven days after the production of the certificate as to delivery. (4) In the event of this country being at war, other than with the Transvaal, or other causes, including strikes, beyond our control, our liability to cease. We would thank you to kindly confirm this at your convenience, meantime we are purchasing the coal and making early arrangements for the commencement of the shipments to Algoa Bay in October.—We are, Sir, your obedient servants, HOULDER BROTHERS AND CO. LIMITED, T. P. W. FORRESTER, Managing Director.

The coal to be delivered at Cape Town under this contract was despatched in eighteen sailing vessels which arrived at Table Bay in the months of May, June, July, August, October, and December 1902 respectively, with cargoes varying in weight from 4280 to 2006 tons. The quantity arriving in each of these several months was in tons as follows: May, 2944; June, 10,072; July, 9865; August, 22,496; October, 7409; December, 2006. The respondent, or those acting on his behalf, accepted delivery of these cargoes, though they complained of the inequality of the monthly supplies.

The appellants claimed demurrage amounting to 10,788*l.* 14*s.* 4*d.* in respect of eight of these ships, one of which sailed on the 31st May and the seven others at different dates in the month of June 1902. The three vessels which sailed on the 31st May and the 1st June arrived at Cape Town in the last week of the month of July, and the five others at different dates between the 16th and 27th Aug. following, both inclusive. The cargoes of these eight ships amounted in the aggregate to 26,380 tons, and if their rate of discharge be measured by the terms of the contract, as the appellants contend that it should be, they were each detained upon demurrage for a certain number of days, varying from twenty-nine to fifty-three. If the demurrage in respect of this detention be calculated at 4*d.* per registered ton per day (as provided in the contract) it amounts, on the registered tonnage of the eight vessels, to the sum sued for. The appellants admit that this sum exceeds the sum recoverable, under the several charter-parties into which they have entered, for demurrage in respect to these eight ships, but they claim a right to recover it on the ground that each of these several instruments is, as between themselves and the respondent, *res inter alios acta*; that the respondent has no concern with it and no rights under it and that the mutual

rights and obligations of the respondent and themselves are to be regulated by the terms of the agreement into which they have entered, and by these alone. The respondent, on the other hand, now contends that he is, as regards chartered ships, only liable to pay the amount of demurrage due under the terms of the several charter-parties, that the agreement of the 7th Aug. 1901 is, as respects demurrage, only an indemnity contract (as it is styled)—that is to say, that it fixes a maximum for anything beyond which he cannot be made liable—and that it is to be construed, in effect, in regard to all chartered ships, as if certain words had been written into it, and its second clause had run somewhat thus: "That the railway authorities are to accept delivery immediately on arrival in Table and Algoa Bay respectively at the rate mentioned in the charter-party, under which any ship may be chartered to carry said coals, not to exceed 120 tons per day for sailers and 250 tons per day by steamers, or the authorities to be liable for demurrage at the rate mentioned in such charter-party, not to exceed 4*d.* per net registered ton per day for sailers and 6*d.* per net registered ton per day for steamers," so that, in the result, the appellants could never make anything under this demurrage clause, but might lose much. This contention is an afterthought on the respondent's part.

Up to the commencement of this action the construction, now insisted upon by the appellants, not only of the contract sued upon but of several similar c.i.f. contracts earlier in date, was in letter after letter expressly admitted by the respondent to be their true construction. The point now relied upon was not specifically raised in the pleadings, nor dealt with by the trial judge, though it was stated by counsel at the hearing of the appeal in the colony to have been mentioned to him. The plea filed by the respondent was not that the contract sued upon was an indemnity contract, in force up to the last, whose function it was to fix the maximum limit of his liability, but a kind of plea of novation, to the effect that by the indorsement and delivery to him of the eight bills of lading for the cargoes of these ships, only three of which documents, however, incorporated the conditions of the charter-parties, he (the respondent) became bound by the obligations the several charter-parties imposed as to the rate of discharge of the chartered ships, and as to the demurrage to be claimed in respect of them, but freed and discharged from the obligations imposed by the contract sued on in respect of these very same matters. Both the colonial courts held, in their Lordships' opinion rightly, that this plea could not be sustained, and in the argument of these appeals nothing was urged in defence of it. Indeed, on the facts and documents proved in evidence it is clear to demonstation, whatever may be its effect, that in order to construe the contract of the 7th Aug. 1901 as an indemnity contract in the manner suggested, it is necessary to attribute to the parties to it an intention which, neither before nor at the time at which they entered into it, did they in fact entertain—an intention, moreover, which at all times down to the trial of the action they both, in effect, repeatedly disclaimed. There is no doubt that the construction of a contract cannot be affected by the declarations of the parties made subsequent to its date, as to its nature or effect, or as to their intention in entering into it. But it is equally true that, where the words of the contract are ambiguous, the acts, conduct, and course of dealing of the parties before, and at the time at which they entered into it may be looked at to ascertain what was in their contemplation, the sense in which they used the language which they employ, and the intention which their words in that sense reveal. It is therefore necessary to consider what the action and course of dealing of the parties in this case was. The appellants had for a length of time, in the course of their business, sold and delivered to the respondent at Cape Town and other ports in the colony large quantities of coal, and up to the outbreak of the war in the Transvaal the appellants were bound to discharge this coal into railway trucks, or on the quays of the particular ports. This obligation, of course, made them liable for any demurrage to which the owners of the chartered ships which carried the coal might be entitled, in respect of their detention. With the outbreak of the war everything was changed. It was seen that it might cause freights, rates of insurance, and demurrage to rise. Crowding at the South African ports, which was almost certain to occur, might render prolonged detention of vessels bound there very probable. To meet this altered state of things, the parties (as was but natural) entered into special contracts in writing, nine in number, all c.i.f. contracts of the same general character, and all given in evidence at the trial. The first of these is dated the 29th Aug. 1900, the last the 22nd Sept. 1902. Under these contracts, considerably more than half a million tons of coal were contracted to be sold and delivered to the respondent at different ports in Cape Colony. In the first three the demurrage clauses are practically identical. They provide for the rate of discharge, and therefore for the number of lay days, but apparently not for the charge to be made per registered ton per day, and end with the words, much relied upon by the respondent, "failing which, demurrage to be for and on account of the Cape Government Railways." In the fifth contract, dated the 5th July 1901, the clause regulates the rate of discharge, but, like the first three, does not fix the charge per ton, and the words above quoted are omitted, while the fourth, dated the 20th June 1901, the sixth (which is the contract sued upon), and the seventh, eighth, and ninth fix, by reference to the rate of discharge, both the number of lay days and the charge per registered ton per day, the seventh containing also in this connection the words "for account of railway." It appears from the correspondence which took place between the parties in reference, both to the making of these several contracts and to their fulfilment, that questions were raised as to whether the liabilities of the respondent should be regulated by the provisions of his own contract, or by those of the different charter-parties into which the appellants had entered, for the hire of the ships employed. The contention put forward by the appellants now was as distinctly and expressly put forward then, and as distinctly and expressly admitted by the respondent to be just and sound. This fact was not controverted in argument before their Lordships, and it is therefore unnecessary to quote

the letters at length. And not only is this so, but from first to last the course of action pursued by them was consistent with the appellants' present contention, and inconsistent with the respondent's. The charter-parties were never given, or shown, to him by the appellants. He never asked to see them, or inquired as to their contents, but accepted as a grace, and with expressions of gratitude, what he now demands as a right. He never paid freight or demurrage to the shipowners, or entered into any correspondence or negotiations with them in reference to either of these matters. Everything was settled between the appellants and respondent without the intervention of third parties representing the shipowners. The conduct of both parties in reference to the contracts earlier in date than that of the 7th Aug. 1901, but similar in character, would certainly appear to be explicable only on the assumption, that they considered that their respective rights and obligations were measured and determined by those instruments, to the exclusion of all others. It appears, therefore, to their Lordships, having regard to all that passed before the 7th Aug. 1901, to be impossible to contend that the contract of that date was not entered into by the parties to it in the belief, and with the intention, common to both of them, that the respondent would be bound by it to pay demurrage in conformity with its provisions, irrespective of the terms of any charter-party into which the appellants might enter. But though the appellants throughout these transactions persistently insisted, to the full, on their legal rights, were profuse in the expressions of a desire to treat the respondent liberally, and only claim from him, in respect of demurrage, the sums which they themselves had paid, or were under the charter-parties liable to pay, they, apparently, managed to reconcile their generosity with their self-interest, by overstating the amounts, and thus making a handsome profit out of the transaction. After the present action had been instituted, the respondent sued the appellants, in England, to recover the sums so overcharged, not on the ground that he had been induced to part with his money by the false and fraudulent representations of the appellants, nor yet (as he might have done if his present contention be well founded) on the ground that he was only liable for demurrage to the amounts claimable under the charter-parties, but on the ground that he (the respondent) had paid the larger sums in ignorance of the fact that they exceeded the amounts represented by the appellants to be payable by them to the shipowner under the charter-parties.

The case was tried before Channell, J., who, apparently, decided that the present respondent was entitled to recover the overplus thus paid by him, up to the month of Sept. 1901, but that, as it appeared upon the evidence that he had then notice of the fact that the appellants were obtaining from him more than they paid themselves, he could not recover anything in respect of payments made after that day. Against this decision the present appellants appealed. The appeal was heard before Lord Alverstone, C.J., and Buckley and Kennedy, L.JJ., their judgments are relied upon by the respondent: (*Smartt* v. *Houlder Brothers and Co.*, the 21st Nov. 1907). The decision of Channell, J. was in effect upheld, and the true construction of the contract of the 29th Aug. 1900, and indeed of all the other eight contracts entered into, was held to be that contended for by the respondent in the present appeals. The Lord Chief Justice and Buckley, L.J., referred in their judgments to a letter of the 13th Sept. 1900, written by the appellants to their own agents, a fortnight after the date of the first contract, and appear to have attached importance to it, as indicating what was the intention of the appellants in entering into this, and the subsequent contracts. Whatever be the true meaning and construction of this letter, and whatever its value, it has not been given in evidence in the present case, and their Lordships cannot, therefore, allow their decision to be in any way influenced by its contents. It is conceded—and was apparently held by the Court of Appeal in this country—that if the appellants had employed their own ships, or if they had taken up ships which they had chartered under time charters, they would under these c.i.f. contracts have been carriers as well as vendors, and their rights to demurrage would have been regulated by the terms of the written contracts into which they had entered. But it is urged that the nature of these c.i.f. contracts is such, that the vendor, *primâ facie*, charters a ship for a voyage to carry the goods sold, as agent for the vendee; that by the transfer of the bill of lading to the latter, whether it incorporates the conditions of the charter-party or not, or by the receipt of the cargo, the vendor makes his principal (the vendee) a party to the obligations of the charter-party, whether the charter-party be made known to, or be delivered to, the vendee or not; that the word "demurrage" when used in the contract sued upon can only mean the demurrage for which the vendee as transferee of the bill of lading, or receiver of the goods shipped, so became liable; and that the agent cannot make a profit out of a demurrage clause such as that contained in this agreement, though if it amounted to a contract of indemnity, as it was held it did, he might sustain a considerable loss. The learned Chief Justice of the Supreme Court in his judgment sums up the argument in favour of the construction of the contract sued upon, in the following sentence: "The more reasonable construction of the contract would, in my opinion, be to confine the defendant's liability for demurrage to the amounts payable by the plaintiffs themselves, not exceeding 4*d.* per net registered ton. The price fixed in the contract was to cover cost, insurance, and freight, and whatever rate of liability the plaintiffs might incur for demurrage, the defendant was not to be liable for more than 4*d.* per ton per day." The Lord Chief Justice of England deals with contracts such as that sued on in the following passage: "I think that under the later contracts as under the earlier contracts they were cost, freight, and insurance contracts; they did contain obligations which the vendor could enforce against the purchaser to take at a certain rate, and that if damage was caused to the vendor by the cargo not being taken out at that certain rate, they were to pay damage calculated on the basis of 6*d.* and 4*d.*"

According to this passage it would appear that the rate of discharge mentioned in the contract and therefore the number of lay days, bind the consignee, even though that rate exceeds the rate mentioned in the charter-party, and the number

of lay days thus fixed by the latter exceed the number fixed by the former. It was apparently found impossible to strike the provision as to the rate of discharge out of the contract altogether, though why this should not be done, if the charter-party alone is to bind the consignee on this question of demurrage, is not clear. It is, moreover, difficult to see how the principle here laid down would work in practice. For instance, suppose a sailing ship, carrying a cargo of 1200 tons of coal under this contract, were by the charter-party bound to discharge at the rate of 100 tons a day or pay demurrage at the rate of 3*d.* per registered ton per day. Under the contract she would have but ten days to discharge, as she was obliged to discharge at the rate of 120 tons per day; under her charter-party twelve days. Assume that she is detained in unloading for fourteen days. Damage would thereby be caused to the vendors, but are they to receive demurrage for two days or for four? If the former, then the clause as to the rate of discharge is in effect struck out of their contract. And again, is the rate to be 3*d.* or 4*d.* per ton per day? If the former, then the damages are not calculated at the rate of 4*d.* a day, as it is laid down that they should be, and, if the latter, then the charter-party is superseded. The transferee of a bill of lading containing no provision touching demurrage, like five out of the eight given in evidence in this case, no doubt becomes liable for damages in the nature of demurrage if he should detain a ship beyond a reasonable time, but he is not, by reason of being such transferee, bound by the special provisions of a charter-party unless they are in some way incorporated in the bills of lading. It is clear from the judgment of Blackburn, J. in *Ireland* v. *Livingston* (*ubi sup.*) that where the consignor of goods under a c.i.f. contract executes an order received by him from another, he is, though a vendor, at the same time an agent, bound, for reward, to obtain the goods at the best price that he reasonably can, and have them insured, carried, and delivered to his principal on the best terms that he reasonably can. But where no commission is charged, the vendor takes upon himself the risk of a rise or fall in the price of the goods, or of freight for their carriage, or of the rate of insurance, and there is not, as to either cost or freight or insurance, any trust or contract of agency between them. It may well be that under a normal c.i.f. contract, the vendor who charters a ship for the carriage of the goods sold, acts in so doing as the agent of the consignee, and, in the absence of any special agreements between them, is under sect. 32, sub-sect. 2 of the Sale of Goods Act 1893 bound to make a reasonable contract in that regard. But the contract sued on in this case is not a normal c.i.f. contract. Nor, as has been already pointed out, was it ever carried out by the parties to it as such contracts are and should be carried out. The fact that one-third of the price is not to be paid till the cargo has been delivered, though according to the authorities it does not prevent the property in the goods from vesting in the consignee, yet gives the consignor a direct interest in the safe carriage and delivery of the goods, and so far differentiates this contract from a normal contract. And no reason is suggested why, if the appellants acted merely as agents for the respondent in chartering these ships, they should enter into an indemnity contract subjecting them to possible loss. There is, however, no rule of law that the vendor in a c.i.f. contract may not secure for himself a profit under a demurrage clause contained in it. Neither is there any indisputable presumption of law that the parties to such a contract did not intend that he should receive such a profit. To use the words of Blackburn, J. in *The Calcutta and Burmah Steam Navigation Company* v. *De Mattos* (32 L. J. Q. B. 322), in such contracts "there is no rule of law . . . preventing the parties making any bargains they please."

And, with all respect to the learned judges sitting in the Court of Appeal in Cape Colony, as well as those sitting in the Court of Appeal in England, it does not appear to their Lordships that the words of the contract of the 7th Aug. 1901—whether they be regarded as in themselves plain and unequivocal or as ambiguous—yet explained by the action, conduct, and mode of dealing of the parties antecedent to its date, can have imported into them the qualifications already suggested, or be read subject to a condition to the like effect. So to construe this contract is, in effect, to make a new contract for the parties, which it is clear that they never up to the commencement of the litigation believed that they had made for themselves. It may well be that the contract, as interpreted by both Courts of Appeal, would be more equitable as regards the respondent than if interpreted as their Lordships think that it must be; but the answer to that is that the parties must be bound by their own words, that the language which they have chosen to employ is too precise and unequivocal, and their course of action too suggestive and uniform to permit a modification of the respondent's obligations in the direction desired. Their Lordships are therefore of opinion, that the decision on the construction of the contract appealed from by Houlder Brothers was wrong. With regard to the appeal of the Commissioner of Public Works, their Lordships are of opinion that delivery of the several cargoes of coal shipped under the contract sued on having been accepted at Cape Town, the breach of contract of which he complains does not preclude the appellants from recovering demurrage for the detention of the ships carrying those cargoes; that his only remedy is in damages for breach of contract, and that the decision appealed from on this point is right. Their Lordships will therefore humbly advise His Majesty that the appeal of Houlder Brothers and Co. Limited ought to be allowed and the appeal of the Commissioner of Public Works dismissed, that the judgment of the Supreme Court (sitting as a Court of Appeal) of the 27th Nov. 1906 ought to be discharged, and that in lieu thereof the appeal of the Commissioner of Public Works from the judgment of the Supreme Court of the 1st March 1906 ought to be dismissed with costs and the last-named judgment restored. The Commissioner of Public Works will pay the costs of these appeals.

Solicitors: for Houlder Brothers and Co., *Templer, Down,* and *Miller*; for the Commissioner of Public Works, *Herbert H. Sherriff.*

Supreme Court of Judicature.

COURT OF APPEAL.

March 4 and 5, 1908.

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

The Hagen. (*a*)

Collision in foreign waters—Negligence on foreign vessel causing collision between two British vessels—Lis alibi pendens—*Service of notice of writ out of jurisdiction—Order XI., r. 1 (g).*

A British steamship proceeding down the Elbe collided with another British and a German ship. The Hamburg agent of the British vessel coming down river exchanged letters of guarantee in lieu of bail with the owners of the German steamship, and the German ship subsequently sued the guarantors of the British ship in Germany.

The owners of the British vessel coming down stream instituted proceedings in this country in personam *against the other British vessel, and applied by summons for leave to serve notice of the writ out of the jurisdiction on the owners of the German steamship. Leave was given.*

Held, on appeal, that leave to serve notice of the writ out of the jurisdiction should not have been granted, and should be set aside, as under the circumstances it was not right to force the owners of the German steamship to appear to proceedings in this country when they had taken proceedings promptly in their own country.

Per Farwell, L.J.: The court should only exercise the power to grant such leave with caution, and, in cases of doubt, the doubt should be resolved in favour of the foreigner.

Appeal from a decision of Bargrave Deane, J. refusing to set aside an *ex parte* order made by Parker, J. giving leave to serve notice of service of a writ out of the jurisdiction.

The plaintiffs respondents on the appeal were the Great Central Railway Company, the owners of the *City of Bradford*, the defendants were the owners of the steamship *Hartley* and the Deutsche-Australische Dampfschiff-Gesellschaft, the owners of the steamship *Hagen*, who carried on business at Hamburg and were the appellants.

On the 27th Sept. 1907 the steamship *City of Bradford* bound down the river Elbe collided with the steamship *Hartley* bound up the river. The steamship *Hagen* was following the *Hartley* up the river, and the *Hartley* after colliding with the *City of Bradford* came into collision with the *Hagen*. Both collisions were alleged by the owners of the *City of Bradford* to have been caused by the negligence of the *Hagen*.

On the 30th Sept. 1907 the agent of the Great Central Railway at Hamburg and the owners of the *Hagen* exchanged letters of guarantee in lieu of bail to meet any damage which the respective vessels might have sustained.

The owners of the *City of Bradford* had given their agent no authority to do this, and did not know it had been done.

On the 30th Sept. the owners of the *Hartley* issued a writ *in rem* against the *City of Bradford* the owners of which entered an appearance.

On the 2nd Oct. the owners of the *City of Bradford* issued a writ *in personam* against the owners of the *Hartley*; on the same day the owners of the *Hartley* entered an appearance in the action, and Parker, J., sitting as Vacation judge, gave leave to serve notice of the writ on the owners of the *Hagen*.

On the 2nd Oct. legal proceedings were instituted in Hamburg by the owners of the *Hagen* against the *Hartley*.

On the 16th Nov. the owners of the *City of Bradford* pursuant to leave granted by Parker, J. served the owners of the *Hagen* in Germany with notice of the writ in the action *in personam*, and on the 26th Nov. the owners of the *Hagen* appeared under protest.

On the 6th Dec. the owners of the *Hagen* instituted proceedings against the guarantors of the *City of Bradford*.

On the 27th Jan. 1908 the owners of the *Hagen* moved the court to set aside the order obtained by the Great Central Railway Company giving leave to serve notice of the writ in the action *in personam* out of the jurisdiction.

Laing, K.C. and *A. Pritchard* appeared for the appellants, the owners of the *Hagen*, in support of the motion.

H. M. Robertson (with him *J. A. Simon*) appeared for the respondents, the owners of the *City of Bradford*.

D. Stephens held a watching brief for the owners of the *Hartley*.

Order XI., r. 1 (*g*) under which the order was made by Parker, J. is as follows:

> Service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the court or a judge whenever. . . . (*g*) Any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction.

On the 3rd Feb. judgment was delivered by Bargrave Deane, J. dismissing the motion to set aside the order made by the Vacation judge, sitting in Admiralty, that service of notice of the writ in the action *in personam* should be made out of the jurisdiction—namely, in Germany.

The owners of the *Hagen* appealed.

The appeal was heard on the 4th and 5th March 1908.

Laing, K.C. and *A. Pritchard* for the appellants the owners of the *Hagen*.—The application to Parker, J. to serve the owners of the *Hagen* in Germany with notice of the writ was made *ex parte*. The owners of the *Hagen* object to fighting the case in the English courts; they are not plaintiffs, and therefore are not under the jurisdiction of the court. Had the action against the *Hagen* been *in rem* there is no doubt the proceedings must have been stayed on application:

> *The Christiansborg*, 53 L. T. Rep. 612; 5 Asp. Mar. Law Cas. 491 (1885); 10 P. Div. 141.

So the plaintiffs have issued a writ *in personam*, and the matter therefore becomes one for the discretion of the court. Parker, J. was not told that the guarantees in lieu of bail had been exchanged in Germany, and that there were proceedings going on in Germany which were

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

practically the equivalent of proceedings in this country. He had not the full materials before him on which to exercise his discretion. Where as soon as possible after the collision bail was asked for and arrest threatened, and these cross letters of guarantee exchanged, which take the place of sureties in lieu of bail, the action here becomes unnecessary. If the judge had been told that the owners of the *City of Bradford* had elected to take proceedings in Germany he would have stayed these proceedings. [*Robertson.*—The *Hartley* has sued the owners of the *City of Bradford in rem*, but the latter have not counterclaimed in that action; they have taken no proceedings *in rem.*] Once bail or its equivalent is given the ship ought not to be arrested in another country; she has purchased her freedom.

The Christiansborg (ubi sup.);
The Mannheim, 75 L. T. Rep. 424; 8 Asp. Mar. Law Cas. 210 (1896); (1897) P. 13.

[Lord ALVERSTONE, C.J.—Were these guarantees by letter as good as bail?] Yes, in *The Christiansborg (ubi sup.)* Baggallay, L.J. said: "I am unable to see the distinction, in principle at least, between a ship being released upon bail in the ordinary form, and being released by virtue of an agreement come to between the two owners or their representatives." Further, on the facts it is doubtful whether the *Hagen* is a necessary party, for the collision occurred between the *Hartley* and the *City of Bradford*. The *Hagen* was following the *Hartley* up the river, and did not collide with the *Hartley* until after the other collision, so it is difficult to see how the *Hagen* could have caused the first collision. It is submitted that we are not proper parties to be added under Order XI., rule 1 (*g.*)

Massey v. *Heynes*, 59 L. T. Rep. 470; 21 Q. B. Div. 330.

The distinction between this case and *The Duc d'Aumale* (87 L. T. Rep. 674; 9 Asp. Mar. Law Cas. 359; (1903) P. 18) is that in that case the cause of action arose on the high seas. There is no case in which, as in this case, everything has occurred abroad, and a defendant has been compelled to come here against his will. A foreigner resident and domiciled abroad cannot be compelled to attend these courts unless he has put himself or his property within the jurisdiction. This is not a case in which a foreign corporation is carrying on business in this country, as in *Logan* v. *Bank of Scotland* (91 L. T. Rep. 252; (1904) 2 K. B. 495), nor is it similar to *The Elton* (65 L. T. Rep. 232; 7 Asp. Mar. Law Cas. 66; (1891) P. 265). The court no doubt has power to make such an order as this in an action for tort (*Croft* v. *King*, 68 L. T. Rep. 296; (1893) 1 Q. B. 419), but they will not do so under these circumstances. [Lord ALVERSTONE, C.J.—I have some doubt whether the facts in the affidavits are sufficient.] The intention of the rule was to cut down the service of a writ in an action in tort from the wider statements in the Judicature Acts. If this order is rightly made, there is no reason why if a collision occurs in the streets of Berlin between two German motor-cars and an English motor-car, the German owners should not be compelled to appear in this country.

Simon, K.C. and *H. M. Robertson* for the respondents, the owners of the *City of Bradford*. —The appellants do not contend that there is no jurisdiction to do what Parker, J. has done, but only that he has wrongly exercised his discretion in the matter. Bargrave Deane, J. had all the parties before him, and knew all the facts before the court to-day, and exercised his discretion upon them. [FARWELL, L.J.—Bargrave Deane, J. took his discretion from Parker, J., and your initial difficulty is that Parker, J. had not sufficient facts before him to fully exercise his discretion.] The dates here are conclusive in favour of the respondents. The affidavit in support of leave to serve notice of the writ was sworn on the 1st Oct., and the arrangements on which the appellants rely to show that proceedings or their equivalent were going on in Germany were not made until the 2nd Oct. These arrangements were made by the Hamburg agent of the Great Central Railway on his own initiative, and were never authorised by the company, and he had no authority to ask for bail. The whole matter can be very conveniently dealt with in the Admiralty Court, and it is submitted that, in giving leave to serve notice of the writ out of the jurisdiction, Parker, J. exercised a wise discretion. Whether the fact that letters of guarantee had been given was known or not is not material, neither are the merits of the dispute material. The only question is, Is there a *bonâ fide* claim? There undoubtedly is such a claim. [KENNEDY, L.J. — The tort occurred abroad, the foreigner was abroad; it is not like a British subject abroad. In *The Christiansborg* it was said: "It would be vexatious in fact to call upon the owner of the ship in respect of the same cause of action to give bail in two courts at the same time."] If these undertakings in lieu of bail are material the respondents must stand by their misfortune, but they are not material; the existence of mere undertakings of this nature are no reason for staying proceedings over here. [KENNEDY, L.J.—Are you not getting an unfair advantage because you got away from Germany by giving these undertakings.] But we are not trying to arrest the *Hagen* in these proceedings. Our action is *in personam*. We only wanted to get away from the Elbe because these ships run in a regular line from Grimsby to the Elbe. How could this alter the court's view of the facts. There is a *bonâ fide* claim here. One of the alleged wrongdoers, the *Hartley*, has been sued. Why should we not bring in the other? The only test is whether the action is based on a *bonâ fide* charge of negligence against both defendants:

The Duc d'Aumale, 87 L. T. Rep. 674; 9 Asp. Mar. Law Cas. 359 (1902); (1903) P. 18.

The owners of the *Hartley* issued a writ *in rem* against the *City of Bradford*, so the matter must be tried in the Admiralty Court whether the respondents wish it or not.

Laing, K.C. in reply.

Lord ALVERSTONE, C.J.—This case is one, to my mind, of very great difficulty, and has been extremely well argued on both sides, and but for the fact that I think it is very important to dispose of this case at once, I should like to take time to consider my judgment. The real difficulty which has pressed upon my mind throughout is that we are asked to interfere with the discretion of the learned judge. The order under which the question arises is Order XI., r. 1, which commences: Service out of the juris-

diction of a writ of summons or notice of a writ of summons may be allowed by the court or a judge whenever (*g*) Any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction. It is not disputed in this case that the *City of Bradford* has a right to bring an action against the *Hartley*, and in that sense it is a proper action, and that, assuming there were two vessels involved in the cause which led to the collision, the owners of the *Hagen* are necessary or proper persons. If I could have felt that Bargrave Deane, J. had exercised his discretion upon all the facts before him I should have greater reluctance to interfere with his decision, but I do not think he has appreciated the difficulties of the matter or dealt with the case upon all the facts. Certainly I do say this, that had these facts been before me I should not have allowed this service to go. With regard to Parker, J. I do not think anybody pretends that he exercised his discretion upon the materials which we now have before us. He acted upon an affidavit by Mr. Lewis; and the question, I think, we have to consider, is what order we ought to make, having regard to all the facts before us. I am anxious not to be unduly influenced by the fact that we are dealing with a case in which it is sought to bring persons, who have not come here, and whose property is not here, before the jurisdiction of these courts. As far as that jurisdiction goes we are bound in this court by the view—and I shall loyally act upon the view—that the court has jurisdiction; but it seems to me there are materials in this case which ought to make the court hesitate before making an order which will have the effect of forcing the owners of the *Hagen* to appear as second defendants in this court in a collision case, the actual collision being between the *City of Bradford* and the *Hartley*, though it may be that was only the consequence of the *Hagen's* negligent navigation. Now, the collision happened somewhere about the 27th Sept. On the 2nd Oct. the *Hartley* issued a writ *in rem* against the *City of Bradford*. So far as the necessity of protecting herself against the *Hartley* is concerned, it is plain that the *City of Bradford*, having got bail in that action, required no further proceeding; but it was seen—nobody complains of the ingenuity of the mind that found it out—it was seen that counter-claiming in that action or availing themselves of those proceedings would not enable them to get the *Hagen* here. Therefore, instead of counter-claiming, they issued proceedings *in personam* on the 2nd Oct. against the Burnett Steamship Company (the *Hartley*) and against the Deutsch-Australische Dampfschiff-Gesellschaft (the *Hagen*). In that action they made application for leave to serve notice of the writ upon the owners of the *Hagen*. I confess it does strike one that although that was a perfectly legitimate step to take, the real object, and the only object, of the proceedings *in personam* was to drag the German company here. It is perfectly legitimate, but I think it is not a circumstance to be left out of consideration when you are dealing with the question whether the court in the exercise of its discretion should give leave for that step to be taken. In addition to that, if the matter had been before me in the first instance, I think I should have attached much more importance than Bargrave Deane, J. appears to have done to what happened immediately after the collision. Mr. Lewis, in his affidavit says: "The defendant company, the Deutsch-Australische Dampfschiffs Gesellschaft carries on business at Hamburg, in the German Empire, but is a necessary or proper party in this action, inasmuch as the plaintiffs allege that the said collision was caused or contributed to by neglect or default in the navigation of the *Hartley* and the *Hagen*." Now, on the 11th Dec. Mr. Robert's, the solicitor for the appellants, first affidavit is made, and it discloses documents which are the first matters, I think, that have seriously to be considered. On the 30th Sept. the the representative of the *City of Bradford* asked the representative of the *Hagen* "to inform me by return in what manner you will give security for the steamship *Hagen*, either to me or my owners for their claims, as otherwise, acting on instructions from my owners, I will be compelled to arrest the ship." That is a distinct intimation of the plaintiffs' intention to arrest the *Hagen* at Hamburg unless security is forthcoming. The reply was as follows: "We received your favour of to-day, and beg to inform you that the collision . . . was not brought about by incorrect manœuvring on the part of our steamship *Hagen*. . . . We are nevertheless prepared to give the security demanded, if you on your part will give a similar undertaking on behalf of the *City of Bradford* as regards the steamship *Hagen*." On the 1st Oct. Mr. Rover, for the *City of Bradford* replies, "I beg to inform you that I, without prejudice, however, to the question of blame, undertake personal bail for the captain and the owners of the steamer *City of Bradford*." We have also got, upon the 2nd Oct., the formal document relating to the preliminary proceedings taken in the court at Hamburg. Now, it is said by the junior counsel for the respondents in his most able argument, that it only amounts to an undertaking to give bail should necessity arise. I agree with that observation, and if we were dealing with the same question as arose in *The Mannheim* (*ubi sup.*), that would be a very material fact, but in my judgment that does not exclude the necessity for considering the matter from the point of view from which we are now considering it. Now, upon the affidavit of Mr. Lewis being filed the defendants entered an appearance under protest and this motion was brought. Mr. Robert's affidavit is very material. He sets out the proceedings instituted in the Lower Court of Hamburg on behalf of the Deutsche-Australische Dampfschiff-Gesellschaft against the owners of the *Hartley*, and he says he is informed and believes that the evidence of the master and crew of the *Hartley* has been given in those proceedings. He also refers to the action *in rem*, instituted in the Admiralty Division by the *Hartley* against the *City of Bradford*: says he is informed that the *City of Bradford* and the *Hagen* were not in collision with each other, and continues: "As between the owners of the *Hartley* and the *City of Bradford*, and so far as the interests of the owners of the *City of Bradford* were concerned, I submit there was no necessity for a second action to be brought by the owners of the *City of Bradford*, as the owners of that vessel could have counter-claimed in the ordinary way for the damages sustained in the collision between those vessels. I further submit there was nothing to

prevent the owners of the *City of Bradford* in that action raising the defence, if so advised, that the collision between the *City of Bradford* and the *Hartley* was due wholly or partly to the navigation of the *Hagen*, and further that the undertakings given in Hamburg by the agents of the owners of the *City of Bradford* and the owners of the *Hagen* respectively not having been withdrawn, the owners of the *City of Bradford* would be in no way damnified, but on the contrary they would be at an advantage by being able to proceed against the *Hagen* in Hamburg." The affidavit concludes: "To the best of my information and belief the application to join them (the owners of the *Hagen*) as a party was irregular and improper on many grounds. It was not *bonâ fide*; it was oppressive and vexatious and an abuse of the practice of the court; it was not solely made in the interest of the owners of the *City of Bradford*; the application was based on an improper affidavit which did not state all material facts to the court, and was a breach of good faith and of the understanding on which the undertakings were given." I confess I have a little suspicion that there is some ground for that suggestion. Mr. Lewis answered that on the 6th Jan., but pratically all he says is that two out of the three ships which were concerned in the collision are English ships belonging to English companies, carrying on business in England and having English solicitors; that on the ground of convenience it is highly desirable that the questions arising in this litigation should be settled in England; and that the said defendants are a necessary and proper party to the action brought by the plaintiffs against the *Hartley*. What I think is of great importance is that there is no answer to the other part of the affidavit. I think it is unfortunate that a fuller answer was not given when there was a direct challenge by Mr. Roberts. In the circumstances, ought the learned judge to have made the order giving leave to serve the notice of the writ on the defendants in Germany? It is not denied that there is jurisdiction. The case of the *Duc d'Aumale* (*ubi sup.*) establishes that beyond question. The only question, therefore, is as to the exercise of the jurisdiction.

In the case of *The Christiansborg* (*ubi sup.*), the existence of a document of guarantee somewhat similiar to those in the present case was held to be sufficient to make the Court of Appeal stay an action against a ship in this country, upon the ground that the guarantee amounted to a bargain that the ship should be released and become a free ship. In that case an action had been commenced abroad, and it is true, as counsel for the respondents pointed out, that case is not a direct authority for what the court may do if the application is one to stay an action properly brought against a German ship in this country. In the same way, I think *The Mannheim* (*ubi sup.*) is not an authority to the extent that the leading counsel for the respondents pressed it in his favour. *The Mannheim* (*ubi sup.*), was a case in which a foreign ship was arrested when she came to this country, and the action was properly commenced in this country; and Sir Gorell Barnes refused to stay the action, holding that a guarantee given abroad was, in the circumstances, no bar to an action being brought here. As I have pointed out, it seems to me that the considerations which operated in that case have not got anything like the same force when you are dealing with a mere question of discretion. I therefore come to the conclusion that in the circumstances it was not right to force the defendants, who, within a reasonable time, had acted upon the undertaking given, and had taken proceedings in Hamburg, practically to abandon these proceedings and come and try the case here. If I had felt that Bargrave Deane, J. had taken all the facts into consideration and had come to a conclusion upon them, I should hesitate to interfere with his decision, but looking at the judgment I can find nothing to show that he did. I come to the conclusion that he has not exercised his discretion, and I think it is a jurisdiction that ought to be very carefully exercised. Where you have got competent parties taking steps to enforce their rights in a foreign civilised country —proceedings taken practically in accordance with understandings—I think we ought not to allow this, to a certain extent, colourable and unnecessary, writ to be issued, not for the purpose of enforcing the rights of the *City of Bradford* against the *Hartley*, but in order to enable these defendants to be brought before the court. It is not disputed that if the *Hagen* were the only ship alleged to be to blame the plaintiffs could not bring these defendants here, and I think the court, having regard to the place of the collision and the other circumstances of this case, ought to be slow to force the German defendants to come here. With great reluctance I come to the conclusion that I should not have made the order, and I think Bargrave Deane, J., did not exercise his discretion upon the facts. He decided the matter solely upon the ground that there had been some little delay in commencing proceedings in Hamburg. I think this appeal must be allowed.

Farwell, L.J.—I agree. I naturally have some hesitation in differing from Bargrave Deane, J., but in my view, with all respect to him, he has not rightly appreciated the bearing, if any, that *The Christiansborg* (*ubi sup.*) and *The Mannheim* (*ubi sup.*) have upon the case. During these present sittings Vaughan Williams, L.J. and myself have on more than one occasion had to consider this Order XI., and we have had a great many authorities, very well discussed, and very fully considered by the court, and the conclusion to which the authorities led us I may put under three heads. I think my memory is accurate. First of all, the Lord Justice adopted, and I agreed with him, the statement of Pearson, J. in *Société Générale de Paris* v *Dreyfus Brothers* in 29 Ch. Div. 239, at p. 242), which has been followed, although not cited, over and over again, that, "it becomes a very serious question, and ought always to be considered a very serious question, whether or not, even in a case like that, it is necessary for the jurisdiction of the court to be invoked, and whether this court ought to put a foreigner, who owes no allegiance here, to the inconvenience and annoyance of being brought to contest his rights in this country, and I for one say, most distinctly, that I think this court ought to be exceedingly careful before it allows a writ to be served out of the jurisdiction."

The second point which I think we considered established by the cases was this, that,

if on the construction of any of the sub-heads of Order XI. there was any doubt, it ought to be resolved in favour of the foreigners; and the third is that, inasmuch as the application was made *ex parte*, the fullest disclosure was necessary, as in all *ex parte* applications, and a failure to make a full disclosure would justify the court in actually discharging the order, even although the party might afterwards be in a position to make another application. I may dismiss the second and third of those heads, because, in my judgment, they do not apply here. I think it would be hard to impute to the deponent of the affidavit the knowledge of the effect of those two cases in Admiralty, which the learned judge of the court below appears to have not himself adopted. One point therefore is, whether the learned judge was right in exercising his discretion as he did. The initial difficulty to my mind is this, that reliance has been placed on two cases which in my judgment have no application—viz., *The Mannheim* (*ubi sup.*) and *The Christiansborg* (*ubi sup.*). It is one thing to say that a defendant who comes here to stop a duly commenced action must show some equity against the plaintiff disentitling him to pursue remedies which *primâ facie* he is entitled to pursue. It is quite another thing to say that the court, in exercising its own discretion as to whether it will allow an action which cannot be commenced at all without its permission to be so commenced, should give that permission. The grounds upon which the jurisdiction, which I may call the *lis alibi pendens*, on which *The Christiansborg* (*ubi sup.*) and *The Mannheim* (*ubi sup.*) really depend, are well set out by the Court of Appeal in the *Peruvian Guano Company* v. *Bockwoldt* (23 Ch. Div. 225). Lord Lindley puts it at p. 232, "A motion is made to compel the plaintiff to elect. It is not sufficient for the person so moving to point out that there are two proceedings being taken with reference to the same matter. He must go a step further, and say that there is vexation in point of fact—that is to say, that there is no necessity for harassing the defendants by double litigation." It is obvious that that does not apply to cases where the plaintiff in England is the defendant in a foreign court, because there is no question of his harassing by double litigation, and therefore no personal equity against him, but the consideration that there is a suit pending elsewhere is a proper one for the judge who is debating whether he shall exercise his discretion in allowing service out of the jurisdiction under Order XI. I think here, if Parker, J. had had brought to his attention those undertakings in lieu of bail bond, and the statement of Baggallay, L.J. in *The Christiansborg* (*ubi sup.*) that there is no distinction in principle between a ship being released on bail in the ordinary form, and being released by virtue of an agreement come to between the two owners or their representatives, he would then have felt bound to consider that there was that which is equivalent to the commencement of an action in a foreign court. Having that before him, and considering the recent date of the occurrence, I have very little doubt that he would have said: "The proper tribunal *primâ facie* is the German tribunal; the collision took place there; it will depend upon German law; and there is no reason at present for harassing the foreigner by bringing him here." It is quite another thing if the foreigner had not commenced any proceedings at all, or if, after the lapse of a considerable time, he had commenced proceedings, but inasmuch as the proceedings were initiated by this agreement in lieu of bail bond which was actually followed up by whatever is the German equivalent to a writ, on the 6th Dec., it appears to me the discretion in this case ought not to be exercised by allowing service out of the jurisdiction. In the case before Gorell Barnes, J., *The Mannheim* (*ubi sup.*), it is to be observed that two years had elapsed between the giving of the bail bond and the actual commencement of the proceedings, and it is obvious that you cannot expect the Englishman who has a right of action which he may enforce if the court will permit him by issuing a writ in this country, to wait over an indefinite period till what is the more proper tribunal is invoked by either party. In the present case I think there is not any question of any lapse of time which is material, and I agree with the Lord Chief Justice that this order ought to be discharged.

Kennedy, L.J.—I am of the same opinion. It appears to me a case of some difficulty, and especially upon the ground that it may be said that this is a decision in a case in which the jurisdiction of this court is invoked to interfere with the statutory discretion of the judge below; but in my opinion Parker, J. had not before him originally the material facts, and it appears to me, with great respect, that the matter has been dealt with by Bargrave Deane, J. without full regard to the circumstances of the case which we have had developed in argument before us. There is no doubt that there was jurisdiction under Order XI., r. 1, sub-sect. (*g*), to bring in this foreign defendant. It was a case in which, had all the parties been originally here and served here, there is no doubt that at any rate the *Hagen* might be treated as a proper party; and as there had been due service of the writ upon the persons who represent the *Hartley*, upon their being served there was jurisdiction, although the collision arose within foreign territory, and the person sought to be added was a foreigner, to make an order. But, assuming that there was jurisdiction to make an order, the court has to decide whether, under the initial words of Order XI., it was a case in which the jurisdiction, though legitimate, ought to be as a matter of discretion, exercised—in this particular case in favour of the *City of Bradford*. In those circumstances you have to consider all the facts. There would be no jurisdiction unless the party could be described as, at least, a proper party to be added by way of defendant, but you have still got to see that all the circumstances make for the exercise of the discretion in favour of the application. For instance, you have to consider what may be called the comparative advantage and the doing of justice to all parties; and amongst the circumstances there is one which was not before Parker, J., and which seems to me to be material. It is this, that the plaintiffs had exchanged with the defendants now sought to be added, on the 30th Sept., before the application to Parker, J., an undertaking to give security in lieu of bail for the purpose of rendering arrest unnecessary. If that was a *bonâ fide* proceeding, really intended between

business men as the initial stage of litigation, there was practically a commencement of an action. It is right to guard the expression by saying "practically," because for some purposes it may not be treated as equivalent to actual arrest. As the Lord Chief Justice and Farwell, L.J. have pointed out, we have not got to decide here as to the right of a person to stop proceedings which require no discretion for their initial stage, but here there has to be a discretion exercised, of which the court cannot divest itself; and discretion means the consideration of all the material facts. We know now that proceedings did go on in the German courts, and that proceedings were, really without any great delay, taken, and that on the 6th Dec.—which was not undue delay—proceedings were instituted in the German court; first, against the guarantors of the *City of Bradford*, and secondly, on the same day, against the guarantors of the *Hartley*. So all the three parties were in ordinary course of being brought before the German court, the evidence of witnesses taken, and the case tried. In those circumstances it seems to me it is impossible to say—particularly in the case of a collision—that it is not a circumstance to be considered that the collision was in the river Elbe, and that one of the parties is a foreigner. Leave being required, it seems to me clear that had all the facts come before me as a judge of first instance as they have come before us to-day I should certainly never have made this order. Looking at all the facts, it seems to me clear that the balance of convenience is so clearly one way that the discretion of the court should only be exercised by the discharge of the order. It is said that the rights of the parties cannot be adjusted so well in Germany as here. I am not at all sure that the rights will not be as well determined there as here, and it is by no means necessarily inflicting injustice upon the present plaintiffs that the *Hagen* is not joined, because upon the materials before us, which are rather meagre, it seems to me they may fight out their battle with the *Hartley* here without any more inconvenience than a triangular battle always involves. The appeal must be allowed with costs.

Solicitors: for the appellants, *Pritchard* and *Sons*; for the respondents, *D. H. Davies*.

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

April 9 and 10, 1908.

(Before Lord Alverstone, C.J.)

Hamel and Horley *v.* Peninsular and Oriental Steam Navigation Company. (*a*)

General average—Damage by collision with quay—Perils of navigation—Unloading of cargo—Repair of ship—Damage to cargo caused by unloading and transhipment — Cargo-owner's claim for contribution.

To constitute a claim in general average there must at some time or other have been a general average act, or something following a general average act, and so intimately connected with it that the whole may be treated as one continuous act, necessary to relieve both vessel and cargo—the whole venture—from a common peril. If the consequence of the damage caused by a peril of the sea is merely to render the ship unable to fulfil her contract, or the cargo unfit to be carried on, as, for instance, where it is damaged by wetting, acts done merely to make either the ship fit to fulfil her contract or the cargo fit to be carried on are not sufficient to establish a general average sacrifice.

So where a vessel shortly after leaving her loading quay, in endeavouring to avoid ordinary dangers of navigation, came into collision with the quay, and was thereby injured and prevented from proceeding on her voyage until repaired.

Held, that damage done to cargo by unloading to enable the vessel to be repaired did not give rise to a claim for contribution in general average, the unloading not being necessary to save the whole venture from a common peril.

Commercial list.

Action tried before the Lord Chief Justice sitting without a jury.

Claim for a general average contribution.

The plaintiffs shipped under bills of lading, which did not contain the York-Antwerp Rules, certain cases of glass at Antwerp in Dec. 1905 on the defendant company's steamship *Peshawur* for carriage from Antwerp to Shanghai. Having completed loading the vessel left the berth and got into the tideway of the river, but before the tugs had the vessel under control the vessel was caught by the tide and it became necessary to let go an anchor. The anchor did not hold, and as the vessel was drifting towards an anchored vessel the engines of the steamship *Peshawur* were started, and the vessel then grounded by the stern on the left bank of the river. In order to get off the bank her engines as well as the tugs were used, but the vessel had to slip her anchor.

The vessel came off the bank and had to go astern to avoid some craft, and in consequence ran astern across the river on to the quay from whence she had come. The contact caused damage to the vessel—viz., to the steering gear, engine, rudder-post, rudder, sternpost, and port propeller. The after-peak was filled with water, and the pumps had to be used to pump out the tunnel-well. The vessel returned to her berth, where half of the cargo was discharged. Five days latter the vessel was taken lower down the river and the balance of cargo discharged. All the cargo was transhipped into another vessel belonging to the defendant company and was carried to Shanghai. The steamship *Peshawur* went into dry dock to repair. The lost anchor was recovered.

On arrival at Shanghai damage to the glass was found which was in excess of what is generally sustained in sea carriage, and this was caused by the discharging from the steamship *Peshawur* and the loading on to the other vessel.

The plaintiffs called evidence to prove that the practice of average adjusters was that where a vessel had to put in by reason of a particular average loss, and that in order that the vessel might be repaired the cargo had to be discharged, the damage caused by such discharge was treated as a general average act.

The plaintiffs claimed a contribution from the ship in respect of the damage so suffered.

(*a*) Reported by W. Trevor Turton, Barrister-at-Law.

J. R. Atkin, K.C. and *Maurice Hill* for the plaintiffs.—There was a general average act before the cargo was unloaded—viz., putting back to the quay. If that was not so then the unloading of the cargo to allow of the vessel being repaired was a general average act. The discharge of the goods at Antwerp constituted a general average act, and the plaintiffs are entitled to claim in respect thereof from the ship. That is shown by the judgment of Brett, M.R. in *Svendsen* v. *Wallace* (4 Asp. Mar. Law Cas. 550; 5 Asp. Mar. Law Cas. 87, 232, 453; 50 L. T. Rep. 799; 13 Q. B. Div. 69, at pp. 76 and 77). Further, it is so treated in practice by average adjusters. The taking back of the vessel to her berth was analogous to putting into a port of refuge, because having started on her voyage she had to go back again. The ship as well as the cargo were in common peril. The whole venture was in peril. [*Atwood* v. *Sellar* (4 Asp. Mar. Law Cas. 153, 283; 42 L. T. Rep. 644; 4 Q. B. Div. 342; 5 Q. B. Div. 286) and *Crooks and Co.* v. *Allan* (4 Asp. Mar. Law Cas. 216; 41 L. T. Rep. 800; 5 Q. B. Div. 38) were referred to.] The plaintiffs are entitled to a contribution.

Scrutton, K.C. and *S. A. T. Rowlatt* for the defendants.—The cargo was not in danger, and the vessel could have been brought to England for repairs. There was no general average sacrifice. There was no general average act before the cargo was discharged, nor did the discharge of the cargo constitute such an act. There must be an antecedent act of general average sacrifice before such a claim as regards unloading can be maintained or included as a subject-matter of contribution:

> *Svendsen* v. *Wallace*, 4 Asp. Mar. Law Cas. 550; 5 Asp. Mar. Law Cas. 87, 232, 453; 50 L. T. Rep. 799; 13 Q. B. Div. 69, at pp. 85 and 88, per Bowen, L.J.

The plaintiffs' contention is not supported by the judgment of Lord Blackburn in

> *Svensden* v. *Wallace*, 52 L. T. Rep. 901; 10 App. Cas. 404, at pp. 416, 417.

The test that there must be an antecedent general average sacrifice laid down by Bowen, L.J. is not satisfied by the practice of average adjusters. It is not disputed that if there was a general average act, the ship is bound to contribute as if there had been a general average statement:

> *Crooks and Co.* v. *Allan*, 4 Asp. Mar. Law Cas. 216; 41 L. T. Rep. 800; 5 Q. B. Div. 38.

The vessel is not liable to contribute to the plaintiffs' loss.

J. R. Atkin, K.C. replied. *Cur. adv. vult.*

Lord ALVERSTONE, L.C.J.—The plaintiffs seek to recover a general average contribution from the ship in respect of glass shipped at Antwerp to be carried to Shanghai. In my opinion, it is necessary to ascertain clearly what the facts are before proceeding further. The glass having been loaded at Antwerp, the vessel, within a few minutes after leaving her berth to proceed on her voyage, got into difficulties, and for an hour or thereabouts she was engaged in endeavouring to avoid perils of the river. The vessel swung up in consequence of the tide catching her stern; she was in danger of colliding with a vessel higher up; and she had to slip her anchor to avoid collision with some other craft. She touched the ground with her stern on the other side of the river, and then came across again, finally running her sternpost and rudder against the wall of the quay or berth where she had loaded, and seriously injured her stern post and rudder, the after peak filling with water. Rather more than half of the cargo was unloaded where the vessel lay, work going on night and day for five days; and then, having 4000 tons or thereabouts still on board, she was taken down the river, and the rest of the cargo was discharged before she was put into dry dock. It was admitted that the glass was transhipped and taken on to Shanghai. It was admitted also that the glass was damaged to a greater extent than was due to ordinary transport by sea, and it must be taken that exceptional damage was caused to the glass, both in the unloading and in reshipping. It was contended on behalf of the plaintiffs that there was either some general average act before the cargo was unloaded, or that the fact that the cargo had to be unloaded to allow the vessel to be repaired constituted a general average act if there was no general average act before, and that upon the authorities the ship was liable to contribute in general average. It was not disputed by the defendants that, if there was a general average act, the ship was bound to contribute as if there had been a general average statement; that followed from *Crooks and Co.* v. *Allan* (4 Asp. Mar. Law Cas. 216; 41 L. T. Rep. 800; 5 Q. B. Div. 38). It was, however, disputed, first, that there was any general average act before the cargo was discharged; and, secondly, that the discharge of the cargo constituted, in the circumstances, a general average act. It was not contended on behalf of the plaintiffs that the state of things that occurred was caused by the negligence of those on board the ship, and I will assume that to be so, and that what had happened was caused by perils of navigation independently of negligence. It was, however, contended by Mr. Atkin that if one took the entries in the log, the material statement in which was—after recounting the various difficulties that occurred—"On sounding the after-peak found same full of water, consequently the ship was brought back to her previous berth," that was analogous to the vessel being taken to a port of refuge, because, having started upon her voyage, she had to go back again. In no way discounting that argument, I think it right to say that I do not consider it a case of going back to a port of refuge. I think that from the time the vessel left the quay until her sternpost ran against the same quay at the end of the attempted manœuvre the vessel was being navigated upon her voyage, or with a view to her voyage, and was incurring perils of navigation, and that the only thing that could be said was that by perils of navigation the ship got into a damaged condition whereby she was not able to go on her voyage and fulfil her contract. In my opinion there was no general average act before the vessel was damaged by striking the quay. The slipping of the anchor was, to some extent, relied upon, but that was not a general average act. That was not a sacrifice, but an ordinary measure taken in navigation to avoid danger. Further, the anchor was recovered, Therefore, upon the first part of the case I find as a fact that there was no general average

act up to the time when the vessel was injured, and that she received her injury in the course of navigation; in other words, it was just the same kind of thing as if there had been a collision between this vessel and another vessel in the river, rendering it impossible for her to proceed upon her voyage.

It was then said by Mr. Atkin that, even although there was only a particular average injury, the ship could not continue her voyage, and, as her cargo had to be discharged to allow of the ship being repaired, there was a general average sacrifice in the unloading of the cargo to enable her to be repaired. It was said also that the condition of things was such that the whole venture was in peril. I come to the conclusion, and find as a fact, that when the vessel got alongside the quay with the after-peak full of water there was no common peril to the ship and cargo. It is perfectly true that if the bulkheads had broken down water might have got into the ship, and it is perfectly true that the pumps had to be kept going to keep the water out of the tunnel; but that is one of the perils of the navigation which necessitated the ship being worked in a certain way, and does not create a basis for a general average claim. The particular parcel of glass was stowed in a hold about midships in front of the engines and boilers. I do not know how many bulkheads there were, but there certainly must have been two, and probably there were three, and I hold and find as a fact that the danger which had to be guarded against was a peril of navigation which required the ship to keep the pumps going and do whatever else might be necessary to prevent further damage to the ship and cargo. I think it is analogous to what would have occurred if a rent had been made in the side of the ship by a collision. In these circumstances I have to deal with the point of law which Mr. Atkin raised even assuming all these facts to be found against him. I will assume that it was necessary to discharge the cargo in order to get the ship repaired. Both parties relied on *Svendsen* v. *Wallace*, but I think it would be better, inasmuch as in my opinion the judgments in that case do not amount to a conclusive authority binding upon me to deal with the question on principle. Nothing would be gained by going through the authorities, which are all reviewed in *Atwood* v. *Sellar* and *Svendsen* v. *Wallace*. Mr. Atkin's case could not be rested upon any authority unless he was right in his construction of the judgment of Brett, M.R. in *Svendsen* v. *Wallace*. I will only note in passing that the case of *Hall* v. *Janson* (4 E. & B. 500) is not an authority for the main proposition. What view ought I to take of the unloading of the vessel, the injury to her having been caused by a peril which was only caused by a particular average loss? It seems to me that I ought to decide against Mr. Atkin's view, unless I am prepared to hold that, whenever a ship is rendered incapable of completing her contract by reason of the perils of the sea, and, in consequence, has to be wholly or partially unloaded to render her fit, that must necessarily be a general average loss, because the venture as it previously existed cannot be carried out or the ship cannot be made fit to deliver the cargo. I am not prepared to go that length. To constitute a claim in general average there must at some time or other have been a general average act, or something following a general average act, and so intimately connected with it that one can treat the whole thing as one continuous act, necessary to relieve the whole venture from the common peril. If the consequence of the peril of the sea is merely to render the ship unable to fulfil her contract, or the cargo unfit to be carried on, as, for instance, where it was damaged by wetting, acts done to make either the ship fit to fulfil her contract or the cargo fit to be carried on are not sufficient to establish a general average sacrifice. That is the conclusion I came to, and it is upon that ground I desire it to be understood that I decide the case.

That being my view, I have to see whether I am bound by any expressions of judicial opinion. It is only necessary to consider the judgments in *Svendsen* v. *Wallace* in the Court of Appeal and House of Lords. Certain passages in the judgments in that case were strongly relied upon by Mr. Atkin. At pages 76 and 77 of the report in the Court of Appeal (13 Q. B. Div.) the Master of the Rolls put four cases, the fourth being as follows: "Or it may be necessary to land the cargo, though neither it nor the ship be in immediate danger, or though the ship only be in danger, because the injury to the ship cannot be repaired without the removal of the cargo." Then a few lines further on he said: "In the second, third, and fourth cases the expenditure, treated as if it were the cost of the sole act done, cannot be a general average expenditure. But we must consider whether any of the three can be treated as part of another act which is a general average act." I need only refer to the fourth case put by the Master of the Rolls, which Mr. Atkin said was substantially this case. The Master of the Rolls, dealing with the fourth case, said: "If you take the act of sacrifice to be not merely the going into port, but the going into port to repair, and if the one act be the going in to repair, and the repair cannot be done without the landing of the cargo, which is the hypothesis, then the landing of the cargo is a part of the act of going into port to repair. It is a part of the act which is done in order to put the ship into such a position that she can be repaired, which is the real meaning of the colloquial maritime phrase, 'going in to repair.' The expression then is going in for repairs; the real accurate meaning is going in to be repaired, or going in so as to be in a position which will enable her to be repaired. The landing of the cargo in such case is upon the hypothesis so necessary a part of the act of taking the ship into port, so as to be in a position to be repaired, that such act cannot be said to be usefully completed until the cargo is landed. This fourth case has always been treated as if the going into port to repair was one act, and as if that were the one act of sacrifice." That is somewhat difficult to follow, but it seems to me that that reasoning, though on the face of it in favour of Mr. Atkin, depends upon the condition that there was a going into port which was regarded as an act of sacrifice, and that the landing of the cargo was, so to speak, a necessary consequence of that going into port, because at the end the Master of the Rolls sums it up by saying that, "This fourth case has always been treated as if the going into port to repair was one act, and as if that were the one act

of sacrifice." In that case the Master of the Rolls was not putting it upon the mere fact that cargo was taken out for the vessel to be repaired; he was considering that there was a sacrifice in going into port which would constitute a general average act followed up by what was subsequently done—namely, the unloading. That is why I think the passage on p. 78 which seems so distinctly an opinion in Mr. Atkin's favour is again only an enunciation of the proposition that if there has been an act of sacrifice, then the act of unloading may be treated as a part of that which was a general average act. The words were: "Unless, therefore, we are bound by authority to hold otherwise, I am of opinion that, according to the law of England, when a ship is obliged, for the safety of ship and cargo, to go into and goes into a port of distress in order to repair damage done by sea-peril, the expenses of going into the port are general average expenses; that, if it is necessary for the safety of both ship and cargo to unload the cargo, or if it is necessary to unload the cargo in order to repair the ship, though it is not necessary for the safety of the cargo, the expense of unloading the cargo is a general average expense; but if the unloading of the cargo is not for either of these causes, the expense of unloading is not a general average expense." That seems to say that, if expenses are to be treated as general average expenses, it must depend upon the vessel having put into port to save the whole venture from a peril; in other words, that there has been a general average act to which the expenses may, so to speak, be attached. The language of the Master of the Rolls cannot be regarded as being conclusive in favour of Mr. Atkin. In the same case there are two passages in the judgment of Bowen, L.J. I have to consider. At p. 85 he says this: "Each item of expenditure which is challenged must be considered on its own merits with reference to two tests. The first test is whether such item itself fulfils, as against some or all of the interests to be considered, the definition of a general average sacrifice; the second is whether such item, though not itself a general average sacrifice, is nevertheless an expenditure caused or rendered necessary by one." Everyone who knew him knows Bowen, L.J.'s extreme accuracy of expression, and I think Bowen, L.J.'s judgment supports the view I have expressed as strongly as the passage in the judgment of the Master of the Rolls which has been relied on by the plaintiffs as an authority in their favour. The Lord Justice having pointed out at p. 86 that *Hall* v. *Janson* in no way warranted the conclusion that the cargo ought in turn to contribute whenever any expenditure was incurred, not of saving the vessel and its contents, but merely for the sake of prosecuting the voyage, deals at p. 87 with the expenses of putting into port, and then, in two passages at p. 88, he expresses a view which makes it impossible for me to hold that the language of the Master of the Rolls binds me in the way suggested. The Lord Justice says: "If necessary for the common preservation of both ship and cargo, the unloading will be in itself a general average sacrifice: (see *The Copenhagen*, 1 Ch. Rob. 289). If not so necessary, it will not in itself amount to a general average sacrifice at all, but it may nevertheless be properly included as a subject-matter of contribution whenever the expenditure is directly caused by some antecedent act of general average sacrifice." If I am right in saying that this unloading was not to save the whole venture from a common peril, then the case falls within the first limb of that sentence. Then comes the passage which I think makes the matter more clear: "It has been maintained by some that the unloading, which is effected to enable the ship to be repaired after a particular average loss, may properly be treated as an act done for the common safety of ship and cargo, on the ground that if the cargo were not unloaded ship and cargo would both be locked up indefinitely, and the voyage placed permanently in suspension. Reserving to oneself the right to consider any special circumstances in other cases arising from the character of the cargo or otherwise that might render unloading necessary for the preservation of both cargo and ship within the meaning of such test, I am unable to adopt the theoretical view that unloading becomes an act of sacrifice simply because it releases cargo and ship from the deadlock that would otherwise ensue." I have read these passages, and I need not say I have considered them as carefully as I can, but I come to the conclusion that the result of the judgments is the same and that the Master of the Rolls was only summing it up in reference to a case where there had been an antecedent act of general average, and that Bowen, L.J. was calling attention to the distinction between the two cases.

I have only a word or two to say as to the judgments in the same case in the House of Lords. It is quite plain that Lord Blackburn did not regard those passages as laying down the law in the way Mr. Atkin says that they do. I will only refer to the passage at the foot of p. 416: "I do not think it necessary to inquire what would be the proper course if the seeking the port of refuge had been solely for the purpose of doing repairs, the cargo not being in any danger. Such a case may, perhaps, sometimes, though rarely, occur. Nor do I think it necessary to inquire what would be the proper course if the ship and cargo were both safe in the harbour of refuge, and the unloading of the cargo was entirely for the purpose of facilitating the repairs. Such a case seems more likely to happen than that first supposed." Mr. Atkin relied upon the passages cited as a judgment, but in one part of his argument he also said that if there was anything in them against him it was *obiter*. But taking them as opinion or judgment, they do not, in my opinion, show that I have come to a wrong conclusion. I find here that there was no general average sacrifice before the vessel touched the quay, and that, although the unloading was highly necessary to repair the vessel, it was not in itself a general average sacrifice. The action therefore fails.

Judgment for the defendants.

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

Solicitors for the defendants, *Freshfields*.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

March 30, 31, *April* 1 *and* 9, 1908.

(Before BARGRAVE DEANE, J. and Elder Brethren.)

THE BLANCHE. (*a*)

Salvage—Practice—Tender—Payment into court—Denial of liability—Costs—Order XXII., rr. 1, 6.

In a salvage suit the defendants paid into court a sum with a denial of liability. The court awarded less than the amount paid in.

Held, that Order XXII., rr. 1 *and* 6, *applied, and that the excess of the sum paid in over the amount awarded should be repaid to the defendants.*

Held, further, that the plaintiffs were entitled to the costs of the action up to the time of payment into court, and the defendants to the costs after that date.

Held, also, that the plaintiffs were entitled to the costs of any issues on which they had succeeded, if such costs could be distinguished.

Fitzgerald *v.* Tilling (1907) 96 *L. T. Rep.* 718) *followed.*

SALVAGE SUIT.

The plaintiffs were the owners, masters, and crews of the steam-tugs *Hercules* and *Islegarth*; the defendants were the owners of the Italian sailing ship *Blanche*, her cargo and freight.

During the night of the 28th Feb. 1908 the *Blanche*, which had been at anchor in King Road, in the Bristol Channel, dragged her anchor and drifted ashore on a muddy bank, where she lay in safety and sustained no damage. The salvage rendered consisted in towing her off the bank to an anchorage in King Road. While rendering the services the *Islegarth* came into collision with the *Blanche* and incurred damage amounting to about 70*l.*, and had also to take assistance from another tug, the *Elf*. The facts are fully set out in the judgment.

The plaintiffs alleged that the *Blanche* was saved from a position of very great danger.

The defendants did not admit that any salvage services were rendered by the tugs, and also alleged that an agreement had been made with the *Islegarth* that she should receive 20*l.* for what she did, and alleged that any damage sustained by her had been caused by her own negligence; and, after denying liability for more than the 20*l.*, due under the alleged agreement, brought into court 100*l.* in respect of the claim by the *Islegarth*, and 50*l.* in respect of the claim by the *Hercules*.

Batten, K.C. and *Lewis Noad* for the plaintiffs the owners, master, and crew of the tug *Hercules*.

Aspinall, K.C. and *D. Stephens* for the plaintiffs the owners, master, and crew of the tug *Islegarth*.

Laing, K.C. and *A. D. Bateson* for the defendants, the owners of the *Blanche*.

During the course of the hearing Order XXII., r. 1, was referred to:

Where any action is brought to recover a debt or damages, or in an Admiralty action, any defendant may, before or at the time of delivering his defence, or at any later time by leave of the court or a judge, pay into court a sum of money by way of satisfaction, which shall be taken to admit the claim or cause of action in respect of which the payment is made; or he may, with a defence denying liability (except in actions or counterclaims for libel or slander), pay money into court which shall be subject to the provisions of rule 6.

The material parts of rule 6 appear in the judgment.

The Chiltonford (17 Times L. Rep. 293), in which it was held that the rules of Order XXII. did not, when that case was heard in 1901, apply to Admiralty actions, was also referred to. The words in Order XXII., r. 1, "in an Admiralty action" were inserted in the rule in consequence of the decision in that case.

BARGRAVE DEANE, J.—In this case the *Blanche*, a full-rigged iron ship of 1526 tons gross, laden with a cargo of barley sailed from San Francisco towards the end of the year 1907, and duly arrived in the Bristol Channel on a voyage to Sharpness. She there entered into a contract with the tug *Hercules* to tow her to Sharpness, and in due course arrived in tow of that tug in King Road on the 28th Feb. 1908. The tide not serving to take her up to Sharpness, she anchored there, with her starboard anchor and forty-five fathoms of chain. A pilot was on board, but he had finished his duties for the time being. She had an Italian crew on board, none of whom could speak English except one, whom we have seen, who acted as interpreter. The pilot did not go ashore, but went to his cabin about half-past nine and went to rest, leaving instructions that if the weather changed they were to pay out more chain, and, if necessary, let go the port anchor. There ought, of course, to have been an anchor watch on deck, but the general effect of the evidence is such as to satisfy me that if there was an anchor watch it was not an efficient watch, and I do not believe the pilot was called, as has been alleged. At all events, the pilot did not come on deck until late in the morning, when he came on deck in consequence of the master of the tug *Islegarth* boarding the ship and calling him. In the course of that night it had blown heavily, and there seems to have been snow squalls as well, and the result was that the anchor dragged and the vessel drifted about a mile until she got ashore on a muddy bank, about a mile to the north of Avonmouth. We are told that she lay there in the mud, with at least 10ft. of mud up her side, and we have heard a good deal of evidence as to the nature of the place. The result is that I am satisfied it was a perfectly safe position, so far as being a place where she could lie, and admittedly she sustained nodamage when lying there. The only difficulty was that if she lay there very long she might possibly have got so deep into the mud that it would have been very serious and expensive to get her out, and I am satisfied it was absolutely necessary she should be got out as soon as possible, and that she should employ tugs for the purpose. I am not going into the question of the conduct of the crew of the Italian ship—it is not material—but certainly it is an odd story that the captain came on deck in the course of the night, saw the ship was dragging, did nothing, but allowed his ship to drift, and went back to bed. It is an odd story, but it has nothing to do with the case.

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

Now, the first question I have to decide is, Did the captain of the *Islegarth* make a contract with the master or chief officer of the Italian ship that he would tow her off for 20*l.*? This is where the question of the interpreter comes in. I am not at all satisfied that that contract was made. That it was intended to be made may very likely be the case, but that it was brought home to the intelligence of the master of the *Islegarth* that he had made any such contract I do not think is established. Therefore we have a case in which there is no contract.

Then there is no doubt that the *Islegarth* was engaged to tow the ship off, and therefore the *Islegarth* is clearly entitled to some salvage award for the services which were rendered. It is not suggested that the *Hercules* made a contract. It is an undoubted fact that the *Hercules* helped to tow her off, and that the crew of the Italian ship, in the presence of both the chief officer and master, made fast a rope from the *Hercules* to the bow of the Italian ship. The two tugs together did tow her off, and, so far as I can make out from the evidence, although there is some conflict about it, the towing off was not a matter of great difficulty. The weather had moderated very considerably. The weather report from Avonmouth shows that the wind had fallen from a strong gale to a moderate breeze and there was a good tide. Thirty-five minutes is the time which both tugs fix as the length of time they were towing to bring this vessel off. Therefore I have to consider the position of that ship, whether she was in any danger, the extent of the salvage services, and, later, the further question as to whether the *Islegarth* is entitled to any compensation for damage or demurrage in addition to the salvage. I have considered this case very carefully, and I have to remember that the defence begins by denying liability. The defendants, while denying liability, pay into court 50*l.* for the *Hercules* and 100*l.* for the *Islegarth*, and the wording of the pleadings may be material when I come to consider the award. "The defendants do not admit that the plaintiffs or either of them rendered salvage services as alleged or at all." That is not an admission. Then in par. 7 I find this: "Save as aforesaid, none of the allegations of the statements of claim is admitted. The services were simply towage, entailed no risk, exposure, or fatigue, and any damage, detention, or liability incurred by the *Islegarth* were due to her own carelessness in not keeping herself clear of a ship stuck in the mud. The *Blanche* was in no danger of any kind. The defendants, denying liability for more than 20*l.*, part thereof for the *Islegarth*, bring into court 100*l.* for the *Islegarth* and 50*l.* for the *Hercules*."

Now, the difficulty which arises in these circumstances is this, that Order XXII., r. 6, states that "when the liability of the defendant, in respect of the claim or cause of action in satisfaction of which the payment into court has been made, is denied in the defence, the following rules shall apply: (*c*) If the plaintiff does not accept, in satisfaction of the claim or cause of action in respect of which the payment into court has been made, the sum so paid in, but proceeds with the action in respect of such claim or cause of action, or any part thereof, the money shall remain in court and be subject to the order of the court or a judge, and shall not be paid out of court except in pursuance of an order. If the plaintiff proceeds with the action in respect of such claim or cause of action, or any part thereof, and recovers less than the amount paid into court, the amount paid in shall be applied, so far as is necessary, in satisfaction of the plaintiff's claim, and the balance (if any) shall, under such order, be repaid to the defendant. If the defendant succeeds in respect of such claim or cause of action, the whole amount shall, under such order, be repaid to him." Now, here I have to consider not only the payment into court in respect of the alleged salvage, but also payment into court in respect of the damage incurred by one of the salvors and further expenses consequent upon that damage. Let me deal with the case first as to salvage. In my opinion this is undoubtedly a case in which salvage services were rendered, but it is a case of towage salvage, and very little more, and the amount paid into court for the *Hercules* is sufficient. The same amount is due to the *Islegarth* for salvage—that is to say, both vessels are entitled to the same amount for salvage. There is, however, the further question as to whether anything should be paid to the *Islegarth* in respect of the accident which happened to her. With respect to that I am a little hampered by this, that the defendant has paid into court 20*l.* under the contract, assuming that there was a contract for 20*l.*, and then the defendant has paid into court 80*l.* more. That is a difficulty, because it is a sort of confession and avoidance. It is a sort of confession that this tug suffered damage during the services, and I have had considerable difficulty in coming to a conclusion about it. I have spoken to the learned President about it, and taken his advice on this somewhat difficult question, and the result I have arrived at is this, that where there is, as here, an absolute denial of liability, and where there is, as here, an admission, a payment into court, a statement that the damages incurred by the *Islegarth* were due to her own carelessness, that is an issue for the court, and must not be taken in any sense as an admission that there is anything due to this vessel. I had a case not very long ago, *The Reading* (98 L. T. Rep. 590; 11 Asp. Mar. Law Cas. 35; (1908) P. 162), in which I had to decide a point somewhat similar to this. It was an appeal from the registrar. My view is that where the court is asked, with a perfectly open mind, to deal with a case where there is in a sense contradiction, the court is entitled to put absolutely aside anything which is pleaded if the side to which the amount tendered is offered refuses it. As in the case to which I have referred, so here, if the offer or tender had been accepted, the whole of the costs of this litigation, so far as the *Islegarth* is concerned, would have been saved; but the *Islegarth* did not care to accept the tender, and therefore I am entitled to treat the case as if there had been no tender. My view about this part of the case, namely, the damage sustained by the *Islegarth*, and the consequent demurrage, and the claim made against her by the *Elf*, is a matter of aye or no—does the court think that that damage and the consequent results were due to the *Islegarth's* own carelessness, as pleaded, or was it an inevitable accident which occurred to her in the course of her salvage operations? Now, as I have said, the wind had

dropped, and it was only a moderate breeze, and she had got control of this vessel, but the *Hercules* was also working to get salvage out of her, and it looks very much as if the *Islegarth* and the *Hercules* were trying to jockey each other, with the result that the *Islegarth* got into this position of difficulty. In the circumstances I am of opinion, and the Elder Brethren agree with me, that the damage was not a consequence of the salvage operations in the ordinary sense of the word, but was due to the conduct of those on the *Islegarth* alone; and that the plea is a good one that it was due to their own carelessness and want of seamanship in manœuvring the *Islegarth*. The result is that I am of opinion that those items of the *Islegarth's* claim cannot be allowed, and we come back to the simple question of salvage. Upon that I award 50*l.* to each of these vessels.

An order was drawn up directing that 50*l.* should be paid out of court to each of the plaintiffs, and that the remaining 50*l.* in court should be paid out to the defendants, the question of costs in the action being reserved for further argument.

The argument as to costs was heard on the 9th April.

Aspinall, K.C. and *D. Stephens* for the plaintiffs, the owners, master, and crew of the *Islegarth* —The denial of liability by the defendants and payment into court by them raised two distinct questions in the action: (1) Are the defendants under any liability to the plaintiffs? (2) Was the sum paid in sufficient to satisfy the liability? The plaintiffs have succeeded on the first point, and are therefore entitled to the whole costs of the action down to payment in, and the subsequent costs occasioned by that question being in issue:

Annual Practice 1908, p. 299;
Powell v. *Vickers, Son, and Maxim*, 95 L. T. Rep. 774; (1907) 1 K. B. 71;
Fitzgerald v. *T. Tilling Limited*, 96 L. T. Rep. 718.

The owners of the *Islegarth* are also entitled to the costs of the issue as to the existence of the alleged contract, for the court has found that there was no contract.

The owners of the *Hercules* were not represented by counsel.

Laing, K.C. and *A. D. Bateson* for the defendants.—The costs are in the discretion of the court:

Order LXV., r. 1.

In a salvage suit in which defendants pay money into court and the court upholds the amount tendered as sufficient, the plaintiffs are entitled to costs up to the date of payment in, and the defendants are entitled to the costs incurred after that date:

The William Symington, 51 L. T. Rep. 461; 5 Asp. Mar. Law Cas. 293 (1884); 10 P. Div. 1.

The issues in this suit on which the plaintiffs succeeded are not like the issues in a common law case, as to which a different rule as to costs may apply. In a salvage suit all the material facts are pleaded and proved, and the issues are merely inferences suggested to the court by counsel. In this case no extra evidence was called on any one of them. It is quite impossible to attribute a part of the costs of the evidence of the master of the *Islegarth* to the issue as to the alleged agreement. Further, the plaintiffs, having only recovered 50*l.*, should only be allowed costs on the County Court scale up to the date of tender. The action should have been brought in the County Court.

Judgment as to the costs of suit was given on the 9th April.

BARGRAVE DEANE, J.—I see no great difficulty in applying the principle laid down by the Court of Appeal in the case of *Fitzgerald* v. *T. Tilling Limited* (*ubi sup.*) to an Admiralty action. I quite agree that in an Admiralty action you have to state the whole of the circumstances of the case, and then you finish up by saying "arising out of the whole of the circumstances of the case we say no salvage, and if anything is to be paid we pay one of you according to the contract entered into." Now, the court has found that there was no contract established, and that it was a case of salvage of a small character; and in the case of one of the vessels has found the tender is exactly right, and in the case of the other that it is in excess of what was due for salvage. The rule, of course, is that in the case of a tender the plaintiff recovers the costs up to the date of the tender, if the tender is upheld, and the tenderer recovers the costs subsequent to that date. That seems to me a very reasonable rule to apply in this case, more particularly having regard to the rapidity with which the case came on for trial. It seems to me that the general rule applies, and that the plaintiffs should have the costs up to the tender, and the defendants should have their costs subsequently to the tender; and then I think I shall direct the registrar, following the principle laid down in the Court of Appeal, that if he can sever any costs—I do not see how he can in this case—if he can sever any costs, as representing the dispute as to whether it was towage or salvage, or whether there was a contract or no contract, from the general costs of the action, he should deal with this case according as the issues were found in favour of one party or the other. I do not see how it can be done in this particular case, but I can conceive it may be done in other cases, and it is my duty to follow the principle laid down in the Court of Appeal. If I said it could not be done, it might be that the Court of Appeal would say afterwards: "You should have left it to the registrar to say whether it could be done." I do not think that in this case I will limit the costs to the County Court scale. I agree the figures are small, but I think the case was one for this court.

Solicitors for the plaintiffs the owners of the *Hercules*, *Williamson*, *Hill*, and *Co.*, agents for *Ingledew* and *Sons*, Cardiff.

Solicitors for the plaintiffs the owners of the *Islegarth*, *Downing*, *Handcock*, *Middleton*, and *Lewis*, agents for *James Inskip* and *Son*, Bristol.

Solicitors for the defendants, *W. A. Crump* and *Son*, agents for *Gilbert Robertson*, Cardiff.

HOUSE OF LORDS.

Thursday, May 21, 1908.

(Before the LORD CHANCELLOR (Loreburn,) Lords ASHBOURNE, JAMES of HEREFORD, ROBERTSON, and COLLINS.)

LARSEN *v.* SYLVESTER AND CO. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Charter-party—Exceptions—"Hindrance of what kind soever preventing or delaying working, loading, or shipping of cargo" — Ejusdem generis.

A ship belonging to the appellant was delayed in obtaining a berth in her loading port, and consequently her loading was not completed within the lay days allowed by the charter-party.

The charter-party contained an exemption from liability "arising from frost, flood, strikes, lock-outs, or any other unavoidable accidents or hindrances of what kind soever beyond their control either preventing or delaying the working, loading, or shipping of the said cargo."

Held (affirming the judgment of the court below) that "hindrances of what kind soever" could not be restricted to hindrances ejusdem generis *with those previously enumerated, and that the charterers were not liable for the delay caused by the crowded state of the dock, which was beyond their control.*

APPEAL from a judgment of the Court of Appeal (Vaughan Williams, Farwell, and Kennedy, L.JJ.), who had affirmed a judgment of the Divisional Court (Phillimore and Walton, JJ.) reversing a decision of the County Court judge at Hull in favour of the appellant, the plaintiff below.

The defendants were the charterers of a steamship called the *Mauranger*, and the action was brought by the owner of the vessel to recover 91*l.* 5*s.* for 146 hours' demurrage of that ship at 12*s.* 6*d.* an hour under a charter-party dated the 4th July 1907, entered into by the defendants. By clause 5 A of the charter-party the cargo was to be loaded within eighty-four running hours (certain holidays excepted), time to count when written notice of readiness to receive the entire cargo was given to the staithman or colliery agent, or handed into his office between the hours of six a.m. and noon; demurrage to be at the rate of 12*s.* 6*d.* per running hour. "The parties hereto mutually exempt each other from all liability arising from frosts, floods, strikes, lock-outs of workmen, disputes between master and men, and any other unavoidable accidents or hindrances of what kind soever beyond their control, preventing or delaying the working, loading, or shipping of the said cargo occurring on or after the date of this charter until the actual completion of the loading."

The *Mauranger* arrived in dock at Grimsby at 7 a.m. on the 18th July, to receive a cargo of coal, and written notice that she was ready to receive her cargo was given at 9 a.m. It was common ground that her lay days under the charter-party then began, and subject to any exception in the charter-party they would expire at 9 p.m. on the 23rd July.

(*a*) Reported by PHILIP B. DURNFORD, EDWARD J. M. CHAPLIN, and C. E. MALDEN, Esqrs., Barristers-at-Law.

The actual loading did not begin until the 27th July at 9 p.m., and finished on the 29th July at 10.30 a.m.

There were six tips at the dock, at one of which the ship was bound to load. It was admitted that during the whole time the charterers had coal available if they had been able to get the ship to a tip, and also that the dock was entirely under the control of the Great Central Railway Company, who owned it, and according to whose regulations ships had to take their proper turn at the berths.

The reason for the delay in loading was that there was a glut in the dock at that period, and some thirty ships were waiting to be loaded, some of those immediately prior in turn to the *Mauranger* being also vessels chartered by the defendants.

Of the total delay, four days were accounted for by the other vessels chartered by the defendants, but it did not appear either that they had sent more vessels to the dock than was their custom, or that the presence of their vessels would in ordinary circumstances have produced congestion at the dock.

The learned judge held that in the circumstances the defendants had not brought themselves within the exception in clause 5 A of the charter-party, and that the word "hindrances" must be construed as meaning hindrances of a kind *ejusdem generis* with those previously mentioned. He therefore gave judgment for the plaintiff.

The defendants appealed.

Scrutton, K.C. and *McKinnon* for the defendants.—The learned judge was wrong in holding that the defendants had not brought themselves within the meaning of the exception. The glut at the dock was a hindrance of the shipping beyond the control of the charterers within the meaning of clause 5. Although the contrary was held by Bigham, J. in similar circumstances in *Shamrock Steamship Company* v. *Storey and Co.* (8 Asp. Mar. Law Cas. 590 (1899); 81 L. T. Rep. 413; 4 Com. Cas. 80), that view was not entirely accepted by the Court of Appeal, who affirmed the decision on another ground. The matter is therefore open for this court to decide. In *Sailing Ship Milverton Company Limited* v. *Cape Town and District Gas Light and Coke Company Limited* (2 Com. Cas. 281) it was held by Mathew, J. that the words "hindrance beyond charterers' control" covered such a case as the present. The words here are "hindrances of what kind soever," which are clearly wide enough to protect the defendants. He also referred to

Crawford and Rowat v. *Wilson, Sons and Co.*, 1 Com. Cas. 154.

Bailhache for the plaintiff.—The decision of the learned judge was right. The cardinal fact here is that this is a fixed lay day charter-party—viz., eighty-four running hours. That being so, when the vessel arrived at Grimsby and written notice of her readiness to load was given, the charterers' obligation to load within eighty-four hours became imperative unless they can bring themselves within the exception. It is suggested that the effect of clause 5 is to make the charter-party one which puts the risk of getting to the tip on the vessel. That would be an entirely different kind of charter-party, and such a construction cannot be arrived at without giving too great weight to the exceptions. The glut in the dock

was not unexpected by the parties. They knew of it, and with that knowledge the charterers contracted to load within eighty-four running hours from the time of notice. The material exception in clause 5 relates to the operation of shipping, and consequently the exception does not apply until the ship is under the tip. Further, to bring the defendants within the exception the hindrance must be one *ejusdem generis* with those specified. The hindrance here was not beyond the charterers' control. As to four days the delay was occasioned by the presence of other ships chartered by the defendants. If a charterer contracts to load a ship within a fixed time he must do so unless he can bring himself within the exception, and that exception must have nothing to do with himself. He referred to

Ogmore Steamship Company v. *Borner and Co.*, 6 Com. Cas. 104;
Aktieselskabet Inglewood v. *Millar's Karri and Jarrah Forests Limited*, 9 Asp. Mar. Law Cas. 411; 8 Com. Cas. 197;
Richardsons and M. Samuel and Co., 8 Asp. Mar. Law Cas. 330 (1897); 77 L. T. Rep. 479; (1898) 1 Q. B. 261;
Allison and Co. v. *Rose Richards*, 20 Times L. Rep. 584.

McKinnon in reply.

PHILLIMORE, J.—I am of opinion that this appeal should be allowed. The question turns upon the construction of clause 5 A of this charter. What happened was that the ship arrived and written notice of her readiness to receive her cargo was given, and she was prepared to move to the tip. There are six tips at the dock, and these tips are under the control of the Great Central Railway Company, acting through its dock master. A ship cannot load except at one of the tips, and there were a great number of ships waiting to load before the *Mauranger*. The rule of the railway company is that the ships must load in their turn, and this ship was detained waiting for her turn for something like twelve days, and the plaintiff claimed and recovered twelve days' demurrage. The defendants, the charterers, admit that time began to run from the moment that notice was given of readiness to receive the cargo. They are not entitled to deduct the time necessary for moving to the tip but they rely upon the exception in the charter, and say that they could not load because there was "an unavoidable hindrance beyond their control" preventing the shipping of the cargo, and that such hindrance occurred at or after the date of the charter. The County Court judge has taken the view that the exception does not apply, and it has been contended on behalf of the plaintiff that the exception has no application, because (1) there is a specific contract to load this ship within a certain number of hours, and that it requires very strong reasons to obviate the necessity for this, and that such a clause of exemption as this contract contains is not to be relied upon, because very strong words are necessary to bring the parties within the exemption; (2) the words "other . . . hindrances of what kind soever" mean other hindrances *ejusdem generis* with those specially mentioned; (3) this was not a hindrance which "prevented or delayed" the loading of the ship; and (4) it did not arise from causes beyond the charterer's control. I endeavoured to appreciate the point that was made with so much force, that we are to look at this as being a fixed day or hour charter, and to read that as the governing clause, and look, as it were, grudgingly at the exception. I endeavoured to appreciate that, but I think Mr. Bailhache overstated the force of that contention. The parties contract as much for the exemption as for the loading or time of arriving, and we must look at the whole clause. Looking at it in this way, is not this a hindrance? What has happened? Owing to an uncommon state of things, which the parties might on the facts have contemplated to some extent, but not to the extent which happened—that is to say, owing to something which need not have happened—there has been a delay in the steamer reaching the tip. She has been hindered not merely by a rule of the dock company, but by the presence of other vessels. If there had been no rule, and the other vessels were there, it might have been a question of racing to the berth, and then the physical occupation of the vessels found there would have been a hindrance. It is none the less a hindrance because the order in which the obstructing vessels are to approach the berth is regulated by the dock company. It seems to me, therefore, that this is brought within the meaning of the word hindrance. Then on the suggestion that the hindrance must be one *ejusdem generis* with those causes mentioned earlier, I have to say that, while not appreciating myself the extent to which that doctrine of *ejusdem generis* has been carried, but, intending to follow it as far as it has been applied, it does not cover this case. There must be words by which people can express that they mean that all accidents and hindrances are to be exempted, and they must be entitled if they please to put down such as occur to them, and to put in a clause to save, if nothing else, mental trouble or descriptive or imaginative trouble which shall cover any other conceivable accident; and it is only a question of drafting how they express it, There are cases both ways upon what is enough to show that all other accidents and hindrances are to be excluded, and what is not enough to show this intention; but even if the decisions do not cover this case, it seems to me plain that, when people say "accidents or hindrances of what kind so ever," they mean that which they appear to say—that is, all other accidents or hindrances, and not merely those *ejusdem generis* with those mentioned. Therefore it seems to me that the parties here must be held to have contemplated that all inevitable hindrances preventing or delaying the shipping of the cargo should be exceptions from the obligation to load within a certain time. Having got so far, I have to consider whether this was a hindrance preventing or delaying the shipping of the cargo. On the whole, I am of opinion that it was. The plaintiffs are in this dilemma. If they do not put their claim from the time when they delivered notice of readiness to receive the cargo, but only from the time when they are alongside the berth, their hours do not begin to run until then, and there is no demurrage. If they put their claim from the time when they handed in their written notice, we have to consider whether or not it is a hindrance to the shipping of the cargo that the vessel should not be in a position to receive her

cargo. I put examples with a view to seeing how far the contention of the plaintiff would go. If the contract for the charter has been entered into, and quite without the fault of either party, an obstruction occurs, possibly even after, or while, the ship is coming into the dock, such an obstruction, for instance, as would be caused by the falling of a balk of timber between the ship and the berth, and it takes from twenty-four to forty-eight hours to remove it, and if it had not been for the obstruction the ship would be in the dock, would not that be a hindrance? It seems to me that it would. I do not think it is possible to say more about it. It seems to me, therefore, that this was a hindrance delaying the shipping. Therefore the defendants have got thus far: that this was a hindrance delaying the shipping of the cargo which occurred on or after the date of the charter. I can conceive of cases where there might be delays which would not cause a hindrance within the meaning of this charter. It may be that for the economical and prosperous working of this dock it is necessary that the berths should always be full, and the dock owners would be always letting fresh vessels into the dock, which might find that at the moment all the berths were occupied, and they might accordingly have to wait for hours or days before they could get to the slip. Such contingencies as that would not be hindrances within the meaning of this clause. But, if it be a question of degree, there can be no doubt that such a delay as there was on this occasion was a hindrance. Then comes the last point made, which relates to four days only of the twelve days' delay. The point is this, and it is worth consideration, that, as regards these four days, the hindrance was not unavoidable or beyond the control of the charterers, because it was due to the fact that they had introduced other vessels into the dock to be loaded which had been chartered by them, and which took precedence of this particular ship, and to that extent delayed the latter. The facts as to this are not very clear, and if the burden of proof on this point shifted from the defendants to the plaintiff it may be said that he did not sufficiently clearly prove the facts alleged. As far as I can understand, all he relies on is the bare fact that there were other vessels chartered by the defendants which if they had not been there would not have taken up the berths, and their absence would have enabled this ship to get to the berth earlier. Whether they came in with a greater number of ships than the dock could have dealt with in the ordinary course of things is not proved, nor when the contracts chartering the ships were made. We do not know whether the contracts were made with a knowledge that they would create a glut in the dock. The one fact we know is that the defendants had not loaded more ships than was usual with them, but rather fewer, so that their contribution to the glut, if they contributed at all, was smaller than usual. I am not prepared to say at this moment that if shipowners A., B., and C., by sending a great number of ships into the dock, cause the business of the dock to become in arrears, and shipowner D. sends in no more ships than could be dealt with in the ordinary course, and no other ships come in while his are there, and the delay is occasioned by the fact that when his ship comes in the arrears of the former day have not been disposed of, in these circumstances I am not sure that he contributes to the glut at all, and I am not prepared to say that he has himself hindered the loading of this other ship. If it could be proved that he had foreseen when he chartered the other ships that these ships, or these ships plus the ordinary ships chartered, would create a glut in the dock which would postpone the loading of this vessel, other considerations might apply. On the facts before us I think the plaintiff's case comes far short of displacing the *primâ facie* proof offered by the defendants that this was a hindrance beyond their control. I am, therefore, of opinion that the appeal must be allowed.

WALTON, J.—I agree that the appeal must be allowed. By the charter-party the time allowed for loading the vessel was eighty-four hours. The time actually occupied was thirty-seven hours. From the time when the vessel was ready to load until the loading was completed was, at day rate, twelve days longer than the thirty-seven hours. That is to say, there was twelve days' delay. How was that delay caused? It was caused by a glut of vessels in the Grimsby Dock. It was undoubtedly a hindrance which caused that delay. The exception relied upon by the charterers is "any other unavoidable accidents or hindrances of what kind so ever beyond their control preventing or delaying the . . . shipping of the said cargo." In the first place it was said by the plaintiff that although there was this delay, caused as I have stated, it was not a hindrance within the meaning of the charter-party, because the word "hindrances" must be read in connection with the previous words "frosts, floods," &c., and that the meaning of "hindrance" must be confined to hindrances which are similar to the causes of delay mentioned in the earlier clause. It is said that it comes within the rule of construction sometimes referred to as the rule of *ejusdem generis*. In the first place, with regard to that rule, I entirely agree with what Fry, L.J. said in *Hutcheson* v. *Eaton* (51 L. T. Rep. 846; 13 Q. B. Div. 861): "Now I think that that doctrine of cutting down the plain meaning of words because they happen to come in connection with others is one to which recourse should not be too freely had." Still, no doubt the rule exists, and having regard to the recent cases in which it has been considered, it appears to me that if there is anything in the clause which indicates that the parties intend the general words to be understood in their natural sense, such an intention must prevail against the rule relied upon. It appears to me in this case, unless actual violence is to be done to the words which the parties have used, that "hindrances" must be understood as meaning all hindrances of every kind. Therefore I think the word "hindrances" is sufficient to include the glut at the Grimsby Dock which caused the delay in loading this vessel. Mr. Bailhache took another point. He said that to come within the exception the "hindrance" must occur after the ship arrived in the dock. I am not quite able to appreciate the argument because the words of the charter-party are quite plain, and exempt the charterers from liability arising from accidents or hindrances which occur on or after the date of the charter. Here the hindrance was a continuing hindrance as long as it lasted. The

glut may have begun before the vessel arrived, but that seems to me to make no difference. Mr. Bailhache also contended that the construction of this charter-party for which the defendants contend has the effect of making this charter-party, which requires the loading to be completed within a fixed time, exactly the same as if the loading had not to be finished in a fixed time. No doubt the charterers undertook to load in eighty-four hours, and if this were an impossibly short time they could not excuse themselves under the exception. They could not say "where all the conditions were favourable we could not load in eighty-four hours, and therefore we are hindered by causes not under our control, and we are not liable if we are more than eighty-four hours." That could not be contended here. It is a charter-party for a fixed time, and it so remains. Another point raised was that this was not a hindrance preventing "the shipping of the cargo." It seems to me that it was so. It prevented the charterers from discharging their duty of placing the cargo from the tip into the ship. The ship's obligations in one sense ended when notice of arrival was given, and the obligations of the charterers then began. It seems to me that in order to put the coals from the tip into the ship the first thing necessary was to get the ship up to the tip, and anything which prevented the charterers from bringing the ship under the tip prevented them from shipping the cargo. Then it is said that this was not a delay beyond the control of the charterers, because they had four other vessels in this dock which arrived there before the vessel in question. The facts seem to be that, although there was a glut in Grimsby Dock, the charterers' business there did not exceed their usual amount. If they were not loading more ships than usual then, for the reasons given by my brother, I think it could not be said that the hindrance was not beyond the control of the charterers. It was an unusual delay due to a glut which the charterers did not cause, and which they could not control. Being beyond their control, I think that they are protected by the words of the charter-party, and that the appeal must be allowed.

The plaintiff appealed.

J. A. Hamilton, K.C. and *Bailhache*, K.C. for the appellant.

Scrutton, K.C. and *McKinnon* for the respondents.

The arguments were the same as in the court below, and they appear sufficiently from the judgments.

VAUGHAN WILLIAMS, L.J.—One is often tempted to deal first with the last argument one has heard, and I propose to say a word or two upon the argument that has just been addressed to us by Mr. Hamilton. I think Mr. Hamilton conceded that the words at the end of Mathew, J.'s judgment in the case of *Sailing Ship Milverton Company Limited* v. *Cape Town and District Gas Light and Coke Company Limited* (2 Com. Cas. 281) are words which are plainly against him and in favour of Mr. Scrutton on this point. I am referring to the words in the charter-party itself as being decisive of the matter, for it contains the provision that demurrage shall be paid "except in case of unavoidable accident, or other hindrance beyond charterers' control." Mathew, J. says, at p. 285: "The fact that the authorities would not allow the ship to enter the Alfred Dock was clearly a 'hindrance beyond charterers' control.' Therefore, in my opinion, the action fails"; but he did not seem to me to have recognised really what the course of the argument had been, according to the report. I turn to p. 283, and I find this in the argument of Mr. Cohen, who appeared for the defendants. He says that the case of *Dahl and Co.* v. *Nelson, Donkin, and Co.* (4 Asp. Mar. Law. Cas. 172, 392 (1882); 44 L. T. Rep. 381; 6 App. Cas. 38), which had been cited by the plaintiffs, "shows that when a ship is prevented from reaching her discharging place the parties must consider what is a fair and reasonable course, having regard to their mutual interests," showing plainly that Mr. Cohen thought that the case he had to deal with was a case as to what was the obligation of the charterer in respect of getting lighters when a vessel had been prevented from reaching her discharging place. It is quite plain that Mathew, J. was dealing with the case on that basis. Generally I have only to say that I agree with the judgments of Phillimore and Walton, JJ. I do not think that it would be useful or proper for me to go at length through those judgments. I want in the first instance to say that I entirely agree with their observations upon the application of the *ejusdem generis* construction. We decided the other day in the case of *Tillmans and Co.* v. *Steamship Knutsford Limited* that the *ejusdem generis* construction did apply, but in the case of a contract entirely different from this, a case in which there was a difference between the first clause and the second clause, to which I have called attention to-day, which went a long way of itself to justify the application of the *ejusdem generis* clause. We pointed out how we could not accept the rule as laid down by Lord Esher, M.R. in *Anderson* v. *Anderson* (72 L. T. Rep. 313; (1895) 1 Q. B. 749), as to starting with the presumption that the general words must receive their natural construction *primâ facie* irrespective of the *ejusdem generis* doctrine, but we thought that *primâ facie* the *ejusdem generis* doctrine applies, unless it is shown from what is on the face of the contract that the intention of the parties was that the general words should not be so limited. I say in the present case I am of opinion that the general words should not be so limited.

For that conclusion I am only relying upon the view of the application of the *ejusdem generis* doctrine which was expressed by Fry, L.J. in *Duck* v. *Bates* (50 L. Rep. 778) and in *Earl of Jersey* v. *Guardians of the Poor of the Neath Poor Law Union* (22 Q. B. Div. 555) and also upon *Hutcheson* v. *Eaton* (51 L. T. Rep. 846; 13 Q. B. Div. 861), which is cited by Walton, J. in his judgment in this case when he was dealing with this question of the application of the doctrine of *ejusdem generis*. I am told in this case that if we do not apply the *ejusdem generis* doctrine we are taking away from the ship the protection of the loading having to be completed within a fixed time of eighty-four hours, and that we ought not so to construe these words. I do not think that that is a true view of the contract. I agree with Phillimore, J. that the contract is not to give the eighty-four hours as a fixed time. It is a contract to give that

number of hours unless something happens—unless there is accident or hindrance—and it seems to me in those circumstances there is nothing to prevent us in a case where the use of the words "other unavoidable accidents or hindrances of what kind soever beyond their control" shows strongly an intention of the parties that the *ejusdem generis* construction shall not be applied from reading the contract as a whole and reading it in the way I have mentioned. I think that the *ejusdem generis* rule does not apply in this case.

That being so, the next question that we have to consider is whether there is a limitation here which limits the application of the exception, and Mr. Bailhache based his argument first upon a statement that in this case the moment the ship arrived in port the charterer was estopped or there was a fiction of law under which you must hold that the ship from the moment of arrival or from the moment of giving notice of readiness was under the tip ready to receive the cargo, and that therefore no fact constituting unavoidable accident or hindrance ever could be relied upon if it occurred in that interval. It is suggested that it was the intention of the parties that although when once the lay days had begun to run this clause might be relied on, that there should be an interval of time between the arrival in port and the beginning to load during which it should have no application. When the learned County Court judge gave his judgment he himself was pressed by a difficulty which Phillimore and Walton, JJ. both mention in their judgment—that is to say, that this clause in the charter-party contains these words, after dealing with the prevention, "occurring on or after the date of this charter." The learned County Court judge in the last paragraph of his judgment says: "The difficulty in accepting this construction I find is that hindrances arising on and after the date of the charter-party are to be covered." I do not know that I need now read the specific passages on which both Phillimore, J. and Walton, J. rest their judgments upon that point. Now, as to the point that it cannot be said that the hindrance was beyond the control of the charterer because the charterer had four, I think it was, or whatever the number of the ships was, of his own at the port, and that they constituted a part of the hindrance or obstruction, I can only say that, looking at the evidence first, I do not see anything to satisfy me that those ships did so in fact; but even if they did so in fact, it seems to me that there are regulations of the dock company as to the going in of the ships and the total number of the ships there, some being ships of the charterers and others being ships of other persons, as to all of which ships, whether the ships of the charterers or the ships of other persons it is impossible to anticipate or prophesy the date of arrival of, and in this case especially is this cogent, where in truth and in fact we know that many of these ships came to Grimsby a month or three weeks out of time. I think that that point is one that I need not say any more about. I think now that I have dealt with most of the arguments that have been addressed to us. I should like to say that although in the present case there is a good deal of evidence upon which one would come to the conclusion that the hindrance through the number of ships waiting for loading was the result of an exceptional state of things, the times of arrival of the ships show that in all probability the weather had a good deal to do with it. I do not think for myself the presence even of a single ship which was in the dock according to the regulations of the dock company could itself be a hindrance beyond the control of the charterer. I wish to call attention to the fact that it is conceded here that if there was one sunken ship there that would be a hindrance. Phillimore, J. puts the case of one crane falling across the dock. That is another instance where a hindrance is admitted, irrespective of whether the accident happened before or after the arrival of the ship in the dock. For the reasons given by Phillimore, J. and Walton, J., I think that this appeal must be dismissed. I think their decision was perfectly right, and although I felt it my duty to recognise the arguments that have been brought before us, and to deal with them more or less in my judgment, in the result my judgment differs in no way from that of the King's Bench Division.

FARWELL, L.J.—I agree with the judgment which has just been delivered, and with the judgments of Phillimore and Walton, JJ., and I have nothing to add.

KENNEDY, L.J.—I have felt considerable doubt upon one point of this case, and that is this: Whether under the circumstances you could properly bring under the head of unavoidable accident or hindrance occurring on or after the date of the charter-party delay in the working, loading, or shipping of the cargo. Whether that was satisfied or not by the fact that when this vessel was asking to be discharged the charterer could point to the fact that there was an unusual number of ships who in the ordinary course were being discharged or loaded, I am not at all prepared to dissent from the view that has been taken, and I will not say more than that I think, on the whole, that is the better view of the two. It seems to me, I confess, that there is a good deal of danger in the construction, and I cannot help having a doubt in my own mind as to what was the intention of the parties. These are very stringent charter-parties which are clear and precise in saying when a vessel has arrived and when a vessel has given notice of readiness to load and is in fact ready to load, not naming any place where she is to be discharged. Therefore she is in every sense an arrived ship. It is not clear whether the mere fact that one ship, two ships, or any number more than one, is being loaded in front can be pointed to by the charterer to say, "My lay days have not begun; there is an unavoidable accident or an unavoidable hindrance beyond my control in the fact that there are other ships ready to be discharged in front of me." The case of *Sailing Ship Milverton Company Limited* v. *Cape Town and District Gas Light and Coke Company Limited* (*sup.*) is the only case which has been pointed to by Mr. Scrutton, who was good enough to answer the question I put to him as to a case in point, and I agree that in a certain way it is. Of course the circumstances there are different, but I cannot shut my eyes to the fact that my brother Mathew, with his enormous experience and judgment in these matters, does hold that a congested state of dock

owing to the fullness through shipping ought to be treated as being a "hindrance beyond charterers' control." Therefore, whatever the charterers may have meant, I think one must take it that it must constitute a hindrance, and in fact of course it was a hindrance, and there is certainly no sufficient evidence, to my mind, here that the particular congestion as a hindrance to the loading was due to arrangements made by the charterer for loading his own ships. It is not a case in which the charterer has directed a particular dock. Apparently this is the only place of discharging in the ordinary way. There is no proof of it that I can see that satisfies me that I should be justified in saying that his acts, so to speak, had produced the congestion which caused the delay, though there may have been three or four ships of his own which had been there during the course of the time. With regard to whether this fact of congestion could possibly be treated as a hindrance, quite rightly there was quoted to me what I had said in the case of *Modesto Pineiro and Co.* v. *Dupre and Co.* (86 L. T. Rep. 560) in which at one passage of the judgment (although I did not expressly base my judgment on that ground) I stated that it was not necessary for me to deal with the point. I unquestionably, according to this report, stated that it seemed to me that the fact that there had been what is called a glut of vessels was not fairly a matter which came under the clause in the charter-party in that case, and if the clause in that charter-party was the same as this I must be taken to have given a construction which, having to decide this point, I must differ from now. The wording is not the same, nor can I pretend, on a reference, to have gone through the circumstances of that case, but there is no doubt that, assuming it to be the same, I did so there think, and I had through a considerable portion of this argument very considerable doubt as to whether under such a charter-party as this with a fixed term it was sufficient for the charterer to say: "I am not liable; this is an unavoidable accident beyond my control that has occurred." I confess I felt for some time inclined, at any rate, to think that the words "a hindrance occurring beyond control" was hardly the phraseology you would use in ordinary business when a port had an extraordinary amount of business of the ordinary kind, nothing of the kind that my brother Phillimore put of an accident happening to a crane or a vessel being sunk which would be strictly described as a hindrance occurring beyond his control. However, my brother Mathew's authority is there that that very word "hindrance" may be properly satisfied by the fact of congestion in discharging the ship. Therefore I do not myself feel at all justified in not treating it as sufficient for this charter-party to exempt the defendants. Under those circumstances I agree with my brethren in the conclusion they have arrived at. I should add this, not only was there the judgment of my brother Mathew in the case referred to, but my brother Channell, who, of course, is a judge of great experience in these matters, has recently had the point before him in the case of *Leonis Steamship Company Limited* v. *Rank Limited* (10 Asp. Mar. Law Cas. 398 (1906); (1907) 1 K. B. 344; when this case came to be discussed in the Court of Appeal (1908) 1 K. B. 499, the time of the court was largely taken up by a very interesting discussion on the law, but apparently on the facts they found that the word "obstruction" would be sufficiently satisfied by a crowded condition of the port.

The plaintiff appealed to the House of Lords.

J. A. Hamilton, K.C. and *Bailhache*, K.C. for the appellant argued that the hindrance was not within the words of the charter, which applied only to hindrances *ejusdem generis* with those enumerated preventing or delaying the "working" of the coal at the pit, the "leading" of it to the coal-tips, or the "shipping" of it at the tips. This delay, caused by a congestion of ships in the dock, is not *ejusdem generis* at all. Further, it was not "beyond the control" of the charterers, for some of the delay was caused by other ships chartered by them, and it did not occur "on or after the date" of the charter-party. They referred to

Shamrock Steamship Company v. *Storey and Co.*, 8 Asp. Mar. Law Cas. 590 (1899); 81 L. T. Rep. 413; 4 Com. Cas. 80;
Baerselman v. *Bailey*, 8 Asp. Mar. Law Cas. 4 (1895); 72 L. T. Rep. 677; (1895) 2 Q. B. 301;
Sailing Ship Milverton Company Limited v. *Cape Town and District Gas Light and Coke Company*, 2 Com. Cas. 281;
Modesto Pineiro and Co. v. *Dupré and Co.*, 9 Asp. Mar. Law Cas. 297 (1902); 86 L. T. Rep. 560;
Aktieselskabet Inglewood v. *Millar's Karri and Jarrah Forests Limited*, 9 Asp. Mar. Law Cas. 411 (1903); 8 Com. Cas. 197.

Scrutton, K.C. and *McKinnon*, for the respondents, supported the judgment of the Court of Appeal.

J. A. Hamilton, K.C. was heard in reply.

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

The LORD CHANCELLOR (Loreburn).— My Lords: I think that this judgment ought to be affirmed. The question is raised upon a charter-party, the relevant words of which have been referred to fully. In my opinion, the hindrance which delayed the shipping in this case was a block of steamers waiting their turn. I think that it was only the block which caused the hindrance. It was argued that this hindrance was not beyond the control of the charterers, because they had certain other ships which took turn before the vessel in question, and so delayed her. I think that the best answer to that contention is that the facts do not establish that those vessels were responsible for the delay in question. Then Mr. Hamilton argued that this hindrance was not within the words of the charter, and he invoked the doctrine of *ejusdem generis*. The language used is, "any other unavoidable accidents or hindrances of what kind soever beyond their control." Those words follow certain particular specified hindrances, which it is impossible to put into one and the same genus. It is sufficient for me to say that in the case of *Earl of Jersey* v. *Guardians of the Neath Union* (22 Q. B. Div. 555) Fry, L.J. referred to words of a very similar kind, and indicated what, I think, is perfectly true—namely, that you have to regard the intention of the parties as expressed in their language, and that words such as these, "hindrances of what kind soever," very often are intended to mean, as I am sure they are in this case intended to mean, exactly what they say. It is impossible

to lay down any general rules for the application of the doctrine of *ejusdem generis*, but I agree with Fry, L.J. that there may be great danger in applying it too loosely. It may result, as he says, in "giving not the true effect to the contracts of parties, but a narrower effect than they were intended to have." One other point was made which I confess that I did not fully understand—namely, that this block in the harbour did not occur on or after the date of the charter. I think that it commenced before the actual hindrance of this vessel, but that it was a continuing hindrance, and I do not think that there is any ground for the objection that has been made upon that point.

Lord ASHBOURNE.—My Lords: I entirely agree with what has been said by my noble and learned friend upon the Woolsack. The case has been argued with great force and insistence, and it has been stated that this is in consequence of the fact that the case does not stand by itself, but there are other cases looking to it for decision. The case rests upon a statement of a very few facts which have been necessarily mentioned to us more than once during the progress of the arguments. A block for which neither of the parties was answerable took place in the harbour and prevented the ship from arriving at its destination—at its proper place—within the time at which otherwise it would have been able to arrive, and it is sought by each party to place the loss that so occurred, without any blame on either side, upon the other. It is alleged on behalf of the appellant that the block is not covered by the wide words used in the charter-party, and that the words that follow the statement of the several matters that are mentioned as grounds of excuse ("frosts, floods, strikes, locks-out of workmen, disputes between masters and men, and any other unavoidable accident") "or hindrances of what kind soever beyond their control" are to be read *ejusdem generis*, which practically means that they are to be denied all meaning whatever. Of course, if that conclusion could be reached, it would be a very easy way of deciding the matter; but when parties put in words of that kind, which are obviously of considerable width, and put them in after consideration, not stopping short at any ordinary general term, but putting in "hindrances of what kind soever beyond their control," it is obvious that the more natural construction would be to assume that they meant something operative and did not mean to use blind words to be dismissed by the phrase that they were only *ejusdem generis*. I quite assent to the suggestion of my noble and learned friend upon the Woolsack that the words of Fry, L.J. were wise and reasonable words in the case that has been referred to, and I do not see any reason why I should be astute to discover any difference in reference to them. I can see no reason in fact or in common sense, or upon the construction of the document, why I should seek to find any special ground for excluding the block that occurred, and had the effect stated from the general words to which I have referred. Therefore I am of opinion that the judgment appealed from should be affirmed and the appeal dismissed with costs.

Lord JAMES OF HEREFORD.—My Lords: I concur.

Lord ROBERTSON.—My Lords: I have fully appreciated the force of the argument which has been addressed to us on behalf of the appellant, an argument characterised not merely by ingenuity, but, I thought, also by great general soundness. I am bound to say that so far as I, personally, am concerned, I should be well disposed to accede to that argument but for the words in the clause in question "hindrances of what kind soever." I hope nothing will be deduced from our decision to-day which shakes the soundness of what is called the *ejusdem generis* system of construction, because it seems to me that both in law, and also as matter of literary criticism, it is perfectly sound—that is to say, that where there are specific specimens given of what are intended a deduction is to be made from them applicable to other matters. I base my judgment solely upon this: The parties, I think, have realised, or at least may well be held to have realised, the applicability of that rule to such contracts and they insert these words "of what kind soever" simply for the purpose of excluding that rule of construction. The effect of the insertion of these words is this—it excludes the limitation which would naturally arise from the context and gives to the word "hindrance" its full and absolute meaning. That, I take it, is the net result of this clause, and accordingly the remaining question is—giving to the word "hindrance" its full latitudes—is the occurrence in question within it? I think that this may be solved by a very simple test. Supposing this vessel to have arrived at its further destination and to have been asked, "You are very late, what has hindered you?" the answer would have been, "The hindrance was a block in the harbour." Upon that simple ground I think that the decision which your Lordships propose is entirely in accord with what I call the net result of the clause. As I have said, I should be sorry if it were inferred from our decision that we detracted from the reasonableness and the authority of the principles of construction which are called *ejusdem generis*.

Lord COLLINS.—My Lords: I am of the same opinion.

The LORD CHANCELLOR.—My Lords: I only desire to add that I agree with what my noble and learned friend Lord Robertson has said as regards the well-established rule *ejusdem generis*.

Judgment appealed from affirmed and ap peal dismissed with costs.

Solicitors for the appellant, *Woodhouse* and *Davidson*, for *Aske* and *Ferens*, Hull.

Solicitors for the respondents, *W. C. Crump* and *Son*.

May 19, 25, *and July* 3, 1908.

(Before the LORD CHANCELLOR (Loreburn), the Earl of HALSBURY, Lords ASHBOURNE and ROBERTSON.)

ANDERSEN *v.* MARTEN. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Marine insurance—Time policy in respect of total loss only — "Warranted free from capture, seizure, detention, and consequences of hostilities" — Damage by perils of the sea—Capture by belligerent—Subsequent total loss.

A vessel was insured against perils of the seas on a time policy in respect of total loss only. The policy contained a clause "warranted free from capture, seizure, detention, and the consequences of hostilities." She sailed, being a neutral, in time of war for a port of one of the belligerents, carrying contraband of war. In consequence of damage by perils of the seas she gave up the attempt to reach her port of destination, and made for a port of refuge, which she would probably have reached in safety, but before she did so she was captured by a ship of the other belligerent, who put a prize crew on board and directed her to proceed to a port where a Prize Court was sitting. Before reaching it she was totally lost by perils of the seas in consequence of the damage which she had previously sustained. She was subsequently condemned by the Prize Court.

Held (affirming the judgment of the court below) 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.

APPEAL from a judgment of the Court of Appeal (Cozens-Hardy, M.R., Moulton and Farwell L.JJ.), reported 10 Asp. Mar. Law Cas. 605 (1907); 98 L. T. Rep. 146; (1908) 1 K. B. 601, who had affirmed a judgment of Channell, J. sitting in the Commercial Court without a jury, reported 10 Asp. Mar. Law Cas. 494 (1907); 97 L. T. Rep. 375, in favour of the respondent, the defendant below.

The appellant was the owner of the German steamship *Romulus* and the respondent was an underwriter at Lloyd's. The action was brought upon a policy of insurance, under circumstances which appear sufficiently from the headnote above and from the judgment of the Lord Chancellor.

J. A. Hamilton, K.C., *Ernest Pollock*, K.C., and *Balloch*, for the appellant, contended that the loss was by perils of the sea and not by capture. The vessel was lost by shipwreck. After the capture she was still at the owner's risk, subject to the decision of the Prize Court. In the case of a neutral ship the judgment of the Prize Court does not relate back to the time of capture. Till the condemnation the property was still in the appellant, and she was wrecked before condemnation. See

The Der Mohr, 3 C. Rob. 129; 4 C. Rob. 314;
The Tobago, 5 C. Rob. 218;
The Dispatch, 3 C. Rob. 278;
Hall on International Law, edit. 1880, sects. 149, 277;
Arnould on Marine Insurance, vol. 2, 7th edit., sect. 830;
Berens v. *Rucker*, 1 W. Black. 313;
Taylor on International Law, edit. 1892, sect. 692.

In this case the Supreme Court of the German Empire has decided in favour of the shipowner, reversing the decision of the court of first instance in favour of the underwriter. See also

Hahn v. *Corbett*, 2 Bing. 205;
Lidgett v. *Secretan*, 1 Asp. Mar. Law Cas. 95 (1871); 24 L. T. Rep. 942; L. Rep. 6 C. P. 616;
Livie v. *Johnson*, 12 East, 648;
The Maria, 1 C. Rob. 340.

"Arrest" is not "capture"; the position may be altered between the capture and the adjudication.

Scrutton, K.C. and *Bailhache*, K.C., for the respondent, maintained that the loss was by the capture, whether she was condemned or not. But for the capture she would have reached the port of refuge in safety. The sentence of the Prize Court relates back to the capture under the English authorities, but it is not necessary for the argument to go as far as that. See

Gosse v. *Withers*, 2 Burr. 683;
Hamilton v. *Mendes*, 2 Burr. 1198;
Cory v. *Burr*, 5 Asp. Mar. Law Cas. 109 (1883); 49 L. T. Rep. 78; 8 App. Cas. 393;
Lozano v. *Janson*, 2 E. & E. 160;
Dean v. *Hornby*, 3 E. & B. 180;
Ruys v. *Royal Assurance Company*, 8 Asp. Mar. Law Cas. 294 (1897); 77 L. T. Rep. 23; (1897) 2 Q. B. 135;
Morrough v. *Comyns*, 1 Wils. K. B. 211;
Stevens v. *Bagwell*, 15 Ves. 139;
Alexander v. *Duke of Wellington*, 2 Russ. & Myl 35.

In any case the loss was the consequence of hostilities.

Ernest Pollock, K.C. in reply.—The cases cited for the respondent are all cases of the property of an enemy, not of a neutral, or cases in which notice of abandonment was given at the time of the capture, which was not the case here. As to the general principles of prize law, see

The Banda and Kirwee Booty case, 3 Asp. Mar. Law Cas. 66 (1875); 14 L. T. Rep. 293; L. Rep. 1 A. & E. 109.

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

July 3.—Their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Loreburn).—My Lords: In this case the owner of the steamship *Romulus* insured that vessel for twelve months, from the 12th Jan. 1905, in a policy expressed to be on disbursements. At the trial it was agreed, no doubt with propriety, that the rights under this insurance were to be determined as though it had been on hull and machinery. The perils usual in a Lloyd's policy, including perils of the seas, men-of-war, takings at sea, arrests, restraints, and detainments, appear in the policy. But the risk insured was only against total loss. And there is the following clause: "Warranted free from capture, seizure, and detention, and the consequences of hostilities, piracy, and barratry excepted." The *Romulus*, a German vessel, sailed during the currency of this policy for Vladivostok, a naval port and basis of naval operations in the war between Russia and Japan

then raging. She carried coal, which had been proclaimed contraband of war. In order to avoid Japanese cruisers, the *Romulus* took a circuitous course to the north, and was so injured by ice that the master made for Hakodate, a Japanese port, for refuge. On the 26th Feb. 1905 she was stopped by a Japanese cruiser in the Tsugaru Straits, some thirty or forty miles from Hakodate. A Japanese officer, with seamen and marines, boarded her, questioned her master, examined her papers, and announced that the ship was captured for carrying contraband of war. Judging that she could make the voyage to Yokosuka, he ordered the master to proceed thither, remaining himself in control. The *Romulus* accordingly shaped her course for Yokosuka, but made much water, and altered her course. She then went aground, and, being unable to get her off, the Japanese officer was obliged to run her further aground at 2 a.m. on the 27th Feb. Ultimately she became a total loss as she lay. On the 16th May 1905, after her destruction, the Japanese Court of Prize condemned both ship and cargo, on the ground that the former "was employed transporting contraband of war by fraud," finding also that her papers had been falsified. In these circumstances the plaintiff claimed as for a total loss by perils of the seas.

The defence was that the owner lost his ship by capture, or seizure, or the consequences of hostilities for which underwriters were not liable, and that subsequently the captors lost her by perils of the seas. Mr. Hamilton, for the plaintiff, in the course of an argument which loses nothing of its merit by being unsuccessful, urged upon your Lordships that the owner, being a neutral, did not lose either the property in his ship or its possession by the arrest of the 26th Feb.; that he still remained at risk on the *Romulus*, and only suffered present inconvenience with a prospect of expense, and a possibility of total loss if ultimately she should be condemned. He had a chance it was argued, better or worse, of recovering his ship by decree of the Court of Prize, even though the cargo might be condemned as contraband, and so still retained an insurable interest until the vessel became a total loss by perils of the seas. No decision seems expressly in point, for hostile vessels stand in some respects on a different footing from neutral vessels in regard to the laws of prize. Carriage of contraband to a belligerent port does not impart a hostile character to a neutral ship. She cannot lawfully be destroyed nor her crew treated as prisoners of war. Carriage of contraband is not unlawful, as is aiding an enemy in an expedition. It is only an adventure which the offended belligerent may, if he can, visit with the penalty of capture and condemnation by a Court of Prize. I think that it is true that in this case the property in the *Romulus* did not pass wholly from the owner on the 26th Feb. The owner still had a chance of recovering the ship, and still remained so at risk that he might in law have insured her, and, being insured already, his policy was not necessarily at an end, though I cannot agree that he still retained possession. All this, however, does not, in my opinion, avail the plaintiff, and indeed some part of it might apply to the vessel of a belligerent, for even an enemy merchantman may in some circumstances be released by a Prize Court.

The real question is whether there was a total loss by capture, seizure, or detention, or the consequences of hostilities. I think that there was in this case a total loss by capture on the 26th Feb., to say nothing of the other words—viz., seizure and so forth. That was the day on which the *Romulus* was seized, lawfully as appears by the subsequent condemnation. There was on that day a total loss which, as things were then seen, might afterwards be reduced if in the end the vessel was released. Suppose that the *Romulus* had been insured against capture on a time policy, had been taken safe to Yokosuka, and there condemned, but that the time policy had expired in the interval between the date of her seizure and the date of her condemnation. In such case, if the plaintiff's contention is sound, the very thing which the policy was designed to cover would have happened during the currency of the insurance, and yet, by reason of the lapse of time in bringing her into port and obtaining a decree, all recourse against underwriters would have been lost, and probably the owner could not have protected himself by further insurance, or, if he could, only by payment of a ruinous premium. A contention which in such circumstances might make the liability of underwriters depend not upon acts done at sea or their lawfulness, but upon the degree of expedition shown by a Court of Prize in adjudicating upon those acts must surely be erroneous. If there were an appeal from the Prize Court which might not be decided for a long time, this observation would apply with increased force. I think that the reasonable and true way of regarding what actually occurred is that there was, in fact, a total loss by capture on the 26th Feb., though its lawfulness was not authoritatively determined till the 16th May following. Accordingly, I agree with the order made by the Court of Appeal. And it would not be necessary to say more were it not that our attention has been directed to a decision of the German Supreme Court of Appeal, which proceeds upon an opposite view. It would not be consistent with the great respect due to that court that I should offer any criticism upon its judgment, even if I felt myself competent, as I do not to discuss German law. I can only say that, without in the least questioning the authority of that court, I think that the law of England is as I have said, and I am, of course, bound to advise your Lordships in accordance with what I believe to be the law of England.

The Earl of HALSBURY.—My Lords: By agreement between the parties, I suppose to avoid a multiplicity of actions, the policy, which is actually a time policy for disbursements in respect of the ship *Romulus*, is to be treated as if for hull. It is for total loss only, and is warranted free from capture, seizure, and detention, and the consequences of hostilities. These are now quite familiar words, and give rise to no ambiguity, and the law is very clear that in this, as in other regions of insurance law, the immediate and not the remote causes of a loss are alone to be regarded. This is an English policy, and the questions raised under it are to be decided according to English jurisprudence. I should have thought that, given the facts, which the Lord Chancellor has pointed out and I will not repeat, it would have been impossible in an English court to deny that there was a total loss

to the owner on the 23rd Feb. This very question arose just 150 years ago, and was argued before Lord Mansfield, C.J., and he observed that a large field of argument had been entered into and it would be necessary to consider the laws of nations, our own laws and Acts of Parliament, and also the laws and customs of merchants which make a part of our laws: (*Goss* v. *Withers*, 2 Burr. 683). After taking time to consider, the learned judge, delivering the judgment of the whole court, on the 23rd Nov. 1758, then decided what would be enough to decide this case. After going through the whole law and discussing the question of how far and to what extent the seizure of the vessel affected a change in the property, he says, "but whatever rule might be followed in favour of the owner against a recapture or vendee, it can in no way affect the case of an insurance between the insurer and insured. . . ." The ship is lost by the capture, though she be never condemned at all or carried into any port or fleet of the enemy, and the insurer must pay the value. If after condemnation the owner recovers or retakes her, the insurer can be in no other condition than if she had been recovered or retaken before condemnation. The reason is that from the nature of the contract the insurer runs the risk of the insured and undertakes to indemnify. He must, therefore, bear the loss actually sustained." Now, I entirely concur with what was said in *Ionides* v. *Universal Marine Insurance Company* (1 Mar. Law Cas. O. S. 353 (1863); 8 L. T. Rep. 705; 14 C. B. N. S. 259), that the words here, "warranted free from capture, &c.," are to be construed as if these words were used in a policy against those events, and, applying Lord Mansfield's words here, it seems to me that it would be a bold thing to argue against a judgment of the full Court of King's Bench, presided over by Lord Mansfield, and 150 years after it has been accepted as the law during that period by every English tribunal. I think that it is important to insist upon the exact form of the policy here, since I do not know what was the form of the policy upon which the German adjudication was founded. I neither understand that judgment nor the reasoning by which it has been arrived at by the court, but it is obvious that we have neither the policy on which the court was adjudicating nor the language of the court itself. I say this because the passage in which the court expresses its disagreement with the English judgment (which is, I suppose, either that of Channell, J. or of the Court of Appeal) is hardly intelligible, and though in the present case, as in the case before Lord Mansfield, it is immaterial to consider when or if at all the property was changed, I cannot let it be supposed that I entertain any doubt that the property was changed, and I do not think that it is true to say that the earlier writers ever had any doubt that where, as in this case, the possession was taken by a hostile force and an adjudication of condemnation as prize by the proper tribunal followed on grounds recognised by the general consent of nations to be lawful cause of capture, the rightfulness of the seizure and consequently the change of property related back to the time of capture. Here a neutral vessel was carrying, with the knowledge and consent of the owner, contraband of war (recognised as such by both belligerents), and furnished with false papers, and how any question could be raised as to the lawfulness of the capture I am myself wholly unable to understand. The ship was a total loss from the moment when she passed into the possession of the Japanese forces.

Lords ASHBOURNE and ROBERTSON concurred.

Judgment appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellant, *Woodhouse* and *Davidson*.

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

Supreme Court of Judicature.

COURT OF APPEAL.

Monday, March 9, 1908.

(Before Lord ALVERSTONE, C.J., FARWELL and KENNEDY, L.JJ.)

THE CHARLOTTE. (*a*)

Collision — Damage to cargo — Action against wrongdoer by owner of cargo—C.i.f. contract —Buyers not owners at time of loss—Payment of invoice price by buyers—Settlement of loss by underwriters with buyers—Subrogation—Right of underwriters to recover in name of sellers.

In performance of a contract made between sellers at Christiania and buyers at Exeter on c.i.f. terms, the sellers shipped goods on a barque to be carried to Exmouth Dock, and sent a bill of lading to their agents in London, who sent it to the buyers in Exeter, telling them they could keep it against their acceptance of a bill at four months or cash less discount. The buyers elected to pay cash, and on the 12th March posted a cheque to the sellers' agents in London drawn on a bank at Exeter. The cheque was presented and paid on the 15th March.

On the 12th March the barque collided with a vessel and put into a port of refuge. The fact of the collision was not known in London till the 16th March.

The goods were afterwards sold at the port of refuge on behalf of underwriters who had insured the goods for the benefit of whom it might concern. The underwriters subsequently paid the buyers as for a total loss, and the sellers retained the proceeds of the buyers' cheque for the invoice price of the goods. The underwriters then brought an action in the name of the owners of the goods against the owners of the ship which collided with the barque, the names of the buyers being given as the plaintiffs.

The court held that the buyers had no right of action, as the property in the goods had not vested in them at the time of the collision, but gave leave for the names of the sellers to be added as plaintiffs, found that the damage to the cargo was caused by the vessel which ran into the barque, and ordered a reference before the registrar to assess the amount of the damage.

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

On the hearing of the reference, the registrar held that as the sellers had been paid the invoice price of the goods they had suffered no loss, and rejected the claim.

The report of the registrar was confirmed by the judge of the Admiralty Court.

The plaintiffs appealed to the Court of Appeal.

Held (reversing the decision of the Admiralty Court), that the passing of the cheque did not deprive the underwriters of their right to recover the loss in the name of the sellers, who were the owners of the cargo at the time of the collision.

Appeal from a decision of Bargrave Deane, J. confirming a report of the Admiralty registrar rejecting the plaintiffs' claim for damages.

The plaintiffs were the owners of a cargo of wood laden on board the Norwegian barque *Fernando*; the defendants were the owners of the Norwegian barque *Charlotte*.

By a contract note dated London, the 10th Dec. 1906, F. Brieseman's successors, as agents for Westye, Egeberg, and Co., Christiania, sold to Messrs. R. W. and F. C. Sharp Limited, of Exeter, a parcel of wood goods for shipment at Christiania. The contract note provided that the goods were sold at a price including freight; prices were as quoted per St. Petersburg nominal standard, cost, freight, and insurance to Exmouth Dock; freight to be paid as per charter-party or bill of lading, and balance as stated below. Payment by approved acceptance to sellers' or agents' drafts, according to agents' option, payable in London at four months from date of bill of lading, or at buyers' option in cash less 2½ per cent. discount, and in exchange for the same, and policy of insurance, and if any freight advance be given, same to be paid by approved acceptance to sellers' or agents' drafts, according to agents' option, payable in London at one month from date of bill of lading, in exchange for shipping documents as above. Marine insurance to be covered by sellers or their agents on Lloyd's terms.

On the 30th Jan. 1907 Westye, Egeberg, and Co. chartered the *Fernando* to carry the parcel of wood goods sold to Messrs. Sharp to Exmouth Dock at a freight of 26*s.* per Petersburg Standard.

On the 1st March 1907 a bill of lading was made out for the parcel of wood goods to be delivered unto Messrs. F. Brieseman's successors, London, *quâ* agents, or order, he (or) they paying freight of the same goods of 171.01 Petersburg standards at 26*s.*, and 4.41 Petersburg standards at 17*s.* 4*d.* per Petersburg standard, and other conditions as per charter-party. As advance on the freight received, 100*l.*

On the 1st March Westye, Egeberg, and Co. sent from Christiania the following invoice:

	£	s.	d.
Invoice of a cargo of wood goods shipped per *Fernando*, Captain Sorensen, to Exmouth Dock, after orders for account and risk of R. W. and F. C. Sharp Limited, Exeter	2118	10	8
	£	s.	d.
Less freight of 171.01 Ptg. Std. 26*s.*... ...	222	6	3
,, ,, 4.41 ,, ,, 17*s.* 4*d.* ...	3	16	5
	226	2	8
	£1892	8	0
Freight advance	100	0	0
	£1992	8	0

On the 5th March F. Brieseman's successors, of London, agents for Westye, Egeberg, and Co., wrote to Messrs. Sharp Limited, Exeter, inclosing

The shipping documents per *Fernando* for a cargo of wood goods you contracted for and bought from Westye, Egeberg, and Co., Christiania, which we authorise you to retain against your acceptance of inclosed 1992*l.* 8*s.* or cash less 2½ per cent. discount for 1892*l.* 8*s.* to be sent us in due course, otherwise the bill of lading and other documents to be considered as remaining at our disposal and are to be sent back to us on demand. Requesting you to acknowledge receipt of the inclosures and saying at the same time how you elect to pay. Three inclosures: One invoice, one bill of lading, one policy of insurance. Policy for the cargo will follow when signed.

The policy, which was taken out by Price, Forbes, and Co. as agents 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 same doth, may, or shall appertain, was on wood goods valued at 2080*l.*, and was signed on the 7th March 1907.

The policy was sent by F. Brieseman's successors to Messrs. Sharp, and on the 12th March Messrs. Sharp wrote acknowledging the receipt of the policy of insurance and inclosing a cheque for 1845*l.* 2*s.* in payment of cargo, and asked for a receipt. The amount for which the cheque was drawn was invoice less freight 1892*l.* 8*s.*, less discount 47*l.* 6*s.* Messrs. Sharp also undertook to send a cheque to cover freight advanced at a later date.

The cheque sent by Messrs. Sharp was drawn on the 12th March in favour of F. Brieseman's successors or order on the Wilts and Dorset Bank Limited, Exeter, and was paid on the 15th March.

About 8.30 p.m. on the 12th March the *Fernando* came into collision with the Nowegian barque *Charlotte*, and received such damage that she had to put into a port of refuge, some of her cargo being damaged and some jettisoned.

The news of the collision reached London on the 16th March, and on that date Price, Forbes, and Co. wrote to Messrs. Sharp at Exeter advising them that the *Fernando* had been towed into Ymuiden after being in collision with the *Charlotte*, and that they were taking the necessary steps to protect the cargo owners' interests.

On the 15th April a telegram was received by the Salvage Association from Lloyd's agent at Amsterdam stating that the cost of repairs was estimated at about 1300*l.*, and the value of the vessel when repaired would be 670*l.* The value of the vessel was estimated at 267*l.*, and the telegram stated that the vessel would be condemned, and advised the cargo to be sold by auction for account of underwriters on cargo.

On the 19th April Price, Forbes, and Co. wrote to Messrs. Sharp stating that, from reports received from Lloyd's agent at Amsterdam, it appeared that the best way of dealing with the cargo was to sell it where it lay, and they had little doubt that the underwriters would adopt this method. They assumed that Messrs. Sharp were willing to accept a total loss under their policy, and requested that the policy and invoice and bills of lading should be sent them, when they would be in a position to deal with the matter.

On the 20th April Messrs. Sharp wrote to Price, Forbes, and Co. stating that they were

willing to accept a total loss under the policies of cargo and advance freight, and inclosing the invoice, bill of lading, policy on advance freight, and policy on cargo.

On the 2nd May Price, Forbes, and Co. wrote to Messrs. Sharp stating that they had completed a settlement of a total loss, and inclosing a cheque for 2059*l.* 4*s.*

Messrs. Sharp then asked F. Brieseman's successors to collect the amount of the freight advance—100*l.*—from the Christiania Saforrikringsselskab, who had insured it, and on the 10th May F. Brieseman's successors wrote to Westye, Egeberg, and Co., asking them to collect that amount, and inclosing them the policy; and on the 3rd June F. Brieseman's successors wrote to Messrs. Sharp forwarding a cheque in payment of the insurance on the advance freight, a receipt being sent them on the 4th June.

On the 1st May a writ *in rem* was issued in the name of the owners of the cargo of wood goods lately laden on board the Norwegian barque *Fernando* against the owners of the barque *Charlotte*, and the address of the plaintiffs was stated to be Exeter; and, on the defendants demanding it, the name of Messrs. Sharp was given as plaintiffs.

On the 18th June the plaintiffs delivered a statement of claim in which they alleged they had suffered damage by reason of a collision between the *Fernando* and the *Charlotte*, caused by the negligence of the *Charlotte*.

On the 21st June the defendants delivered a defence by which they denied that Messrs. Sharp are or were at any material time owners of the cargo or entitled to sue. They further denied that the plaintiffs had suffered any damage, or that the cargo had been damaged by the collision, or that those on the *Charlotte* had been negligent, and alleged that the collision was solely caused by the negligence of those on the *Fernando*.

The action was heard before Bargrave Deane, J. on the 5th July 1907, when the defendants contended that the property in the cargo had not passed to Messrs. Sharp at the time of the collision, and that they were not entitled to sue. The learned judge upheld that contention, and pronounced the plaintiffs to have no right of action, and ordered the barque *Charlotte* to be released, but gave the plaintiffs leave to appeal, and, on the application of the plaintiffs, suspended the order for the release of the *Charlotte*.

On the 6th July the plaintiffs applied to amend the writ by adding another plaintiff, and on the 9th July the learned judge gave the plaintiffs leave to amend the writ of summons by adding the address of Westye, Egeberg, and Co. as plaintiffs to that of R. W. and F. C. Sharp Limited, the present plaintiffs, on the consent of the said Westye, Egeberg, and Co. in writing being filed, and ordered that their name and address be furnished by the plaintiffs to the defendants' solicitors, and condemned Messrs. Sharp in all costs occasioned by their introduction as plaintiffs, and further ordered the *Charlotte* to remain under arrest.

On the 12th July the writ in the action was amended in accordance with the order of the 9th July, and on the 21st July the defendants delivered an amended defence denying that either Messrs. Sharp or Messrs. Westye, Egeberg, and Co., or either of them, are or were at any material times the owners of the cargo, and further denied that either of the plaintiffs had suffered damage, or that the cargo was damaged by the collision. Alternatively they alleged that if Messrs. Westye, Egeberg, and Co. had suffered any damage, which they denied, they brought into court, while denying liability, 40*s.*, and alleged that it was sufficient to satisfy any claim.

The action was again before Bargrave Deane, J. for hearing on the 26th and 27th July, when the learned judge held that the collision was caused by the fault of those on the *Charlotte*, and pronounced for the plaintiffs' claim and condemned the defendants and the barque in the said damage and costs, and referred the question of damages to the registrar and merchants. On the 30th July the learned judge gave the plaintiffs the general costs of the action, excepting those caused by the amendment of the pleadings.

On the 31st July the learned judge ordered the *Charlotte* to be sold, and under that order the proceeds of sale, amounting to 439*l.* 3*s.* 2*d.*, were paid into court.

On the 25th Nov. the plaintiffs filed the following claim in the registry:

			£	*s.*	*d*
1. 174.42 standards wood			2118	10	8
Less proceeds of sale.....		Fl. 16,000.00			
Lighter rent.....	Fl. 300.00				
Surveyor's fees	88.27				
Copy protest.....	4.58				
Cargo's proportion of general average on contributing values, Fl. 13,978	4808.43				
Cargo's proportion of general average attaching to freight advance.....	415.21				
Fees of Lloyd's agent at Amsterdam.....	500.00				
		6,116.49			
		9,884.51	1300	5	7
			£818	5	1
2. Freight compromised at Fl. 422.28 at 12.08			34	15	0
3. Cables				17	6
4. Agency...			13	19	6
			£867	7	1

With costs and interest.

After the filing of the claim the solicitors for the plaintiffs wrote to the solicitors for the defendants, saying:

We understand you are now prepared to admit the figures set forth in the claim recently delivered subject to your contention that credit should be given for the money paid by Messrs. Sharp to Messrs. Westye, Egeberg, and Co. If this is so, will you kindly confirm it in writing, and we hope to get an appointment before the registrar this term.

The defendants' solicitors replied:

The amount claimed as the invoice value of the goods is not quite correct, but we admit the invoice. We shall not raise any dispute as to the other figures contained in your claim, subject, of course, to our contention that you have not given us credit for the proceeds which Messrs. Westye, Egeberg, and Co. received from Messrs. Sharp, and that consequently the former firm have not suffered any damage. This is subject to your admitting that Messrs. Westye, Egeberg, and Co. received from Messrs. Sharp the value of the goods—namely, 1845*l.* 2*s.*—on the 15th March, and 100*l.*, the advance freight, at a later date. Please let us hear from you as to this.

To this letter the plaintiffs' solicitors replied

We admit that Messrs. Sharp Limited paid to Brieseman's successors on behalf of Messrs. Westye,

Egeberg, and Co. the sum of 1845*l.* 2*s.*, which amount was paid into the bank of Brieseman's successors on the 13th March last, and debited to Messrs. Sharp by their bank on the following day; the 100*l.* advance freight was paid in the early part of April.

The reference before the registrar was held on the 13th Dec., and on the 16th Dec. the registrar made the following report:

This was a claim against the owners of the *Charlotte* by Messrs. Westye, Egeberg, and Co., the owners of a cargo lately on board the barque *Fernando*, for damages in respect of injury to their cargo, caused by a collision between the *Fernando* and the *Charlotte*. The action came on for trial before Bargrave Deane, J. on the 5th July 1907. It was pleaded by the defendants that Messrs. Sharp and Co., of Exeter, the plaintiffs in the action, were not the owners of the cargo at the time of the collision, and had no right of action, no property having then passed to them, and this objection was upheld by the learned judge. It is unnecessary to refer at length to the various proceedings which afterwards took place before the court further than to state that the case was revived, Messrs. Westye, Egeberg, and Co., of Christiania, being added as plaintiffs, and that after the hearing of the evidence judgment was given for the plaintiffs, the owners of the *Charlotte* being held liable for the collision. Messrs. Westye, Egeberg, and Co. in due course filed their claim for damages, amounting to 867*l.* 7*s.* 1*d.*, but no question of figures or amount was in dispute at this reference, which was heard on the 13th Dec., my decision being required on a single point only. This point having been raised on the pleadings, it would have been more satisfactory to me if it had been decided by the court on argument after giving judgment on the merits, and in a common law action it would certainly have been then decided. The point, stated shortly, is whether under the circumstances of this case Messrs. Westye, Egeberg, and Co. are entitled to damages. The facts on which the point arises are as follows: The contract of sale of the cargo was dated the 10th Dec. 1906. Messrs. Westye, Egeberg, and Co. were sellers, and Messrs. Sharp, of Exeter, were purchasers. Payment was to be by four months' draft or in cash less 2½ per cent. discount. Under the contract, which was c.i.f., the seller had to insure the cargo. It was insured by his agents in the purchaser's name. The collision took place on the 12th March 1906 in the North Sea, whilst the cargo sold as above was on its way from Norway to Exmouth. The ship and cargo were subsequently taken to Ymuiden, where at a later date the cargo was sold. On the 13th March Messrs. Brieseman, Messrs. Westye, Egeberg, and Co.'s agents, received from Messrs. Sharp a cheque for the invoice price of the cargo, and on the 4th April another cheque for the advance freight. Messrs. Sharp on the 20th April abandoned the cargo to the underwriters as for total loss. Messrs. Westye, Egeberg, and Co. were therefore then in the same pecuniary position as if there had been no collision, the buyers having accepted the cargo at Ymuiden and paid the full price for it. The defendants therefore contended that Messrs. Westye, Egeberg, and Co. were not entitled to any damages, or, at any rate, to more than nominal damages, in respect of which they paid into court in their defence a sum of 40*s.* I am of opinion that Messrs. Westye, Egeberg, and Co. cannot recover damages. In order to give them a right to pecuniary compensation there must be a pecuniary loss. Messrs. Westye, Egeberg, and Co. have not suffered any pecuniary loss, and therefore are not entitled to compensation. If they were awarded damages, they would receive not *restitutio in integrum*, but something more. It was not, of course, concealed that, as the cargo was insured for more than its invoice value, the buyers were not losers by the payment they made—on the contrary, they were gainers; but all I am concerned with in this reference is to ascertain whether Messrs. Westye, Egeberg, and Co. have suffered any damage, and the mere statement of the facts shows that they have not, or, at the most, nominal damages, which are covered by the payment into court. With the motive which induced the buyers to pay for the cargo and not make any claim, I have nothing to do. It was, however, contended by counsel for Messrs. Westye, Egeberg, and Co. that they were trustees in the proceedings for Messrs. Sharp, and were therefore entitled to damages. But Messrs. Westye, Egeberg, and Co. are sellers, who have been paid by the buyers, who have made no claim of any kind against the former, nor is there any question of subrogation as between the underwriters and Messrs. Westye, Egeberg, and Co., and no kind of fiduciary relationship exists between the buyers and sellers. It occurred to me whether—though the point was not raised—as damage had been done to a cargo, an order somewhat similar to that in *The Glamorganshire* (6 Asp. Mar. Law Cas. 344 (1888); 49 L. T. Rep. 572; 13 App. Cas. 454), where the court ordered that the damages should be held by it until the right to them was ascertained, might not be made. But at this reference I have only to ascertain, whether on the pleadings and evidence Messrs. Westye Egeberg, and Co. have suffered any loss entitling them at law to recover damages, and I find they have not. This point, therefore, does not seem open at this stage of the proceedings, and, if it were, there may be various answers to it in law and in fact. It may appear at first a singular result of the litigation that the court has decided that the buyers had no right of action, and that at the reference the sellers should be held not to have sustained a pecuniary loss, but, as stated in *The Egyptian* (2 Mar. Law Cas. O. S. 56 (1864), these questions must be decided on strict judicial principles, and it will be found, I think, to arise from the fact that the parties to the contract have not been careful to act with sufficient consideration of their legal position. According to the ordinary practice, the plaintiffs must be condemned in the costs of the reference.

On the 30th Dec. the plaintiffs delivered a petition in objection to the report of the registrar. In their petition they set out the facts alleged, that Messrs. Sharp paid for the cargo and freight and took the benefit of the policy of insurance, allowing Westye, Egeberg, and Co. to retain the purchase price of the cargo, and submitted that the report was erroneous and ought not to be confirmed because the registrar was wrong in law in finding that Westye, Egeberg, and Co. were not entitled to recover; because Westye, Egeberg, and Co. in fact suffered a loss and were only permitted to retain the invoice price of the cargo on giving Messrs. Sharp the benefit of the policy of insurance; because the effect of the registrar's finding was to give the benefit of the policy of insurance to the defendants; because, even if the property had not passed from the sellers to the buyers at the time of the collision, Westye, Egeberg, and Co. had sufficient interest therein to maintain the action and recover damages either for themselves or for the benefit of the buyers; and because if Westye, Egeberg, and Co. were not entitled to maintain the action, Messrs. Sharp, their co-plaintiffs, were entitled to do so.

On the 14th Jan. 1908 the defendants delivered an answer to the petition of the plaintiffs in which they stated that the action was brought by the underwriters, who paid Messrs. Sharp as for a total loss, and they submitted that the registrar's report was right for the reasons he gave and because there was no evidence of, nor any permis-

sion to, retain the purchase money as alleged, nor was there evidence of Westye, Egeberg, and Co. acting, nor were they acting, for the benefit of others.

The petition was heard by Bargrave Deane, J on the 17th Feb. 1908.

Aspinall, K.C. and *Dawson Miller* for the plaintiffs.—The point successfully taken by the defendants before the registrar raises a question of importance to underwriters, for a policy of insurance is often taken out, as in this case, for the benefit of whom it may concern. As Messrs. Sharp received the policy and collected the money, they did not ask for the return of their cheque from Westye, Egeberg, and Co. [BARGRAVE DEANE, J.—Whom do you really represent?] The action is brought for the benefit of the underwriters, who have paid for a total loss; they are subrogated to the rights of the assured, and, as both vendor and vendee are on the record as plaintiffs, one or other has certainly suffered a loss. Even if Westye, Egeberg, and Co. are not entitled to recover for themselves, they can recover on behalf of Messrs. Sharp: (*The Winkfield*, 85 L. T. Rep. 668; 9 Asp. Mar. Law Cas 259; (1902) P. 42, which overruled *Claridge* v. *South Staffordshire Tramway Company*, 66 L. T. Rep. 655; (1892) 1 Q. B. 422). The cargo has admittedly been damaged to the extent of 867*l*., and what has happened with regard to the payment for the goods is quite immaterial. The wrongdoer cannot benefit by the insurance effected by the person wronged (*Bradburn* v. *Great Western Railway Company*, 31 L. T. Rep. 464; L. Rep. 10 Ex. 1), and the effect of the registrar's report is to allow the wrongdoer to do so.

Scrutton, K.C. and *A. D. Bateson* for the defendants.—The report of the registrar is right, and ought to be confirmed. The court has decided that Messrs. Sharp cannot sue alone, for the property in the cargo had never passed to them. Messrs. Westye, Egeberg, and Co. cannot recover more than nominal damages, for they have suffered no loss. The reason why Messrs. Sharp did not stop their cheque was because they wanted to secure their profit, 240*l*., which had been insured, but in fact they had no property in the goods which were lost. The underwriters can only have the rights that the assured had. The underwriters' right to recover "could only arise, and did only arise, from the fact that the underwriters had paid an indemnity, and so were subrogated for the person whom they had indemnified in his personal rights from the time of the payment of the indemnity":

Simpson v. *Thompson*, 3 App. Cas. 279, at p. 293.

On the facts it was clear Messrs. Sharp had lost nothing by the collision, for they had no property in the cargo, and Westye, Egeberg, and Co. had been paid for the goods, and so had suffered no damage.

Aspinall, K.C. in reply.—The cash given by Messrs. Sharp to Westye, Egeberg, and Co. would have been demanded back if the cargo had not been insured. Westye, Egeberg, and Co. were only allowed to retain the cheque because Messrs. Sharp were paid by the underwriters, so Westye, Egeberg, and Co. have clearly obtained the benefit of the insurance, and can sue for the loss on behalf of the underwriters.

BARGRAVE DEANE, J.—I think the registrar is perfectly right in this case. You have got to take the facts as they are, not as they might have been if you had behaved differently. It appears to me that, from beginning to end, this case has been conducted in the wrong way. It began by there being an action by Messrs. Sharp against the owners; then it was amended. Messrs. Sharp never having been the owners of the cargo, never had any rights in that respect, and therefore could not subrogate any right to the underwriters. Messrs. Westye, Egeberg, and Co. were the owners of the cargo; they had rights, and they would be entitled, if they had not been fully paid, to subrogate those rights, so that they could sue on behalf of the underwriters. But they have not received the underwriters' money; they have received the full purchase value of these goods from Messrs. Sharp, and there is no privity between them and the underwriters at all—you cannot mix them up. If different circumstances had arisen, if different arrangements had been made, possibly the position might have been different; but I have to deal with the facts as they are, and, dealing with the facts as they are, I say that Messrs. Sharp are out of the case altogether—they cannot sue for anybody else. With regard to Westye, Egeberg, and Co., they have suffered no damage, and therefore, having suffered no damage, they have got nothing they can pass on to anybody else, and there is no privity between them and the underwriters. In my opinion the registrar is perfectly right, and the petition must be dismissed with costs.

On the 19th Feb. 1908 the plaintiffs delivered a notice of appeal asking that the order of Bargrave Deane, J. should be reversed, and that the defendants should be ordered to pay the plaintiffs the amount of their claim.

The appeal was heard by the Court of Appeal on the 9th March.

Aspinall, K.C. and *Dawson Miller*, for the appellants, after stating the facts and reading the judgment of the learned judge and the report of the registrar, were stopped by the Court.

Scrutton, K.C. and *H. M. Robertson* (with them *A. D. Bateson*).—This is an appeal by Westye, Egeberg, and Co., for the learned judge has decided that the plaintiffs, Messrs. Sharp, had no property in the goods at the time of the collision, and so they were not entitled to sue, and he has in effect struck them out of the action. There has been no appeal from that decision, and there cannot be, for the time for appealing against that decision has elapsed, and no extension of the time can be granted:

Coles v. *Ravenshear*, 95 L. T. Rep. 750; (1907) 1 K. B. 1.

[Lord ALVERSTONE, C.J.—I am not sure that Messrs. Sharp were ever necessary plaintiffs.] The mistake of the plaintiffs' legal advisers is no special reason for extending the time to appeal; indeed, in this case no appeal has been entered at all, so it is not a question of extending the time. At the time of the collision Westye, Egeberg, and Co. had not been paid for the goods, and were not paid until three days after the collision.

Messrs. Sharp therefore had no right to sue, for the property had not passed to them:

Shepherd v. *Harrison*, 24 L. T. Rep. 857; 1 Asp. Mar. Law Cas. 66 (1871); L. Rep. 5 H. L. 116;
Mirabita v. *Imperial Ottoman Bank*, 38 L. T. Rep. 597; 3 Asp. Mar. Law Cas. 591 (1878); 3 Ex. Div. 164.

Westye, Egeberg, and Co. might have sued, but, by reason of Messrs. Sharp paying them the invoice price, they have suffered no damage. Messrs. Sharp paid Westye, Egeberg, and Co. to secure the profit which had been insured, but when Westye, Egeberg, and Co. had been paid the invoice price they suffered no loss; they therefore had no rights against the wrongdoer to which underwriters could be subrogated. The underwriters are only bound to indemnify the assured, and the underwriters had not done that, for Westye, Egeberg, and Co. had made no claim upon them. [*Castellain* v. *Preston* (1883) 49 L. T. Rep. 29; 11 Q. B. Div. 380) was referred to.]

Lord Alverstone, C.J.—I am unable to follow the reasoning upon which the respondents succeeded in the court below in satisfying the learned judge that the appellants were not entitled to more than nominal damages. As I understand the order of the 5th July, it merely pronounced that the plaintiffs, Messrs. Sharp, had no right of action. That, if it meant anything, meant that those plaintiffs alone had no right of action. The learned judge gave them leave to amend; and then Westye, Egeberg, and Co. were added. I myself should have thought this case quite clearly different from the case cited to us (*Coles* v. *Ravenshear, ubi sup.*), where in the Court of Appeal it was held—with some reluctance, no doubt—that a mistake of counsel was not a special circumstance to justify the Court of Appeal in extending the time for appealing. I should feel bound by that decision, and of course should act upon it loyally, but in my opinion it has no relation to the point in this case. Counsel for the respondents has said you cannot move a step now without getting the order of the 5th July reversed. In my judgment that is assuming too much in favour of the defendants. I think the most that can be said as to the decision of the court was that Messrs. Sharp were not entitled to recover alone. Whether that was right or wrong I do not care very much. It certainly does not prevent this court from saying, if necessary, that Messrs. Sharp's name should be added, when there are other plaintiffs before the court. Now I come to the merits of this case. The facts are these: A c.i.f. contract; undertaking or contract to pay by acceptance of bill or cash less discount; and I should rather agree with counsel for the respondent that the earliest point at which property passed was when the cheque was received or cashed, some three days later. I am aware that there may be an argument the other way. Therefore, at the time of the collision, Westye, Egeberg, and Co. were the owners of the goods, and could sue for the damage done, and had a right to look to the underwriters. I quite fail to understand the meaning of the learned judge in the court below when he said: "With regard to Messrs. Westye, Egeberg, and Co., they have suffered no damage, and, therefore, have got nothing they can pass on to anybody else, and there is no privity between them and the underwriters." To my mind that was, for the moment, an omission to observe that Westye, Egeberg, and Co. were themselves unpaid vendors; that they had made a c.i.f. contract for the benefit of Messrs. Sharp, and that they had taken out the policy, and, as counsel pointed out to us, had clean bills of lading which preserved the property in them until events happened which had not happened at the time of the collision. Then it is said because Westye, Egeberg, and Co. received a cheque for 1845*l.* 2*s.* on the 15th March and cashed it, therefore Westye, Egeberg, and Co. cannot sue in their names for the benefit of whom it may concern. I asked counsel for the respondents whether he had any authority for that proposition, and all he said was that if it pleased Messrs. Sharp, for reasons best known to themselves, to pay that money, that prevents Westye, Egeberg, and Co. from being able to sue upon Messrs. Sharp's behalf, or to sue in their own name for the benefit of the people who paid. I can see no legal principle upon which that proposition can be maintained, and I know of no authority and none has been cited to us. Therefore it seems to me when this action is in the name of the owners of the cargo; when the name of Messrs. Sharp is given at first; when objection is taken that the property had not passed to them; and when the names of other plaintiffs are added, then the question is whether Westye, Egeberg, and Co. have the right to sue, either for themselves or for the benefit of persons who have the real interest; and it seems to me that the mere passing of the cheque cannot be held to deprive the underwriters who had to pay of their right to recover in the name of the vendors, who were the owners of the cargo at the time of the collision. Therefore I think the appeal ought to be allowed, with costs.

Farwell, L.J.—I agree, and I do not in any way depart from what I said in the case that has been cited to us; but it has nothing to do with this case. Bargrave Deane, J. simply decided that Messrs. Sharp alone could not recover, but he did not strike Messrs. Sharp out. Westye, Egeberg, and Co. were added. I always understood that underwriters are entitled to any damages that may be recovered against a wrongdoer in respect of a collision, and that they are subrogated to the rights of the persons insured; and any arrangement as to payment between vendor and vendee cannot deprive underwriters of that right of subrogation. In my view there has been some misunderstanding in this case, and this appeal must be allowed.

Kennedy, L.J.—I am of the same opinion. Here is an ordinary contract of sale—a c.i.f. contract—which is to be fulfilled by the shipment of cargo, in accordance with the contract, from Christiania, to be delivered in London, the bills of lading being drawn by the seller, the shipper, in favour of London agents, *qud* agents, because by the terms of the contract payment is to be made in London to those agents; and therefore they retained, to that extent, the dominion over the property, which, if they had made the bill of lading without any condition, simply a bill of lading for delivery of the goods to the immediate buyer, they would not have retained. The cargo on its way is damaged, and the underwriters agree to pay as for a total loss. At the actual time of

the happening of the loss—an hour or so before—payment was being made to the London agents, a cheque being remitted by the buyer to the agents, but I will assume that the property had not passed to Messrs. Sharp at the time of the loss. In that case, as it seems to me, Westye, Egeberg, and Co. had a right of action for some loss, which, it is now agreed, may be treated as a total loss, against the underwriters. I confess I am a little surprised that, on the *Charlotte* being found alone to blame, any further question between business men should have arisen, but it was held by Bargrave Deane, J. that the buyer could not sue, standing alone, the policy having been taken out by Westye, Egeberg, and Co.; that the property not having passed at the time of the suit the persons to sue upon the policy ought to be Westye, Egeberg, and Co, and that as Westye, Egeberg, and Co. were not then plaintiffs, on the pleadings as they stood he gave judgment against the then plaintiffs. What happened then? There was no striking out of those plaintiffs, but the judge held that further parties ought to be added. I find from the registrar's report, which I assume is correct, that the case was revived, Westye, Egeberg, and Co., of Christiania, being added as plaintiffs. It is not a substitution of Westye, Egeberg, and Co. for Messrs. Sharp, but the addition of a person or persons as plaintiffs, who, I assume, were rightly considered by the learned judge to be necessary, according to our law, to give a right to recover against the *Charlotte*, for those whom it might concern. Then the matter goes before the registrar, who, in his very careful report, comes to the conclusion that Westye, Egeberg, and Co. have no right because they have received from Messrs. Sharp since the loss what Messrs. Sharp ought to have paid to them under the contract. I am unable to understand upon what grounds those who represent the wrongdoers can successfully argue that because Westye, Egeberg, and Co. have, as a matter of fact, had the transaction carried out by the payment of that cheque some days after the collision, Westye, Egeberg, and Co. have in some way lost their rights. If they are the proper parties to say, "This was our cargo that was lost, pay us the damage," can it be any answer to say, "You have been paid by the vendees who, relying upon the insurance for the benefit of whom it might concern, have sent the money to you, as it were, in advance"? I confess I am quite unable myself to understand that reasoning. I do not see what the legal foundation for that is—how it can be said that the wrongdoers can say, "Because the vendee has paid you, and relies upon your giving him the benefit of the policy, we have not anything to pay you for having damaged your cargo." I am, further, of opinion that the decision which has been cited, with regard to amendment, does not apply to such a case as this, where there has been the addition of a plaintiff in the way set forth in the registrar's report.

Solicitors for the appellants (plaintiffs), *William A. Crump* and *Son*.

Solicitors for the respondents (defendants), *Stokes* and *Stokes*.

March 5 and 17, 1908.

(Before Lord ALVERSTONE, C.J., FARWELL and KENNEDY, L.JJ.)

THE VENTURE. (*a*)

Action for possession — Sale of vessel — Claim against proceeds—Advance of part of purchase money — Resulting trust in favour of person making advance.

In an Admiralty action in rem *for possession instituted by the administratrix of the deceased registered owner of a yacht, an order was made for the sale of the yacht, and the proceeds of the sale were brought into court; all claims against the fund being referred to the registrar. On the reference the only claimant was a brother of the registered owner, who proved that the yacht had been bought for* 1050*l.*, *of which sum he had provided* 550*l. The registrar by his report found that the claimant had provided* 550*l. of the purchase price of* 1050*l.*, *but that he was not satisfied that that sum had been found by him on the terms of his becoming part owner of the yacht.*

On appeal to the judge of the Admiralty Court the report of the registrar was confirmed.

The claimant appealed.

Held, that the order of the Admiralty Court must be set aside, for, on the claimant proving that he had advanced a portion of the purchase money, a presumption, which had not been rebutted by evidence, arose in favour of the claimant; that there was a resulting trust in his favour to the extent of the advance made by him; and that he was therefore entitled to fifty-five one-hundred-and-fifths of the proceeds of the sale of the yacht.

See the rule as to resulting trusts stated by Eyre, C.B. in (1788) Dyer *v.* Dyer (2 *Cox*, 92).

APPEAL from a decision of Bucknill, J. confirming a report by the Admiralty registrar in an action for possession.

The plaintiff in the action was Margery Ida May Stone, the widow and administratrix of Andrew Stone; the defendant was Percy Stone.

The action was an action *in rem*, and was brought by the plaintiff, who claimed as lawful owner of the yacht *Venture* possession of the vessel and a decree ordering the possession of the said vessel to be given to her, with costs and damages against such persons as the court might find liable for the detention thereof.

The writ in the action was issued on the 5th June 1907, and on the 10th June 1907 the judge made an order, to which Percy Stone consented, that the plaintiff should have possession of the yacht *Venture*, and that, if the vessel was sold, the proceeds of sale were to be brought into the Admiralty Division of the High Court.

The yacht when sold realised 831*l.*, and that sum was brought into court.

On the 15th July 1907, on the plaintiff's application to pay the 831*l.* out to her, the judge made an order that the application be referred to the registrar to ascertain and report as to the claims against the fund.

The reference was held on the 22nd July; the only claimant to the boat was the defendant Percy Stone, who claimed to be entitled to a half share of the yacht. Counsel for the plaintiff,

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

Mrs. Stone, put in the register of the vessel, which showed that Andrew Stone was the only registered owner.

Counsel for the defendant and claimant Percy Stone called Percy Stone and a witness named Sabistan.

The effect of the evidence is fully stated in the report of the Admiralty registrar.

On the 23rd July 1907 the registrar reported as follows:

This was a summons for payment out of 831*l.*, being the proceeds of the sale of the yacht *Venture*, which was paid into court in an action of possession in which the plaintiff is Mrs. Stone, the administratrix of the late Andrew Stone, who died intestate on the 14th March 1907. This summons was referred to me on the 15th July 1907 to report upon the claims against this fund. The only claimant was Mr. Percy Stone, brother of the late A. Stone, who gave evidence before me on the 22nd July on his own behalf, as did another witness, Mr. Sabistan. Each side was represented by counsel. The claim made by Mr. Percy Stone was that he was a partner in the yacht with his late brother, and was therefore entitled to the proportion of the fund in court due in respect of his share. It appeared that for some years the late A. Stone—and it is admitted by Mr. Percy Stone—was sole owner of a small yacht, the *Arcadia*, in which he and his brother used to sail. As it was too small, it was decided to purchase a larger yacht, and, after negotiations and inspection by both brothers, the *Venture* was bought in March 1905 for 1050*l.* Of this sum 550*l.* was supplied by Mr. Percy Stone and 500*l.* was left on mortgage. As the vendor was anxious to have all the purchase money, A. Stone on the sale of the *Arcadia* paid 300*l.* of the 500*l.*, and 200*l.* was found by Mr. Rubinstein, a solicitor, who took a mortgage on the *Venture* for this sum, which mortgage was duly registered. Subsequently on or about Oct. 1906 the mortgage was paid off, A. Stone finding 75*l.* and P. Stone 175*l.*; the latter therefore claimed to be interested in the *Venture* to the extent of 675*l.*—the 50*l.* above the 500*l.* being commission payable to the agent of the owner of the *Venture*, which for some reason P. Stone did not regard as part of the purchase money of the yacht. A. Stone was a medical electrician, and his brother was at first assistant to him with a salary, and then became a kind of partner, who apparently received the fees from such patients as he attended. A. Stone appears to have been extravagant in his habits, and did not have a banking account, but handed cheques received from patients—the practice producing more than 2000*l.* a year—to P. Stone, who supplied him with the cash and the cheques he required. It was argued on behalf of Mrs. Stone that the account was in reality that of the firm, and that cheques drawn by P. Stone were really on behalf of A. Stone, but it is unnecessary for me to decide this point. I have to report that, after considering the evidence, I find that Percy Stone has not made out his claim to be a partner in the yacht. The evidence leads me to the conclusion that A. Stone was the actual and ostensible owner. I think that, having regard to the curious financial arrangements between these two brothers, it was entirely consistent with their relations that P. Stone should find the money he did without becoming a partner. There is not a line of written evidence to support his contention as to a partnership, and it is clear that A. Stone acted as the owner of the yacht, inviting the guests, and ordering the provisions. I am further of opinion that as there was a kind of running account between these brothers, such as I have already described, cheques handed by A. Stone to P. Stone would liquidate any debt due to P. Stone as the cheques were paid from time to time and to the extent of such cheques, and that A. Stone may have rightly considered that he had paid off these advances for the purchase of the yacht even though he might on balancing the account, at any particular and subsequent date, have been indebted to his brother for a considerable sum. For these reasons, there being no valid claim against the fund in court, Mrs. Stone, as administratrix of her husband, is entitled to payment out of the whole sum. As it is usual for the registrar to state his opinion as to the costs of references, I have to say that in my opinion P. Stone, having failed in his contention before me, should pay the costs of the reference.

On the 25th July 1907 Percy Stone gave notice of objection to the registrar's report, and on the 29th July 1907 obtained an order from the judge giving him leave to produce further evidence on the hearing of the objections to the registrar's report.

On the 11th Oct. 1907 Percy Stone delivered a notice of motion praying that the report of the registrar should be set aside on the ground that his findings were wrong in law and fact, and were unsupported by or were against the weight of evidence.

The objections to the report of the registrar were heard on the 1st Nov. 1907, when further evidence was called, the material parts of which are set out in the judgment of Bucknill, J.

Bucknill, J.—This is a motion on behalf of Percy Stone in objection to the report of the registrar, dated the 23rd July 1907, in which he found against Percy Stone's claim with regard to a yacht, the *Venture*. The proceedings in this matter have been very unusual. I can read between the lines, and feeling runs high, for the widow of Andrew Stone does not appear to be in good favour with the other branch of the Stone family. Andrew Stone, the husband of the present plaintiff—she being the plaintiff in an action brought against the "owners of the yacht *Venture*" for the possession of the vessel, the form of action which was necessary in the circumstances, and in the course of which action Percy Stone appeared as the only claimant—died on the 14th March 1907, and she was the administratrix of his estate. The yacht which was the subject of her action was by consent sold, I do not know how or to whom, but the net proceeds of the yacht amounted to 831*l.*, and that amount has been brought into court to abide the event of this case. Other proceedings have been commenced, lamentably I think, and, as far as I can see, somewhat unnecessarily, in Chancery by Percy Stone. I say no more, but it is again another indication of some family feeling in this matter, and it is in my opinion lamentable that the parties should be fighting as they are over this 831*l.*, and that I should be asked to believe on the evidence that this widow is entitled to only half the proceeds of this yacht. But I have got to decide the case, and I have to ask myself two questions: First, was the registrar right—was he justified, that is to say—on the evidence before him, in making the report which he has made? The only witnesses whom he heard, though I think some letters were put in, were Percy Stone and Mr. Sabistan. The registrar had an opportunity of observing Percy Stone, and he probably asked himself the question, amongst others, whether his statements, made on oath, that he was a partner in the yacht with Andrew Stone were to be accepted. He heard the other witness, who gave evidence on a not very

important point, because his evidence only comes to this, that Percy Stone said that he and his brother were buying the yacht between them. If he had said that Andrew had told him, it would have been very important, although Mr. Sabistan's evidence did not have much effect upon the registrar's mind, and upon the story told by Percy Stone, he found—and I think justifiably—in terms that Percy Stone had not made out any claim to be a partner in this boat Amongst other things, the registrar said: "I think that, having regard to the curious financial arrangements between these two brothers, it was entirely consistent with their relation that Percy Stone should find the money he did without becoming a partner." I agree to that.

The registrar proceeded: "There is not a line of written evidence to support his contention as to a partnership, and it is clear that Andrew Stone acted as the owner of the yacht, inviting the guests and ordering the provisions. I am further of opinion that as there was a kind of running account between these brothers, such as I have already described, cheques handed by Andrew Stone to Percy Stone would liquidate any debt due to Percy Stone as the cheques were paid from time to time and to the extent of such cheques, and that Andrew Stone may have rightly considered that he had paid off these advances for the purpose of the yacht, even though he might on balancing the account, at any particular and subsequent date, have been indebted to his brother for a considerable sum. For these reasons, there being no valid claim against the fund in court, Mrs. Stone, as administratrix of her husband, is entitled to payment out of the whole sum."

Then, as to the costs, the registrar reported that, as it was usual for him to state his opinion as to the costs of the reference, he had to say that, in his opinion, Percy Stone, having failed in his contention before him, should pay the costs of the reference. Now, I have said that I think the registrar was right in his finding of fact. He saw the witnesses and I did not, but I think that I should have come to the same conclusion myself. The evidence before him was shortly this: Percy Stone was called, and he proved that there were two boats which Andrew Stone had owned prior to the purchase of the *Venture*—the *Arcadia* and the *Cymbeline*. Percy Stone said the *Arcadia* was Andrew's own property. "We agreed," he said, to buy the *Venture* together." Then he said what the price was. He said: "I found 550*l.*; the *Arcadia* was sold for 300*l.*"; and here is a strange bit of evidence which shows what the financial arrangements were. He said: "This was paid to me, and I paid it to Rubinstein to pay off Baird, and Rubinstein paid off Baird 200*l.* borrowed from Rubinstein." Mr. Rubinstein took a mortgage, we know, of this yacht to secure that advance, and the witness proceeded: "200*l.* was paid off on the 30th Oct.; my brother paid 75*l.* and that left 125*l.* I paid this off by cheque." Then he was cross-examined by Mr. Nelson. He said: "I am an electrician. I was a servant of my brother; we were not really partners at Cleveland-row. The practice belonged to my brother. My brother owed money privately. The banking account was not kept at the Birkbeck Bank. No account was kept. It was a good business—over 2000*l.* a year. My brother's account was not kept in my name." Now, that is the statement which justified that particular part of the report. He also said: "I have given cheques for my brother. My brother gave me the patients' cheques, and I would give him cash. I cannot say why he did not have a banking account. It may have been his debts." Here again I make the observation by way of parenthesis, there is no doubt about it that Andrew was an extravagant man, and that his domestic arrangements were extremely unfortunate—I mean with the other sex. I need not say more than that. Percy said: "I may have given a cheque for 150*l.* last year. (Everyone acted for him as banker.) Andrew Stone spent his money as he got it. My brother was in this business from my father's death. I joined him seven or eight years ago. My mother was paid an allowance. I received the money patients paid me. First I received a salary. I paid my mother entirely. I was introduced as a partner on condition that I paid my mother. Rubinstein never acted for my brother in the purchase. I bought the boat." I stop there for a moment, and I now turn to the correspondence. The letter to which I refer was not absolutely put in—that is, I have no note of it—but it was in the correspondence handed up by Mr. Langdon. I refer to a letter of Mr. Rubinstein's of the 11th April 1907, and I find this expression: "When she was purchased by Mr. J. F. Stone, our Mr. Rubinstein advanced 200*l.* therein." That is Mr. Andrew Stone, so it is manifest that that must have been a mistake, because Mr. Rubinstein's own statement in his own letter is that the boat was purchased by Andrew; and here let me say once and for all that she was registered in the name of Andrew as sole registered owner at the Customs House. Now I proceed with the evidence of Percy Stone: "I allowed it to be registered solely in his name, though I paid for the boat. Sole reason so as to be able to fly the blue ensign." I do not know what the registrar thought about that. I should have probably said "nonsense" if I had been sitting. Percy continued: "Only my money was banked. My brother had no money. Supplied my brother with money frequently, and sometimes he deferred payment. My wife went out several times. My brother appointed captain. I used to lend my brother cash. After purchase of vessel agreed I was to pay 2*l.* a week, oil and petrol. Wages 3*l.* 15*s.* I have two engineering bills. All bills rendered in my brother's name. I never had any bills in my name rendered for anything supplied to this yacht except oil. All catering bills paid by my brother. Wine and dock dues also paid by him. I gave him 2*l.* every week in cash towards men's wages. It was by agreement I should pay half. Bought in 1905. Five hundred pounds mortgage, 550*l.* I found by cheque. Nothing in writing to show I paid 550*l.* Never suggested a mortgage. Seventy-five pounds paid off in instalments. Cannot say when 125*l.* was paid off (by cheque, counsel says, the 30th Oct. 1906); I think that is about the date. I went very often on the yacht. *Arcadia* was my brother's own yacht. I often went on it. The 27th July yacht went. I went about the beginning of August. I did not pay any of the expenses of the yacht. He may have paid for petrol at Dover. I never asked a friend."

Again there is another observation, and a very strong observation. Although no friend was called before the registrar to say that he had been asked to go on board this yacht by Percy, the evidence produced before me, by permission of Bargrave Deane, J., was to contradict and vary the statement of Percy himself. Witness after witness has said: "We have often been asked and asked by Percy." What value can I attach to such evidence as that, Percy saying before the registrar he never asked friends, and the friends coming to say before me, "Percy often asked friends"?

That is all his evidence. Then Mr. Sabistan is called, and he says: "Percy Stone said they were buying it between them, and 3*l.* was all he would allow for expenses. Andrew Stone asked me to see about paying off the mortgage. Went to see about paying off mortgage. Andrew paid me my salary, 250*l.*, by weekly instalments. Knew of differences between Stones." I say once more that on the evidence before the registrar he was justified in coming to the conclusion to which he came. Now a word or two before I refer to the evidence given before me. The case of *The Sais* (*Shipping Gazette*, March 7, 1907) was a decision of Bargrave Deane, J., the learned judge who gave permission, in this case with which we are now dealing, to allow further evidence to be called before me on this objection to the report. That was a case not exactly similar to this, but an application was made to the learned judge on objection to the learned registrar's report to admit further evidence, and he refused to admit it. Of course it goes without saying that my learned brother was right in making the order which he did in this case. I do not know what counsel urged before him, but I want to refer to the judgment in *The Sais* knowing what must have been passing through his mind, and that judgment is very strong. He said this: "I follow the reasons of Sir Robert Phillimore in *The Thuringia*" (1 Asp. Mar. Law Cas. 166 (1871), and then he quotes it. I do not know that I have got that case before me, but Sir Robert Phillimore in that case draws strong attention to this point, that unless the parties—who had the case fought out before the registrar, and came before the court afterwards on making objection to the registrar's report, and asking that further evidence may be given—could show that they had been taken by surprise, or that some evidence had turned up which they did not know of before, the judge would necessarily look with great minuteness, and, perhaps, although he did not use the words, with some suspicion, upon evidence which might have been called before the registrar and which was not. Therefore I find it my duty—I may say I should certainly do so without that authority—to look most carefully and most minutely at the evidence of witnesses called before me who were not called before the registrar. Now, what was the evidence? First of all, there were some letters; there was a letter written to a lady with whom at one time the relationship between herself and the deceased man was not that of matrimony. As one can understand, there was a time when money had to be asked for, and the money was not forthcoming. This extravagant man with a good business of 2000*l.* a year, which he spent as he did, did not find himself in funds to meet her demands, and he wrote a letter which contained one or two statements which I had better read. He speaks of a law case which has been on, and says: "I cannot always lay my hands on 3*l.* at once; therefore if it is a day late you must not mind. The things off the yacht will be sent you. She belongs to Ike now." Ike is the claimant. It was untrue that she did belong to Ike. She is not suggested to have belonged to Ike. The highest which was ever stated was that he was a partner in it. The next letter before me, which was not produced before the registrar, is a letter which does not affect my mind at all; it is a letter from Percy, the claimant, to a man called Bow, "My dear old Bow," "You will, I think, be surprised to hear that we have purchased a 42-ton auxiliary yawl, the *Venture*," and he asked him to come down and lend him a hand on board, paying him the compliment of saying, "And who better than you?" That does not carry it any further. That was Percy's statement written to a friend. That letter made no impression on my mind. Now I will just refer to the witnesses called before me. The first one called was Mr. Dixon; he was spoken to a month ago only before he came here, and therefore long after Bargrave Deane, J. had given permission for further witnesses to be called, so he had not been thought of apparently by Percy when leave was given to adduce further evidence, and this boat was bought in 1905. What he said was this: "I was very little on the *Venture*; Percy often asked me to sail on the *Venture* as his guest." Again, Percy says he did not ever ask him. "The deceased man said, 'Percy and I are sharing the expenses and running the boat.'" I should think it is quite likely they were. That is not at all inconsistent with Andrew's owning the boat and that Percy was paying half the expenses, as otherwise the boat would be laid up because the extravagant Andrew would probably not have been able to pay the expenses himself. He was cross-examined by Mr. Laing, and he then said that they shared the *Arcadia* expenses, "but that she belonged to Andrew," and he said the expenses were shared between the two brothers. Then the letter was read of the 15th March, to which I have just referred, and I do not think there is anything more in his evidence which I need refer to, except in re-examination he said that Andrew owned the *Arcadia* and the *Cymbeline*. Mr. Ewer was the next witness called; he said Andrew asked him to stay with him last summer, and he joined him as sailing friend taking a share of the expenses. He said Percy and Andrew owned the boat and shared the expenses. Without saying that that gentleman is a dishonest witness, it is very likely, and extremely probable, that, instead of saying "Percy and I own the boat and share the expenses," Andrew said exactly the same thing as to the other witness, "The boat belongs to me, but we share the expenses." Then he is cross-examined, and he says, "Andrew wrote to me last winter, and he said, 'Percy and I own the boat.'" Then the skipper was called, but I do do not think he was a satisfactory witness; he had himself to look after. He might very well have thought that the boat belonged to the two; he did not trouble much about it. When Andrew died, he naturally looked to the first man he could think of, and that was Percy. I was not altogether pleased with the demeanour of that witness

in the box. I do not say he was saying that which was wilfully untrue, but I put him on one side because he made no impression upon me in favour of the side he was called for. Then I come to the evidence of Mr. Roe, who says, "I knew Andrew and Percy; Ewer and I shared a boat." He gave the same sort of evidence that Mr. Ewer did: "Andrew said, 'Lay your boat up and come and sail with us.'" These men were independent; they preferred to have their own little boat in their own way, and they declined the invitation; but he went on to say, "Andrew said Percy and he owned the yacht and shared the expenses." When he was cross-examined he said, "Andrew told me Percy and he shared the expenses and owned the yacht." I make the same observation about him as about the other witnesses: they may have been perfectly honest, but they were not called before the registrar, and one would have thought that they would have been called when the claim was made, but they were called after the registrar had reported against the claim, and it is quite easy to understand that these men would be thinking Andrew said, "We own the boat together and pay the expenses," when all that he said was what he said to another witness, "We share the expenses," without saying anything about the ownership. Then Mr. Hickman is called; he apparently is a very fair witness, and he says, "Andrew told me the yacht was the joint property of Percy and himself," and in cross-examination he said, "I was very friendly with Percy. I was asked about three weeks ago to give evidence." These persons had no reason whatever to think about this case from 1905 to 1907, and yet they were called to say exactly what passed in terms, even the very words. They might have been mistaken in their evidence, but I do not think it was dishonestly presented to the court. Then a lady was called to whom the letter was written. I do not wish to say more about that than that it seemed to me to be a very painful thing and quite unnecessary to have called her, and to have put her in the position in which she was put to prove the receipt of this letter. It shows the bitterness with which the case has been fought on the part of the claimant. I think she might have been left alone. The deceased man afterwards married a respectable woman, who is now his widow and the plaintiff in the action. That is his evidence.

The conclusion that I have come to is this, that the registrar's report was justified by the finding which he arrived at, and that the evidence called before me and which might have been called before the registrar, and which one would have thought would have been called before the registrar if it had been thought at the time that it was valuable, is, although I do not go so far as to say that the witnesses were all trying to deceive me, not such evidence as enables me to get over the great obstacle which presents itself to the claimant—namely: The fact that the boat was registered in the name of Andrew alone; the fact that Andrew owned the two previous boats, the *Cymbeline* and the *Arcadia*; the fact that the expenses were jointly incurred between Percy and himself; and the fact that Andrew was an extravagant fellow having no banking account, paying his way, making 2000*l.* a year, or perhaps less—there was a quibble whether it was 2000*l.* or not—spending the money as it came in, and getting his brother to cash his cheques when he wanted them. These two brothers were on very affectionate terms with each other, enjoying their holidays together on board this yacht; and it seems to me to be a most lamentable affair that this litigation should have been started. The claim has not been proved to my satisfaction. If it had come before me on the evidence which I have heard only, I should certainly have rejected the claim. I find the registrar was justified in the conclusion to which he came on the evidence before him; and the whole result is that I confirm the registrar's report, and all the costs which have been properly incurred before the registrar the plaintiff shall have, and she shall also have the costs of this objection to the report and the costs of the action.

On the 7th Nov. 1907 the defendant, Percy Stone, gave notice of appeal from the judgment of Bucknill, J., and the appeal was heard by the Court of Appeal on the 5th March 1908.

J. A. Hamilton, K.C., *Langdon*, K.C., and *A. D. Bateson* for the appellant, Percy Stone.—The evidence given before the registrar and Bucknill, J. by Percy Stone and by those called on his behalf was uncontradicted, and proved that Percy Stone had advanced half the purchase money for the yacht; consequently his claim on the proceeds of sale should have been pronounced for. The reason why his claim was rejected seems to be that there was no evidence in writing which supported it, but, in view of the relationship of the parties, there is no reason why there should be any writing, for the two brothers lived together. The entry of Andrew Stone on the register as owner is not conclusive evidence that he is the sole owner.

Laing, K.C. and *A. E. Nelson* for the respondent, the widow of Andrew Stone.—The question for the registrar was, Could Percy Stone make out his case? [Lord Alverstone, C.J.—Why was this question as to the part ownership of the yacht by Percy Stone left to the registrar?] It has been done in Admiralty cases of this class, and there is no appeal on that point. The question is one of fact; the registrar found there was no valid claim against the fund in court, and the plaintiff as administratrix of her husband, the sole owner, was entitled to payment out of the whole fund. The evidence before the registrar was reviewed by the judge, and he came to the conclusion that the report was fully justified. He further held that the additional evidence called on behalf of Percy Stone, and heard by him, failed to establish Percy Stone's claim.

The judgment of the court was given by Farwell, L.J.

Farwell, L.J.—In my opinion a great deal of time and money has been wasted in discussing a point which really does not arise, or which need not have arisen. It would have been amply sufficient to call Mr. Percy Stone, and when he had once proved—as, in my judgment, the report of the registrar shows that he did—that he found 550*l.*, part of the purchase money, the ordinary rule applies. That rule is stated by Eyre, C.B. in *Dyer* v. *Dyer* (2 Cox, 92) as follows: "The clear

result of all the cases, without a single exception, is, that the trust of a legal estate, whether freehold, copyhold, or leasehold; whether taken in the names of the purchaser and others, jointly, or in the names of others without that of the purchaser; whether in one name or several, whether jointly or successive, results to the man who advances the purchase money; and it goes on a strict analogy to the rule of the common law, that, where a feoffment is made without consideration, the use results to the feoffor." Since trusts and equities are now recognised, and may be enforced under the Merchant Shipping Acts, this principle extends to ships, although under the old Registry Acts it did not. It follows that when it is once proved that Percy Stone advanced 550*l.* of the 1050*l.* purchase money for this yacht, he thereupon became entitled to fifty-five one-hundred-fifths. That being the presumption, it was, of course, open to the other side to displace that presumption, but it was not incumbent on Percy Stone to prove more than that. It was for the other side to displace that presumption if they could, but they offered no evidence at all. I regret that there should have been this reference. It seems to have done no good. The result is that in our opinion the order ought to be discharged, and there ought to be an order for the payment of fifty-five one-hundred-fifths of the proceeds to the appellant. The appeal will be allowed without costs. The appellant will have the costs of the reference, but not of the hearing before Bucknill, J.

On the 17th March the Court of Appeal varied their judgment as to costs, and ordered the respondent, plaintiff in the court below, to pay the costs of the action in addition to the costs of the reference, but directed that the costs of an application by the appellant, defendant in the court below, for a stay, which application was refused by the court on the 12th Nov. 1907, should be given to the respondent.

Solicitors for the appellant, *Rubinstein, Myers, and Co.*

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

April 8 *and* 9, 1908.

(Before Sir GORELL BARNES, P., FARWELL and KENNEDY, L.JJ.)

BAXTER'S LEATHER COMPANY *v.* ROYAL MAIL STEAM PACKET COMPANY. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Bill of lading — Construction — Limitation of liability—Loss of goods by negligence of shipowner.

Goods were carried under a bill of lading which contained a clause exempting the shipowner from liability for loss arising from very numerous specified perils, "whether any of the perils, causes, or things above-mentioned, or the loss, damage, or injury arising therefrom, be occasioned by or arise from any act or omission, negligence, default, or error in judgment of the pilot, master, . . . or otherwise howsoever."

By a subsequent clause it was provided that: "The master, owners, or agents . . . shall not be accountable to any extent for" [certain specified goods, which did not include the goods in question] "whatever may be the value of such articles, nor for any other goods of whatever description beyond the amount of 2l. per cubic foot for any one package . . . nor in any case for any amount beyond the invoice price of the goods, unless shipment be made upon a special order containing a declaration of the value and the bills of lading are signed in accordance therewith and extra freight as may be agreed upon be paid."

The goods were not delivered at destination through (as was found by the judge) the negligence of the shipowners. The value of the goods had not been declared and no extra freight had been paid.

Held (affirming the judgment of Bigham, J.), that the shipowners were not liable beyond the limited amount provided for by the special clause in the bill of lading.

Decision of Bigham, J. (1908) 1 *K. B.* 796) *affirmed.*

APPEAL of the plaintiffs from the judgment of Bigham, J. at the trial of the action without a jury.

The plaintiffs brought this action to recover the sum of 98*l.* as damages for breach of duty by the defendants in respect of the carriage of goods in the defendants' ship the *Afghanistan.*

The plaintiffs delivered to the defendants two cases of dressed leather goods for carriage in the defendants' ship, the *Afghanistan*, from London to Buenos Ayres upon the terms of a bill of lading.

The goods were not shipped upon a special order containing a declaration of value, and no extra freight was paid.

Upon the arrival of the vessel at Buenos Ayres the two packages of dressed leather goods could not be found, and the plaintiffs alleged that the goods had been lost owing to the negligence of the defendants.

The bill of lading, dated the 12th Sept. 1906, was as follows:

River Plate bill of lading. For use in London. The Royal Mail Steam Packet Company. Shipped in apparent good order and condition . . . on board the steamship *Afghanistan* for carriage to Buenos Ayres . . . and the said goods subject . . . to the exceptions and stipulations hereinafter mentioned, are to be delivered in the like apparent good order and condition at the Port of Buenos Ayres.

The material exceptions and stipulations were as follows:

1. That the master, owners, or agents of the vessel or its connections shall not be responsible for loss, damage, or injury arising from any of the following perils, causes, or things, namely: The Act of God, the King's enemies, pirates, robbers, thieves by land or sea, vermin, barratry of master and mariners, capture, seizure, or embargo, adverse claims, restraints of princes and rulers or people, strikes, lock-outs, labour disturbances, trade disputes, whether partial or general, or anything done in furtherance thereof, whether the owners be parties thereto or not, the action of mobs, effects of climate, heat of holds, steam, smoke, sweating, insufficiency of packages, in size, strength, or otherwise, bursting of packages or consequences arising therefrom, leakage, breakage, pilferage, chafage, wastage, rain,

(*a*) Reported by J. H. WILLIAMS and W. TREVOR TURTON, Esqrs., Barristers-at-Law.

spray, rust, oil, frost, thaw, floods, decay, hook marks, or injury from hooks, stowage, or contact with or smell or evaporation from any other goods, or damage from coal or coal dust, leakage or flow of or contact with urine, manure water, drainage of any animals carried in the said ship, or from their stalls, inaccuracies in, obliteration, insufficiency, or absence of marks, numbers, or addresses, or description of goods shipped, difference between the marks or the contents of the packages and the description thereof in this bill of lading (the alleged marks, numbers, or description in margin notwithstanding), injury to or soiling of wrappers or packages, loss of weight, detention, delay, lighterage to or from the vessel, transhipment, landing, jettison, explosion, heat, fire, on board or on shore, at any time or in any place, nor for incorrect delivery, perils, or accidents of the seas, rivers, and navigation, pumps or pipes of any kind (including consequences of defect therein or damages thereto), collision, stranding, heeling over, upsetting, submerging, or sinking of ship in harbour, river, or at sea, admission of water into the vessel, by any cause, and whether for the purpose of extinguishing fire or for any other purpose, unseaworthiness of the ship at or after the commencement of the voyage (provided all reasonable means have been taken by the shipowners or their agents to provide against such unseaworthiness); whether any of the perils, causes, or things abovementioned, or the loss, damage, or injury arising therefrom be occasioned by, or arise from, any act or omission, negligence, default, or error in judgment of the pilot, master, mariners, engineers, stevedores, workmen, or other persons in the service of the shipowners or their agents, whether in relation to the navigation, management, or stowage of any carrying vessel, or otherwise, and whether on board the said ship or any other ship belonging to, or chartered by them, for whose acts they would otherwise be liable, or otherwise howsoever.

(7) That the master, owners, or agents of the vessel or its connections shall not be accountable to any extent for specie, furs, lace, or cashmere, manufactured or unmanufactured . . . whatever may be the value of such articles, nor for any other goods of whatever description beyond the amount of 2*l.* per cubic foot for any one package, or relatively for any portion thereof, nor in any case for any amount beyond the invoice price of the goods, unless shipment be made upon a special order containing a declaration of the value, and the bills of lading are signed in accordance therewith, and extra freight as may be agreed upon be paid.

There was no evidence to show when, or how, or why, the goods had disappeared.

The defendants claimed that their liability was limited by clause 7 of the bill of lading, and they paid into court the sum of 16*l.* 10*s.*, being at the rate of 2*l.* per cubic foot for each of the two packages.

The action was tried before Bigham, J. without a jury.

J. A. Hamilton, K.C. and *Mackinnon* for the plaintiffs.—The plaintiffs can recover the value of the packages. There was negligence, for the goods were safely put on board, and the vessel arrived safe at Buenos Ayres, yet the goods were not delivered: that at least is *primâ facie* evidence of negligence, and that is sufficient. When goods are lost and the loss is unexplained, that is *primâ facie* evidence of loss by negligence:

> *The Xantho*, 55 L. T. Rep. 203, at p. 204; 6 Asp. Mar. Law Cas. 8 (1886), per Lord Esher, M.R., at p. 10;
> *Reeve* v. *Palmer*, 28 L. J. 168, C. P.

If negligence can be proved, as has been done, the protection of clause 7 of the bill of lading does not apply:

> *Tattersall* v. *National Steamship Company Limited*, 5 Asp. Mar. Law Cas. 206 (1884); 50 L. T. Rep. 299; 12 Q. B. Div. 297, at p. 302;
> *Beck* v. *Evans*, 16 East, 244;
> *Smith* v. *Horne*, 2 Moore, 18.

If a carrier wishes to exempt himself from liability through negligence of himself or his servants, he must use express words so exempting him:

> *Price and Co.* v. *Union Lighterage Company*, 9 Asp. Mar. Law Cas. 398; 88 L. T. Rep. 428; (1903) 1 K. B. 750.

Clause 7 of the bill of lading, as to the limitation of liability, must be read subject to the obligation of the carrier to use reasonable care. The following case was also cited:

> *Thomas Wilson, Sons, and Co.* v. *Owners of the Cargo per the Xantho*, 57 L. T. Rep. 701; 12 App. Cas. 503, reported as *Wilson and Co.* v. *Owners of the Cargo of the Xantho* in 6 Asp. Mar. Law Cas. 8, 207 (1887).

Scrutton, K.C. and *D. Stephens* for the defendants.—The defendants rely on clause 7 of the bill of lading, and therefore they are only liable for 16*l.* 10*s.*, being at the rate of 2*l.* per cubic foot. That clause applies where there has been a loss by negligence. In *Tattersall* v. *National Steamship Company Limited* (*ubi sup.*) cattle were shipped under a bill of lading, which provided "these animals being in sole charge of shipper's servants, it is expressly agreed that the shipowners, or their agents or servants, are, as respects these animals, in no way responsible either for their escape from the steamer or for accidents, disease, or mortality, and that under no circumstances shall they be held liable for more than 5*l.* for each of the animals." Through negligence in not disinfecting after carrying cattle with foot-and-mouth disease on a previous voyage some of the cattle were damaged to an amount exceeding 5*l.* Smith, J. in that case, at p. 302 of 12 Q. B. Div., said: "It seems to me that the true construction of the bill of lading is this: as the animals are going to be in charge of the shipper's servants during the voyage, it is agreed that the shipowners shall not be responsible for accidents, disease, or mortality; but it is not denied that this must mean, except accidents, disease, or mortality occasioned by the negligence of the defendants' servants. Then it is further stipulated on behalf of the shipowners that "under no circumstances shall they be liable to a greater extent than 5*l.* for each of the animals. I take the meaning of the whole to be that they are not to be liable for accidents, disease, or mortality arising during the voyage, unless occasioned by the negligence of their servants, and that even in respect of accidents, disease, or mortality so occasioned they shall only be liable to the amount of 5*l.* So construed, the obligation in no way restricts or affects the primary obligation of the shipowner to have the ship reasonably fit to receive the goods." That shipowners can limit their liability even in the event of the damage being due to their own negligence is clear from the case of *Morris and Morris* v. *Oceanic Steam Navigation Company Limited* (1900, 16 Times L. Rep. 533), where a bill of lading, under which certain goods (which were damaged in

transit) were carried, contained the following provision: "It is also mutually agreed that the value of each packet receipted for as above does not exceed the sum of 100 dollars, unless otherwise stated herein, on which basis the rate of freight is adjusted, and that the ship and carrier shall not be liable for articles specified in sect. 4281 of the United States Revised Statutes, unless written notice of the true character and value thereof is given at the time of lading and entered in the bill of lading. Mathew, J. in giving judgment said that "It was argued for the plaintiffs that the meaning of the clause was that there must be a declaration of value of above 100 dollars, in order that the freight might be properly adjusted on the high valuation. His Lordship did not think that that was the object or meaning of the clause, and he felt compelled to come to the conclusion that the clause was intended to limit the liability of the defendants in the event of a breach of their duty to use diligence to make the vessel seaworthy." There was no gross negligence on the defendants' part, and therefore the cases of *Beck* v. *Evans* (*sup.*) and *Smith* v. *Horne* (*sup.*) are distinguishable. Further, if the clause does not apply to a loss by negligence, the burden of proof is on the plaintiffs to prove negligence on the defendants' part in order to succeed. There is no evidence of negligence on the defendants' part.

Feb. 5.—Bigham, J.—Two packages of leather goods were shipped in the defendants' ship by the plaintiffs and consigned for delivery at Buenos Ayres. The bill of lading which was given by the defendants to the plaintiffs constitutes the contract under which the goods were carried by the defendants, and in that bill of lading the material clause is clause 7, in which the words applicable to the present case are as follows: "The master, owners, or agents of the vessel or its connections shall not be liable . . . for any other goods of whatever description beyond the amount of 2*l.* per cubic foot for any one package." I read that clause as limiting the liability of the shipowners even in the event of their having been negligent.

Whether it was to limit their liability in the event of their being guilty of what is called gross negligence I do not know. I am satisfied that all that can be imputed to the defendants is what is called simple negligence. The only evidence of negligence consists of the mere fact that the shipowners have not delivered the goods at their destination. That fact is consistent with there having been no negligence at all; but there are authorities which show that such circumstances raise a presumption of, at all events, simple negligence, and therefore I find that there has been some negligence, and that it was due to that negligence that the goods were not delivered. The cases, in my opinion, support the view I take. *Tattersall* v. *National Steamship Company Limited* (*ubi sup.*) was a case in which cattle were being carried, and as they were to be shipped under the sole charge of the shipper's servants, it was stipulated by the bill of lading that the shipowners should be in no way responsible either for the escape of the cattle from the steamer or for accidents, disease, or mortality, and that under no circumstances should they be held liable for more than 5*l.* for each of the animals. It appeared that the ship provided by the shipowners in that case had on her previous voyage carried cattle suffering from foot and mouth disease, and the result was that some of the cattle on the voyage in question became infected, and the plaintiff suffered damage exceeding 5*l.* in respect of each of the animals. The question was whether the shipowners were liable, and it was held that they were, because the clause in the bill of lading did not relieve them from their common law liability to provide a ship fit to carry the cargo intended to be carried in her. But then came the question, were the shipowners nevertheless at liberty to say that their liability was limited by the last words of the clause in the bill of lading? In reference to that Smith, J. said this: "Then it is further stipulated on behalf of the shipowners that 'under no circumstances' shall they be liable to a greater extent than 5*l.* for each of the animals. I take the meaning of the whole to be that they are not to be liable for accidents, disease, or mortality arising during the voyage, unless occasioned by the negligence of their servants, and that even in respect of accidents, disease, or mortality so occasioned they shall only be liable to the amount of 5*l.*" Smith, J. construed the clause which for all practical purposes is similar to that in this case. In the case of *Morris and Morris* v. *Oceanic Steam Navigation Company Limited* (*ubi sup.*) the words were: "It is also mutually agreed that the value of each package receipted for as above does not exceed the sum of 100 dollars, unless otherwise stated herein, on which basis the rate of freight is adjusted, and that the ship and carrier shall not be liable for articles specified in sect. 4281 of the United States Revised Statutes, unless written notice of the true character and value thereof is given at the time of lading and entered in the bill of lading." In reference to that clause Mathew, J. said at the end of his judgment: "It was argued for the plaintiffs that the meaning of the clause was that there must be a declaration of value if above 100 dollars in order that the freight might be properly adjusted, and that the only consequence of not stating the value was that the freight must be readjusted on the higher valuation. His Lordship did not think that that was the object or meaning of the clause, and he felt compelled to come to the conclusion that the clause was intended to limit the liability of the defendants in the event of a breach of their duty to use diligence to make the vessel seaworthy." That is to say that the clause was intended to limit the liability of the shipowners even in the event of the damage being due to their own negligence. What I have said does not in the least conflict with what Lord Macnaghten said in *Wilson* v. *Owners of Cargo per the Xantho* (*ubi sup.*). If people want to protect themselves against the consequences of the negligence of their servants, they must be careful to say so in plain terms, but in my opinion it is so difficult to apply the words of clause 7 to any other circumstances except to those of the negligence of the shipowners' servants that I must hold that the defendants have, by the words used, excluded the consequences of such negligence. There will be judgment for the defendants, who will get the costs from the date of payment of the 16*l.* 10*s.* into

court, and the plaintiffs will get the costs of the action up to the date of that payment in.

The plaintiffs appealed.

J. A. Hamilton, K.C., and *F. D. Mackinnon* for the appellants. Their arguments were the same as in the court below, and they cited, in addition, the case of *Phillips* v. *Clark* (2 C. B. N. S. 156).

Scrutton, K.C. and *D. Stephens*, for the respondents, were not called upon to argue, but they referred to

Peek v. *North Staffordshire Railway Company*, 8 L. T. Rep. 768; 10 H. L. C. 473;
Manchester, Sheffield, and Lincolnshire Railway Company v. *Brown*, 50 L. T. Rep. 281; 8 App. Cas. 703.

Sir Gorell Barnes, P.—In this case the plaintiffs were shippers of two cases of dressed leather on board the defendants' ship for carriage from London to Buenos Ayres. They were to be carried in the *Afghanistan*, the defendants' vessel, from London to Buenos Ayres, and they were to be carried upon the terms of the bill of lading. When the ship came to Buenos Ayres these goods were not forthcoming, and, as I understand it, there was no evidence to show what had happened to them. The plaintiffs sued the defendants for non-delivery—in other words, for the value of the goods. The case was defended and heard before Bigham, J., and he came to the conclusion that in that state of facts the fact of non-delivery was consistent with there being no negligence, but that the authorities showed clearly that non-delivery raised a *primâ facie* presumption of negligence on the part of the shipowners; and, therefore, he said that, in the absence of evidence to rebut that presumption, he must find, as a fact, that the loss of the plaintiffs' goods was due to negligence by the defendants. There has been no quarrel with that part of his finding, so this case has been argued upon the presumption that the shipowners might be considered to have been guilty of negligence in not delivering these goods under the circumstances which I have stated. I am not concerned to inquire whether that is correct or not, because the view I take is that, having regard to the terms of the bill of lading, the shipowners are not responsible even if that were so.

The question turns upon the construction of the bill of lading under which these goods were carried. To my mind there is no question of principle whatever in the case. I do not myself think that any other cases which have been decided really afford much assistance on this point, because to my mind the case turns simply upon the construction of this bill of lading. The legal position of the parties, except so far as controlled by the terms of the bill of lading, has been established, one may say, ever since the time when the mercantile law came into being. The shipowner is responsible, not strictly speaking as being a common carrier, but on the same footing as a common carrier, unless he chooses to cut down that liability by the insertion of excepted perils. He has done that, and done it at an increasing rate, until now it is extremely difficult on a bill of lading of this kind to find any cause whatever for which the shipowner is still left responsible. We have an instance in clause 1, which is a long clause, which almost requires a microscope to find out what it has got in it, which relieves the shipowner from responsibility for almost any kind of thing that can be thought of. It requires the ingenuity of counsel to find out anything for which the shipowner may be responsible. That is the way the matter stands as regards the general position; but it is further established by a long series of cases that the shipowner, if he wants to exclude negligence, must do so in express terms—that is to say, he enumerates a number of perils, and, if any of those perils are brought about by the negligence of the shipowner, he remains liable if he has not excluded negligence in relation to them, and done so in express words. As this bill of lading has now developed, he excludes negligence in relation to all those perils in every possible way. That being the general legal position of this matter, we have to turn to the construction of the bill of lading. I think that this bill of lading must receive a natural and a reasonable construction, bearing in mind this, that a bill of lading, the nature of the obligation being originally, and one may say almost entirely, on the shipowner, and cut down as far as he does cut it down by the bill of lading, has to be construed most adversely to the shipowner. Starting with that position, let us see what this bill of lading says. I do not intend to read clause 1, but that clause contains an enormous number of perils for which the shipowner is not to be responsible whether those perils have arisen from negligence or have not. Having so far exempted himself, he then introduces clause 7, which deals with two different things. First of all, it deals with goods which are very valuable, and possibly of a very small size, and, secondly, it deals with all other goods. Its terms are these: "That the master, owners, or agents of the vessel or its connections shall be not accountable to any extent for bullion, specie, precious metals, silks, furs, lace, or cashmere, manufactured or unmanufactured . . . whatever may be the value of such articles." So far it has dealt with those goods about which there is very great risk in carrying either because of their extreme value or their extremely delicate and fragile character. For those, reading the language in its ordinary sense, the shipowner says that he will not be accountable. Then the clause goes on as follows: "Nor for any other goods of whatever description beyond the amount of 2*l.* per cubic foot for any one package, or relatively for any proportion thereof, nor in any case beyond the invoice price of the goods"—which would cut down the 2*l.* to the invoice price if less than 2*l.* per cubic foot—"unless shipment be made upon a special order containing a declaration of the value, and the bills of lading are signed in accordance therewith, and extra freight as may be agreed upon be paid." That deals with all other kinds of goods, on which a limit of liability is placed. It is most material in considering the construction of the clause to remember that there is that alternative which is found in the last part of the clause. This enables the shipper, notwithstanding the condition that very valuable and very fragile goods are not to be at the shipowner's risk at all, and other goods only to be at his risk to a certain extent, to declare the value (of course it must be before shipment) and to have a special order declaring the value. Then the bill of

lading may be signed, that is to say, an ordinary bill of lading, in accordance with the value, and extra freight be paid as agreed, so that additional consideration should be given, and so that the shipowner should take on himself a liability larger than he is willing to do under clause 7 at ordinary rates of freight. That being the position under the bill of lading, and those being the clauses which have to be considered, the argument for the defendants appears to be stated in its shortest and most concise form in the report of this case before Bigham, J. in Mr. Scrutton's argument (1908) 1 K. B. 796, 798). What he says is this, and I really adopt this argument as expressing my view: "It is true that a shipowner, in the absence of a special contract, incurs the same liability as a common carrier; but a shipowner is not a common carrier, and the contract of carriage must be construed without reference to the common law liability of a common carrier. Clause 7 of the bill of lading entirely exempts the defendants from liability in the case of certain goods, and limits the amount of their liability 'for any other goods of whatever description.' The intention is to limit the defendants' liability in all cases in which they are liable, and one thing for which they are liable is negligence." That is to my mind a sound argument. It amounts to this, that under the first clause the shipowners have excluded themselves from liability altogether for loss caused by certain specified perils; but it is clear they may still be liable for something which they have not excluded. Then they go on to say, "But with regard to valuable and very fragile goods we will not be accountable to any extent." My reading of that is that they will not be responsible at all; and as regards other goods they will only be responsible in a limited amount unless in these two cases the shipper says when he ships the goods that he wants to be put on different terms to that, and wants to pay an extra freight and make the shipowner responsible as he would have been if he had not had that clause or some other clause, making a special bargain. That is my view of this case.

It seems to me to be a pure question of the construction of the document; and in arriving at the construction I have put upon it I do so bearing in mind the fact that the clause has to be construed most adversely to the shipowner. I am satisfied that when a fair and proper construction is placed upon it, based upon that principle, the only reasonable effect to give to it is to say that the shipowners will not be responsible at all for certain losses, and for certain particular goods will not be responsible at all, and for other goods will not be responsible beyond a certain amount. That is my view of this case, and therefore in my judgment the appeal should be dismissed.

Farwell, L.J.—I am of the same opinion. The question turns simply on the construction of this document. As Lord Bowen stated in *Steinman and Co.* v. *Angier Line* (7 Asp. Mar. Law. Cas. 46 (1891); 64 L. T. Rep. 613; (1891) 1 Q. B. 619, 623): "Words of general exemption from liability are only intended (unless the words are clear) to relieve the carrier from liability where there has been no misconduct or default on his part or that of his servants." I should say that one is only dealing with the duty to carry safely, and not with the other duty of providing a seaworthy ship. I should therefore read clause 1 reading in the words which the law imports—that is to say, the master, and so on, shall not be responsible for loss, and so on, unless it has arisen from the conduct or default of the master or that of his servants. Almost everything that one can think of is mentioned amongst these excepted perils. The document is to be read together; and inasmuch as it has taken two experts some days' consideration to find anything which they can suggest as an addition to the excepted perils, I think it is not unreasonable to regard the persons as contracting on the footing that they were excepting all these perils subject to the proviso that the exemptions should not extend to negligence. Then, dealing with the bill of lading as a whole, I apply clause 7 to that. Now, it is to be observed that clause 7 assumes the existence of the shipowner's liability; but there is no liability under clause 1 except in the case of negligence. It follows therefore that clause 7 must be intended to apply to cases of negligence. I therefore read the two together to mean that they shall not be responsible for loss, and so on, unless it arises from negligence, provided always that in no case shall they be accountable to any extent for bullion and other specified articles; no damages shall be recovered if it be bullion, &c., unless the shipper has declared value and paid extra freight, when the shipowner's liability will remain. That seems to me to be a perfectly rational contract, and to make the two clauses consistent. I think that this appeal should be dismissed.

Kennedy, L.J.—In this case I entirely agree with Bigham, J. Clause 1, which is now in a form which is not an uncommon form, protects the carrier generally, without reference to the character of the goods, from every sort of mischief there particularly specified even, in terms of that clause, where the loss is caused by negligence. But the clause which we are particularly bound to construe here is this 7th clause, which deals with two things: First a class of goods of special value, and therefore of special temptation to dishonest people, and also in many cases no doubt of very small bulk and more easily lost than the ordinary packages of a general shipment, and it says with regard to certain articles of that kind the shipowners are not to be liable to any extent. Then the clause goes on to deal with goods not so specially named and says that they will not be accountable for them beyond 2*l.* per cubic foot, nor beyond the invoice value, unless the value is declared and extra freight is paid. It seems to me that, read in its natural sense, and bearing in mind the decisions of which there are now a considerable number showing, as the President has said, that these exceptional clauses must be read as favourably to the shipper as they reasonably can be read, the only rational meaning I can put upon that clause is that for these special articles the shipowners will not be liable to any extent, even if there has been negligence, and that for other goods they limit their liability. Why should they limit their liability in respect of these articles if, as the plaintiffs contend, they are to be liable when negligence is the cause of the

loss? It seems to me that to do that would be most unreasonable, and unless one is bound to read the contract in such a way by the natural meaning of the words, it seems to me that one ought to say that one will adopt a construction which avoids such an absurdity; because, as is pointed out by Bigham, J., in his judgment, it seems now settled that, if the goods are not delivered at destination in accordance with the terms of the contract, in such a case there is, *primâ facie* at any rate, proof of negligence. In his judgment Bigham, J. said: "To my mind the mere fact of non-delivery is equally consistent with there being no negligence, but the authorities show clearly that non-delivery raises a *primâ facie* presumption of negligence on the part of the shipowner." That is a case difficult for the shipowner to meet by proof of a cause of loss within the special exceptions of his bill of lading. In my view, without at all impinging upon the principle which is now settled with regard to the necessity of the shipowner, if he seeks protection, showing clearly that he has claimed protection in terms against negligence, the object of clause 7 here is to limit the liability, excluding it altogether in the case of certain things, and limiting it in amount in others, and the contention of the defendants is right.

Sir GORELL BARNES, P.—I want to add one word to my judgment, and that is, that I have not said anything which in any way affects the obligation of the shipowner to provide a seaworthy ship, or suggests that there has been any interference with that obligation.

KENNEDY, L.J.—I quite agree, and my judgment, of course, is subject to the same condition.

Appeal dismissed.

Solicitors: for the appellants, *Ballantyne, McNair,* and *Clifford*; for the respondents, *Holman, Birdwood,* and *Co.*

HIGH COURT OF JUSTICE.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

May 28 and 29, 1908.

(Before BUCKNILL, J. and Elder Brethren.)

THE CRAIGELLACHIE. (a)

Collision—Sailing vessel and steam trawler—Trawler engaged in trawling—Duty to keep clear—Duty to keep course and speed—Collision Regulations 1897, *arts.* 9, 20.

A sailing vessel on a S.W. course on the starboard tack collided with a steam trawler on a course of N.N.E. The trawler with her trawl on the ground was making about two to two and a half knots, and was exhibiting a black ball to signify that she was engaged in fishing. The trawler kept her course and speed, expecting the sailing vessel to keep clear. Those on the sailing vessel, owing to bad look-out, did not sight the steam trawler until they were close to her, and kept their course and speed, expecting the steam trawler to keep clear of her.

Held, that the sailing vessel was to blame for bad look-out.

Held, further, that the steam trawler was to blame for not keeping out of the way of the sailing vessel as she could and ought to have done, for under the circumstances she was not so incumbered with her trawl as to cast on the sailing vessel a duty to keep out of the way.

DAMAGE ACTION.

The plaintiffs were the owners of the fishing vessel *Maggie Cormack* and her master and crew suing for their effects; the defendants were the owners of the steam trawler *Craigellachie.*

The collision between the two vessels occurred about 7.15 a.m. on the 25th June 1907, in the North Sea, about thirty miles N.E. of the Tyne. The wind at the time was N.W., a strong breeze; the weather was fine and clear, and the tide ebb.

The case made by the *Maggie Cormack,* a sailing fishing vessel rigged as a keel boat of 31 tons register, and manned by a crew of seven hands all told, was that she was in the North Sea in the course of a voyage from the fishing ground to Shields with a small catch of fish. The *Maggie Cormack,* under double-reefed mainsail and single-reefed foresail, was proceeding on the starboard tack, heading about south-west, and was making about six knots.

In these circumstances those on board the *Maggie Cormack,* which had always maintained her course, suddenly observed close to and on the port side of their vessel the trawler *Craigellachie,* which, before anything could be done by those on board the *Maggie Cormack,* struck her on the port side with her stem a violent blow, cutting right into her, and doing her such damage that in a few minutes the *Maggie Cormack* sank and, with her cargo and crew's effects, was totally lost.

Those on the *Maggie Cormack* charged those on the *Craigellachie* with not keeping a good look-out; with failing to keep out of the way of the *Maggie Cormack*; with not easing, stopping, or reversing their engines; with improperly attempting to pass ahead of the *Maggie Cormack*; and with failing to give any indication of her presence or course by whistle signal.

The case made by the defendants was that shortly before 7.15 a.m. on the 25th June the *Craigellachie,* a steam trawler of 111 tons gross and 30 tons net register, was trawling about thirty miles N.E. of the Tyne, manned by a crew of eight hands all told. The *Craigellachie* was heading about N.N.E., and with her trawl down was making about two and a half to three knots. She was carrying a black ball on her forestay, and a good look-out was being kept on board her.

In these circumstances those on the *Craigellachie,* having seen several other boats running down from a similar direction, more particularly noticed about a quarter of a mile distant and about two points on her starboard bow the *Maggie Cormack* heading for the *Craigellachie.* As the *Maggie Cormack* came straight on towards the *Craigellachie* it was thought that she intended to speak the *Craigellachie,* and the whistle lanyard was pulled and broke. Then, as the *Maggie Cormack* still held on, it was realised that she was not going to speak, but nothing could then be done by those on the *Craigellachie* to prevent the *Maggie Cormack* with her port bow running down the stem of the *Craigellachie* and doing damage.

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

Those on the *Craigellachie* charged those on the *Maggie Cormack* with not keeping a good look-out, and with neglecting to keep out of the way of the *Craigellachie*.

The following Collision Regulations were referred to during the course of the case:

9 (*k*). All vessels or boats fishing with nets or lines or trawls, when under way, shall in daytime indicate their occupation to an approaching vessel by displaying a basket or other efficient signal where it can best be seen. If vessels or boats at anchor have their gear out, they shall, on the approach of other vessels, show the same signal on the side on which those vessels can pass. . . . This article shall be read and construed as part of the Regulations contained in schedule 1 to the Order in Council, under section 418 of the Merchant Shipping Act 1894, made the 27th day of November 1896, and as if it had formed one of such Regulations, and been numbered 9 among the articles containing the same.

12. Every vessel may, if necessary in order to attract attention, in addition to the lights which she is by these rules required to carry, show a flare-up light or use any detonating signal that cannot be mistaken for a distress signal.

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.

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. 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.

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.

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.

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.

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.

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. and *H. C. S. Dumas* for the plaintiffs, the owners of the *Maggie Cormack*.—*Primâ facie* it is the duty of the steamer to keep out of the way of the sailing ship. It is said that the *Maggie Cormack* infringed arts. 27 and 29, and the man in charge of the *Craigellachie* suggests that the sailing vessel broke art. 26. Art. 26 applies to sailing vessels only, and does not override art. 20. The man in charge of the *Craigellachie* thought that those on the plaintiffs' vessel were going to speak to him; he was wrong as to that, and acted under a misapprehension, but that does not excuse his breach of the rule. It may be said that the plaintiffs' vessel should not have held on so long, but the court seldom requires a sailing vessel to alter her course and speed: (*The Highgate*, 62 L. T. Rep. 841; 6 Asp. Mar. Law Cas. 512 (1890), in which Sir J. Hannen refers to and distinguishes *The Tasmania*, 60 L. T. Rep. 612; 6 Asp. Mar. Law Cas. 381 (1889); 14 P. Div. 53). On the courses of these vessels the trawler only had to port two points to avert a collision, and that might have been done up to the last minute. If there was any negligence on the part of the plaintiffs it was not the effective cause of the collision; bad look-out is the only negligence suggested, but her duty is to keep her course and speed. Look-out does not affect the performance of that duty which necessitates her holding on until she has some intimation that the other vessel is going to fail in the duty imposed on her of keeping clear:

The Ranza, Ship. Gaz., Dec. 13, 1898.

Batten, K.C. and *A. D. Bateson* for the defendants, the owners of the *Craigellachie*.—The *Craigellachie* had her trawl down on the starboard side, making two to two and a half knots, heading N.N.E., and was exhibiting the black ball which indicated that she was trawling; the sailing vessel, therefore, should have kept out of the way. There was a total absence of look-out on board the sailing vessel, which nothing can excuse. The sailing vessel could easily have altered her course, and should have done so, for she ought to have seen that the *Craigellachie* was hampered by her trawl and was only going at a sufficient speed to fish. The trawler was right to keep her course and speed: (*The Tweedsdale*, 61 L. T. Rep. 371; 6 Asp. Mar. Law Cas. 430 (1889); 14 P. Div. 164, which was decided on arts. 19 and 23 of the Collision Regulations 1884, which correspond with arts. 20 and 27 of the Collision Regulations 1897). Art. 26, requiring a sailing ship to keep clear of a sailing trawler, was first passed in 1897, and a committee of the Board of Trade considered whether the regulation should deal with the case of *The Tweedsdale* (*ubi sup.*), but a majority thought that a steam trawler should keep out of the way. The position of trawlers has since been considered, and art. 9 was passed in May 1906. *The Upton Castle* (93 L. T. Rep. 814; 10 Asp. Mar. Law Cas. 153; (1906) P. 147) was decided on art. 10 of the Collision Regulations 1884, and followed *The Tweedsdale* (*ubi sup.*). *The Highgate* (*ubi sup.*) is no longer an authority; that case was decided on the Collision Regulations 1884, and there was then no note to art. 22, which corresponds to art. 21 of the Collision Regulations 1897. There is no doubt that sailing vessels must keep out of the way of sailing vessels fishing (Collision Regulations 1897, art. 26), and the reasons which justify that rule are identical with the reasons in *The Tweedsdale* (*ubi sup.*). That case is not touched by art. 9 of the Collision Regulations.

Aspinall, K.C. in reply.—*The Tweedsdale* (*ubi sup.*) was decided on the facts of that case; the vessel there was so incumbered that she was in the same condition as a broken-down vessel. The facts are not the same in this case; the *Craigellachie* might have ported and stopped and so

kept out of the way. If it was impossible for the steam trawler to act, the sailing vessel must of course do her best to keep out of the way, but in this case the steam trawler might have acted.

BUCKNILL, J.—It seems to me that both vessels are to blame in this case. In the first place the sailing vessel had no look-out of any sort or kind, and she was going at a rapid speed on the starboard tack. Having no look-out was a distinct breach of the regulations, and a breach which materially contributed to the collision. Therefore the sailing vessel is to blame. With regard to the trawler, she had her signal ball up, which was a proper indication to the other ship that she was trawling. She was moving at between two and a half and three knots an hour or thereabouts. I find as a fact that she could, by porting her helm, have avoided this collision but for the contributory negligence on the part of the sailing ship. She was not, therefore, so handicapped that she could not obey the obligations which are cast upon steamships to get out of the way of sailing ships. The man on board the steam trawler thought the sailing ship was coming down to speak to him. He was wrong. He speculated, and because he speculated and thought she was coming down to speak to him, he took no steps, as he ought to have taken, by porting his helm, as he might have easily done, and so have avoided the collision. The cases which have been cited do not seem to me to carry the matter so far as the learned counsel who have cited them think they do. I have nothing to do with the history of the regulations. They are international. We all know what an enormous amount of time was expended on their preparation, and they have been settled as international regulations. It is not for the court to state what it thinks is the reason which led to the preparation of these rules. It is for the court to construe them. Taken as a whole, the rules imply that: The steamer, being a steamer, has got to get out of the way of the sailing vessel, if they are proceeding in a direction so as to involve risk of collision. I do not think the case of *The Tweedsdale* (*ubi sup.*) has anything to do with this case. I do not think that *The Upton Castle* (*ubi sup.*), which Bargrave Deane, J. decided, has anything to do with it. I decide this case upon the facts, coupled with the regulations. I say that where a steamship and a sailing ship are so proceeding as to involve risk of collision, the steamer must get out of the way of the sailing ship if she can. I find that the *Craigellachie* never got out of the way. The duty of the steamship to keep out of the way of the sailing ship was not complied with, and therefore my judgment is that both vessels are to blame.

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

Solicitors for the defendants, *Williamson, Hill,* and *Co.*, agents for *R.* and *R. F. Kidd.*

HOUSE OF LORDS.

July 2 and 3, 1908.

(Before the LORD CHANCELLOR (Loreburn), Lords MACNAGHTEN, JAMES OF HEREFORD, and DUNEDIN.)

OWNERS OF STEAMSHIP KNUTSFORD *v.* E. TILLMANNS AND CO. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Bill of lading—Exceptions—Construction—Port "inaccessible on account of ice"—"Any other cause"—"Error in judgment of master."

Goods were shipped on board a steamship under bills of lading which contained the following conditions and exceptions: "Error in judgment, negligence, or default of master whether in navigating the ship or otherwise. Should a port be inaccessible on account of ice, blockade, or interdict, or should entry and discharge at a port be deemed by the master unsafe in consequence of war, disturbance, or any other cause, it shall be competent for the master to discharge goods intended for such port at some other safe port or place, at the risk and expense of the shippers, consignees, or owners of the goods, and upon such discharge the ship's responsibility shall cease."

The ship having arrived off her port of destination was prevented from getting in by ice. She remained off the port for three days, and then proceeded to another port and discharged her cargo. There was evidence that if she had waited one day longer she would have been able to get in to her port of destination, as the ice broke up.

Held (1) *that the port was not "inaccessible on account of ice" within the meaning of the exception*; (2) *that "error in judgment of the master" did not cover a mistake as to his liabilities under a bill of lading*; (3) *that "unsafe in consequence of . . . any other cause" meant causes* ejusdem generis *with "war or disturbance," and that the shipowners were not protected by the exceptions in the bills of lading.*

Judgment of the court below affirmed.

APPEAL from a judgment of the Court of Appeal (Vaughan Williams, Farwell, and Kennedy, L.JJ.) who had affirmed a judgment of Channell, J. sitting without a jury.

Claim by the plaintiffs, who were holders and indorsees of certain bills of lading, for damages for breach of contract to carry goods in the steamship *Knutsford* to Vladivostok. The freight was paid in advance. Alternatively the plaintiffs claimed a return of the freight as money had and received to the use of the plaintiffs, the consideration for such payment having wholly failed.

The four bills of lading were in the following form:—

Eastern trade bill of lading outwards—*viâ* Suez Canal. Shipped in apparent good order and condition by John Batt and Co. (London) Limited on board the steamship *Knutsford* . . . now lying in or off the port of Middlesbro' and bound for Vladivostok . . .

(*a*) Reported by W. TREVOR TURTON, EDWARD J. M. CHAPLIN, and C. E. MALDEN, Esqrs., Barristers-at-Law.

a quantity of foundry coke . . . and to be delivered from the ship's side where the ship's responsibility shall cease in the like good order and condition at the port of Vladivostok or so near thereto as the ship may safely get, unto order or his or their assigns, subject to exceptions and conditions hereinafter enumerated. Freight for the said goods and primage (if any) to be paid by the shippers in advance, on delivery of the bill of lading, in cash without discount . . . Freight and primage (if any) in advance to be considered as earned whether the ship or goods be lost or not lost at any stage of the entire transit. The following are the conditions and exceptions hereinbefore referred to: (1) Act of God . . . (2) . . . barratry, misfeasance, . . . error in judgment, negligence or default of pilot, master, officers, engineers, seamen or firemen, or other persons in the service of the ship, whether in navigating the ship or otherwise; risk of craft or hulk or transhipment; and all and every the dangers and accidents of the land and water, and of navigation of whatsoever nature and kind . . . ; (4) should a port be inaccessible on account of ice, blockade . . . or should entry and discharge at a port be deemed by the master unsafe in consequence of war, disturbance, or any other cause, it shall be competent for the masters to discharge goods intended for such port on the ice or at some other safe port or place, at the risk and expense of the shippers, consignees, or owners of the goods; and upon such discharge the ship's responsibility shall cease. . . . 12. The company reserves the right of forwarding the goods to their destination by any other vessel belonging either to this or any other company or individual, subject to all conditions which may be exacted by the companies or individuals who made complete the transit; the risk of transhipment, landing, storing, and reshipment to be borne by the shippers, consignees, or owners of the goods, but the expense to be defrayed by the company. . . . Dated at Middlesbro' Oct. 12, 1905, for the captain and owners.

Clause 12 of the time charter provided that:

The captain (although appointed by the owners) shall be under the orders and direction of the charterers as regards employment, agency, or other arrangements; and the charterers hereby agree to indemnify the owners from all consequences or liabilities that may arise from the captain signing bills of lading by the order of charterers or their agents, or in otherwise complying with the same, and the owners shall be responsible for full, true, and proper delivery of the cargo. . . .

Watts, Watts, and Co. were the time-charterers of the vessel.

One of the bills of lading was signed by the time-charterers, to whom the shippers of the goods paid the freight, the other three by the master.

The defendants alleged that the bills of lading were not signed on their behalf, and that the bills of lading were signed by the master of the vessel as agent for the time-charterers.

The steamship *Knutsford* proceeded on the voyage and arrived within forty miles of Vladivostok, where ice was encountered. The vessel arrived on the 12th Feb. 1906. The master made three unsuccessful attempts to get through the ice—*i.e.*, on the 12th, 13th, and 14th Feb.—and, being informed by a pilot that that weather might continue for some time, considered the port to be inaccessible and left on the 14th Feb. 1906 for Nagasaki, where the cargo was discharged. A day after the vessel's departure for Nagasaki the entrance to Vladivostok was blown by the wind clear of ice. The master made for Nagasaki because of the boisterous weather and the ice, thinking it not safe to continue the struggle with the ice.

J. A. Hamilton, K.C. and *Adair Roche* for the plaintiffs.—The exceptions in the bills of lading do not protect the defendants. The master was wrong in considering that the terms of the bills of lading entitled him at his own discretion to say whether the port was accessible or not. There was nothing to excuse the master from waiting till nature removed the temporary obstruction. The first part of clause 4 of the exceptions refers to an actual fact, and the second part refers to the master's discretion, and the words "other causes" cannot incorporate part of the first half of the clause into the second half. "Other causes" must be construed *ejusdem generis* with the matters previously enumerated—viz, war, &c. "Ice" cannot be included in "other causes." "Inaccessible" means not inaccessible to the ship at the moment of arrival, but inaccessible for a reasonable time. It was unreasonable for the master to wait only the time he did. Had the master turned back on the 15th Feb., the vessel could have reached Vladivostok. A misreading of a clause in a bill of lading cannot be an error of judgment in the navigation of the ship. The principle of *ejusdem generis* applies, and "error" must refer to something in the nature of navigation. The defendants allege that they were not the right parties to be sued, but the case of *Wehner* v. *Dene Steam Shipping Company* (1905) 2 K. B. 92) is in point. The owners are liable, but they can obtain an indemnity from the time-charterers. The four bills of lading were received all together in respect of one shipment, and all purported to be on behalf of the captain and owners although one was signed by Watts, Watts, and Co. By the charter-party the time-charterers were bound to indemnify the owners. The bill of lading signed by the time-charterers was on behalf of the captain and owners and bound the owners.

J. R. Atkin, K.C. and *Lewis Noad* for the defendants.—The protection in the bills of lading applies. The words "or any other cause" refer to "unsafe" as well as to "ice." "Inaccessible" means inaccessible in fact for a reasonable time. The port was inaccessible, for the ship, having made a reasonable effort, failed to gain an entrance. It was reasonable for the master, under the circumstances, to think that the obstruction would not be removed within a reasonable time. There was no obligation to wait an indefinite time if there was a reasonable expectation of the continuance of the obstacle. "Deemed by the master unsafe" means deemed to be unsafe in the master's discretion. The provision is meant to cover dangers of uncertain duration. The master had discretion to say that it was unsafe to enter the port. The provision of "error in judgment of the master" offers additional protection. As to the bill of lading which was signed by Watts, Watts, and Co., there was no evidence to make the defendants liable. The time-charterers had no authority to sign so as to bind the owners. The master could bind the owners. If the master signed by the charterer's direction, he could bind the owners. If the charterers signed on behalf of the master, the owners could not be bound. It is for the plaintiffs to prove that the

charterers had authority to sign on behalf of the master.

J. A. Hamilton K.C. replied.

CHANNELL, J.—In this case several points arise. One, to my mind, is of real difficulty. I will deal with the simpler points first. As to the last one dealt with by Mr. Hamilton, I cannot help thinking if the captain had signed by the direction of Watts, Watts, and Co., which he was bound to do by the charter-party, he then would, in my opinion, have bound the owners. It is a point which I happen to know there has been a difference of opinion upon, but, personally, I should adhere to the opinion I gave once before—namely, that it would have bound the owners of the ship, notwithstanding that the real contracting party behind the whole thing was the time-charterer. Three bills of lading were so signed. They are all in one form, and they are for the captain and owners, and for the captain and owners even although they are signed by the hand of the captain and with his name. In one, Watts, Watts, and Co., instead of directing, as they were entitled to do, the captain to sign, signed it themselves. I cannot help thinking that is exactly the same as if they had directed the captain to put his name, and he had put it. If they had struck out "for the captain and owners," and then signed it themselves, I think they would then, on the face of it, have been purporting to make it their own contract; but they did not purport to make it their own contract. They purported to sign it for the captain and owners, and therefore to make it the contract of the captain and owners, and that is a thing which, in substance, they had power to do by the terms of the charter-party. Consequently, that objection, I think, fails. Of course, it would have been a good objection if the captain's hand did not bind the owners, but I think the fourth bill of lading is exactly on the same footing really as the other three. Then, as to error in judgment of the master. I think that is nearly the same thing as the subsequent clause. I am now upon the supposition that the subsequent words in clause 4, "should entry and discharge at a port be deemed by the master unsafe," do not apply. Assuming that they do not apply, does the clause about error in judgment, which is an exception to the liability of the contractors under the bill of lading to deliver, apply? No doubt the master made an error of judgment in one sense, because he misconstrued the bill of lading, and he thought that that subsequent clause did apply. But I do not think "error in judgment" means that sort of thing. Error in judgment, whether in navigating a ship or otherwise, on the largest interpretation that one could possibly give to the word "otherwise"—and I think it is a large word there—could not, in my opinion, cover such a thing as a misreading of the document under which the captain was acting. It is something totally different altogether, and a thing which one would not at all expect to be provided for by this kind of exception. Then, further, although I think possibly there was an error of judgment in the master which delayed the delivery, I do not see that it prevented the delivery, because after he got back to Nagasaki, if he was wrong in construing this bill of lading, the goods might have been sent on. He might have been ordered to go on in his own vessel; at any rate, the goods might have been delivered under this clause, and, therefore, the error did not cause the non-delivery, even although it might have caused some delay in the delivery. That brings one down to the clause which really is the important one—"Should a port be inaccessible on account of ice, blockade, or interdict."

On the evidence I think that the port was not inaccessible. I cannot think "inaccessible" means inaccessible at the particular moment when the vessel first arrives off the port. It is clear the vessel must wait a little time on getting to the port. Many illustrations might be given about it. Practically at the same time as this vessel other vessels did get in. It is true I do not think the other vessel could have got in on either of these three days, the 12th, 13th, and 14th Feb., but I do not think that makes the port inaccessible any more than a port would be inaccessible at low water which had not a draught over the bar for a vessel. It is a temporary cause, and although I do not think it would have obliged the captain if the time had been at the commencement of the winter, to have waited the whole winter, yet I think that, considering it was at a time when the weather was improving, it is different, and in substance it means inaccessible within a reasonable time after the vessel arrived off the port and endeavoured to get in. So far I do not think there is very much difficulty.

Now comes the clause as to which, in my judgment, there is difficulty; it is this, "or should entry and discharge at a port be deemed by the master unsafe in consequence of war, disturbance, or any other cause, it shall be competent for the master to discharge goods intended for such port on the ice"—that possibly applies to the whole clause. I do not say it does not, and it may apply to inaccessibility by ice, "or at some other safe port or place at the risk and expense of the shippers, consignees, or owners of the goods; and upon such discharge the ship's responsibility shall cease." Now, in order to justify that delivery at another port it must come within the clause "should entry and discharge at a port be deemed by the master unsafe," and unsafe in consequence of "war, disturbance, or any other cause." To begin with, it is entry and discharge at a port; it is not in the course of the voyage at all that the master is to judge of the safety. But here the vessel had got within forty miles of the place, and if it came within the clause in other respects I do not know that one could say that the entry and discharge at the port was not a matter that the master was, in point of fact, to deal with. But the real question is that which Mr. Hamilton put in the first part of his argument in his reply—namely, whether "any other cause" is *ejusdem generis* with war and disturbance. I do not think that anyone could say that ice is, or that perils of the sea generally are. But the rule of *ejusdem generis* is a very difficult rule to apply, and, although Mr. Hamilton says that he does not recollect any authority which has altogether disregarded the rule, it has been stretched a good deal in recent cases. I think, looking at the whole matter, I rather come to the conclusion that I must apply the rule here, and that war and disturbance is something totally different from what happened in this case. On that ground, therefore, I have come to the conclusion that I

must decide for the plaintiffs. I ought, perhaps, to say that I do not in any way doubt the master's *bona fides*, and I do not doubt that he had, to some extent, the safety of the vessel under his consideration. But the real thing in his mind, I have not the slightest doubt at all, was the delay it would have caused; and the difficulty in this case is in seeing whether the master ought not to have waited a little longer. One is always in a difficulty in judging after the event. One knows now, after the event, if the captain had waited another day he would have got in all right; but, of course, it is not fair to rely upon that. One has to look at his judgment at the time. I feel sure that was the real matter in his mind, and I do not see that there was any real danger in his waiting. There may have been danger in waiting more than three or four days longer because of the want of coal; but the captain had plenty of coal on board to wait three or four days more. It was suggested that it was not a very nice place to stop at; but there was no real danger. The danger that the captain apprehended, as far as he apprehended danger, was a danger by forcing his way through the ice. The question is whether he ought not to have waited two or three days longer, when, as events turned out, he would not have had to force his way through at all, but would have got through quite easily. It is very difficult up to that point as to whether the captain in exercising his judgment was not influenced by the question of delay, but I do not think I should like to base my judgment upon that. I do base it upon the ground of *ejusdem generis*, that there is nothing in this contract which makes the judgment of the master binding in reference to the safety of the ship from perils of the sea or ice, which is quite a different thing—there is nothing to that effect; there is only his judgment that is made binding in case of war or disturbance, or something of that character, which is a thing altogether different from ice. On that ground I give my judgment for the plaintiffs, and the damages are to be arranged in some way already provided for, I understand.

The defendants appealed.

J. R. Atkin, K.C. (*Lewis Noad* with him) for the defendants. The port of Vladivostok was "inaccessible on account of ice," within the meaning of clause 4 of the bills of lading. "Inaccessible" means inaccessible at the time the ship arrives, and for a reasonable time afterwards, and the captain had a discretion as to how long he should be making attempts to reach the port. The words "or any other cause" ought not to be limited as being *ejusdem generis* with the immediately preceding words, "war, disturbance":

Anderson v. *Anderson*, 72 L. T. Rep. 313; (1895) 1 Q. B, 749.

They mean whether the port is in fact inaccessible by reason of ice, and the captain is to have a discretion to act as circumstances dictate. The *ejusdem generis* doctrine ought not be extended. Thus in *Baerselman* v. *Bailey* (8 Asp. Mar. Law Cas. 4; 72 L. T. Rep. 677; (1895) 2 Q. B. 301), where the words were: "any act, negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowners in navigating the ship or otherwise," the shipowners were held to be exempt from liability for damage caused to the goods by their being negligently stowed by the stevedore employed by the shipowners. As to the bill of lading signed by the time-charterers there is no evidence to show that they had any authority to sign for "the captain and owners."

J. A. Hamilton, K.C. (*Adair Roche* with him) for the plaintiffs.—The question of inaccessibility is a question of fact, and the captain had no discretion vested in him to say whether the port was inaccessible or not. Where there is a temporary obstruction to the prosecution of a voyage the captain must wait a reasonable time for the removal of such obstruction, and then proceed. He is not excused from the obligation of delivering the cargo he has undertaken to carry to the agreed port of discharge merely by the fact that there exists a temporary obstruction which may cause delay:

Metcalfe v. *Britannia Ironworks Company*, 3 Asp. Mar. Law Cas. 313, 407 (1877); 36 L. T. Rep. 451; 2 Q. B. Div. 423.

In this case the captain ought to have waited a reasonable time, and Channell, J. found rightly that the captain did not wait a reasonable time. Exceptions in a bill of lading in favour of shipowners must be stated in express and unambiguous terms:

Price and Co. v. *Union Lighterage Company Limited*, 9 Asp. Mar. Law Cas. 398 (1903); 88 L. T. Rep. 428; (1903) 1 K. B. 75.

With regard to clause 4 it divides itself into two parts; the word "ice" is limited to the first part of the clause. The words "any other cause" in the second part of the clause must be regarded as *ejusdem generis* with "war, disturbance," which immediately precede it. There is a recognised rule in construing bills of lading that general words are to be treated as *ejusdem generis* with prior particular words:

Re Arbitration between Messrs. Richardson and Samuel and Co., 8 Asp. Mar. Law Cas. 330 (1897); 77 L. T. Rep. 479; (1898) 1 Q. B. 261.

As regards errors in judgment of the master, those words must be confined to things connected with the navigation of the ship. A misconstruction of a clause in a bill of lading is not an "error in judgment in navigating the ship." With reference to the fourth bill of lading which was signed by the time-charterers "for the captain and owners," it is implied in the charter-party that the charterers can direct the captain to sign. The defendants are therefore properly sued on the whole of the bills of lading and are liable, although they may by the terms of the charter-party claim to be indemnified by the charterers.

J. R. Atkin, K.C., in reply, referred to

Thames and Mersey Marine Insurance Company v. *Hamilton, Fraser, and Co.*, 6 Asp. Mar. Law Cas. 200 (1887); 57 L. T. Rep. 695; 12 App. Cas. 484;

Nobel's Explosives Company Limited v. *Jenkins and Co.*, 8 Asp. Mar. Law Cas. 181 (1896); 75 L. T. Rep. 163; (1896) 2 Q. B. 326;

Norman v. *Binnington and Co.*, 6 Asp. Mar. Law Cas. 528 (1890); 63 L. T. Rep. 108; 25 Q. B. Div. 475.

Feb. 26.—VAUGHAN WILLIAMS, L.J.—This is an appeal from a judgment of Channell, J. The main question in this case is a question of con-

struction of words appearing in a bill of lading, and the particular words that we have to construe are the words appearing under clause 4: "Should a port be inaccessible on account of ice, blockade, or interdict, or should entry and discharge at a port be deemed by the master unsafe in consequence of war, disturbance, or any other cause, it shall be competent for the master to discharge goods intended for such a port on the ice or at some other safe port or place at the risk and expense of the shippers, consignees, or owners of the goods, and upon such discharge the ship's responsibility shall cease." There is another point in the case which does not affect all the four bills of lading which we have to deal with in this action, but which only affects one of them. Channell, J. deals with that point at the beginning of his judgment, which will be found at p. 191 of (1908) 1 K. B. He says: "I will deal with the simpler points first. With regard to the effect of the signature of the fourth bill of lading by Watts, Watts, and Co. in their own name, if the captain had signed that bill of lading by the direction of Watts, Watts, and Co., which he would have been bound to do by the charter-party, he would, in my opinion, have bound the owners, notwithstanding that the real contracting party was the time-charterer. Three bills of lading were so signed. They are all in one form, and are for the captain and owners, even although they are signed by the hand of the captain and with his name. With regard to the fourth, Watts, Watts, and Co., the time-charterers, instead of directing, as they were entitled to do, the captain to sign, signed it themselves. I am of opinion that the effect of their so signing is exactly the same as if they had directed the captain to put his name to the bill of lading and he had accordingly signed it. If they had struck out the words "for the captain and owners," and then signed it, I think they would, on the face of it, have been purporting to make it their own contract; but they did not purport to make it their own contract. They purported to sign it for the captain and owners; and, therefore, to make it the contract of the captain and the owners, and they had absolute power to do that by the terms of the charter-party. Consequently, the objection taken on behalf of the defendants to their signature fails. The objection would have been good if the captain's hand did not bind the owners; but, for the reasons I have given, I am of opinion that the fourth bill of lading is exactly on the same footing as the other three." That makes it necessary that I should read par. 12 of the charter-party: "The captain (although appointed by the owners) shall be under the orders and direction of the charterers as regards employment, agency, or other arrangements, and the charterers hereby agree to indemnify the owners from all consequences or liabilities that may arise from the captain signing bills of lading by the order of the charterers or of their agents or in otherwise complying with the same, and the owners shall be responsible for the full, true, and proper delivery of the cargo. The stevedore shall be employed and paid by the charterers, but this shall not relieve the owners from responsibilty as to proper stowage, which must be controlled by the captain, who shall keep a strict account of all cargo loaded and discharged as usual." I confess that, speaking for myself, I have had very considerable difficulty about this small point. It only applies to one bill of lading. When I read the judgment of Channell, J. I do not quite understand what he means when he says: "Consequently the objection taken on behalf of the defendants to their signature fails. The objection would have been good if the captain's hand did not bind the owners, but, for the reasons I have given, I am of opinion that the fourth bill of lading is exactly on the same footing as the other three."

I am very anxious, if I can, to dispose of this matter without differing from Channell, J. at all about it. As I have just read the judgment again, and as I have read clause 12 of the charter-party again, I feel the recurrence of a difficulty that I hoped I had got over. It seems to me that the difficulty is that here the owners say that they will accept certain liabilities if certain antecedent conditions are performed. One of those antecedent conditions is the signing of the bills of lading by the captain, and they say, "The charterers hereby agree to indemnify the owners from all consequences or liabilities that may arise from the captain signing bills of lading by the order of charterers or of their agents." It seems to me that the due performance of these conditions is essential here. Channell, J. says: "I am of opinion that the effect of their so signing—that is Watts, Watts, and Co. so signing — they were the time-charterers — is exactly the same as if they directed the captain to put his name to the bill of lading, and he had accordingly signed it." I can only say that, sitting alone, I should not have come to that conclusion. I do not know that it makes any real difference whether I venture to differ or express my great doubt, but I may content myself with expressing my grave doubt as to what to understand by that. I understand that my brethren are disposed to affirm the judgment of Channell, J. in this respect.

Now, having got rid of that point, I come to the question of construction to which I have already alluded. Clause 4 deals with two possible events on the happening of either of which it shall be competent for the master to discharge goods intended for Vladivostok either on the ice, or at some other safe port or place at the risk and expense of the shippers, consignees, or owners of the goods and upon such discharge the ship's responsibility shall cease. Now, as I read these words, the earlier inaccessibility arises from a physical reason like the presence of ice which has rendered the port inaccessible, or it arises from the acts or orders of persons competent to do such acts or to give such orders—that is in the case of a blockade or interdict. Now, here comes the second condition, "Or should entry and discharge at a port be deemed by the master unsafe in consequence of war, disturbance or other cause." On one side it is said that we are to read the words "or any other cause" according to their wide general meaning. According to the contention of the other side we are not so to read those words, but we are to read them as limited by the antecedent setting out of the particular instances "war or disturbance," and it is said that "any other cause" must be a cause *ejusdem generis* with war and disturbance. I do not want to attempt to lay down any general

rule beyond that which is necessary for the decision of this case. When I come to deal with the genus which is suggested by the words "war or disturbance," I think that, according to the general rules that have been laid down, one should find some common bond between war and disturbance, and if you cannot find any bond between war and disturbance, the necessary consequence would be that you could not limit the words "or any other cause" by the doctrine of *ejusdem generis*, because you must find one genus. Now, the question is what that genus should be. Of course, you could make a fairly wide definition of the genus if you say that the genus includes cases presenting such features that the master may deem the port unsafe in consequence of actions of others making it physically unsafe to enter or discharge at the port by reason of these external actions by these people whether arising in respect of war or whether arising in respect of civil disturbance. That is what I understand was suggested, although I am rather afraid I have not expressed it as well as it was expressed by Mr. Hamilton. On the other hand, it is suggested that the genus may be wider still —that the genus suggested by the words "war or disturbance" is a genus which covers everything which could reasonably be considered as a cause of insecurity or presence of danger in the case of entry at the port of discharge. The objection to the last definition is that I do not know that you want the words "or any other cause" in such a case; but those at all events are the two suggestions that are made. I do not feel inclined myself to adopt the greater and wider genus which was suggested in one of the cases and then put by me to Mr. Atkin, because Mr. Atkin would not adopt it himself. I do not think under those circumstances, as this is a doubtful matter as to what the genus ought to be within which war and disturbance are supposed to fall, I ought to adopt a view which Mr. Atkin, acting on behalf of his clients, would not accept. Therefore I come to the main point which was argued by Mr. Atkin—namely, that the *ejusdem generis* rule does not apply here at all. We said that the right rule is that you should *primâ facie* give to the general words which follow the enumeration of a series of particular words their natural wide meaning, unless, upon the face of that which you have to construe, you find some reason to show that that wide construction should not be given, but that there should be a narrowed construction, which is limited, or the breadth of which is limited, by the particular words which have been enumerated before. That is what he said, and he based his contention upon the case of *Anderson* v. *Anderson* (*ubi sup.*). That case, it is right to mention before one says anything about the judgment, was a case of a post-nuptial settlement made by a husband upon his wife, under which he demised to trustees a leasehold messuage, and premises particularly described in a schedule, and he assigned to them "all the household furniture, plate, linen, china, glass, and tenant's fixtures, wines, spirits, and other consumable stores, and other goods, chattels, and effects in or upon or belonging to the said leasehold messuage." In the schedule the leasehold premises were described as "A piece of ground, with the messuage, tenement, or dwelling-house, back buildings, coach houses, stable buildings, and all other erections thereupon." It was held that under the general words "goods, chattels, and effects," there passed to the trustees carriages, horses, harness, and stable furniture, in or upon the coach house and stables. There are two passages which I ought to read in the judgment of Lord Esher. The first is this: "I will take first the rule, as stated by Lord Eldon in *Church* v. *Mundy* (15 Ves. 396, at p. 406). He said: "The best rule of construction is that which takes the words to comprehend a subject that falls within their usual sense, unless there is something like declaration plain to the contrary." He is there citing Lord Eldon's words, and then, speaking for himself, he says, after quoting some words of Knight Bruce, V.C. in *Parker* v. *Marchant* (1 Y. & C. Ch. 290): "Nothing can well be plainer than that to show that *primâ facie* general words are to be taken in their larger sense, unless you can find that in the particular case the true construction of the instrument requires you to conclude that they are intended to be used in a sense limited to things *ejusdem generis* with those which have been specifically mentioned before." Then Rigby, L.J. says this upon p. 755 of *Anderson* v. *Anderson* (*sup.*): "I construe this document in the same way. The doctrine known as that of *ejusdem generis* has, I think, frequently led to wrong conclusions on the construction of instruments. I do not believe that the principles as generally laid down by great judges were ever in doubt, but over and over again those principles have been misunderstood, so that words, in themselves plain, have been construed as bearing a meaning which they have not, and which ought not to have been ascribed to them. In modern times I think greater care has been taken in the application of of the doctrine; but the doctrine itself as laid down by great judges from time to time has never been varied; it has been one doctrine throughout. The main principle upon which you must proceed is to give to all the words their common meaning; you are not justified in taking away from them their common meaning unless you can find something reasonably plain upon the face of the document itself to show that they are not used with that meaning, and the mere fact that general words follow specific words is certainly not enough." Then he cites the same decision of Knight Bruce, V.C. in *Parker* v. *Marchant* (*sup.*), which was cited by Lord Esher, and I can only say, speaking for myself, that I think that the words of those judgments do upon the face of them go some way to show that the argument of Mr. Atkin was right. I want to say that this view which was taken by Lord Esher, Lopes, L.J., and Rigby, L.J. is not a view which has only been taken in this particular case. I have here before me the decision of Fry, L.J. in *Jersey* (*Earl*) v. *Neath Union* (22 Q. B. Div. 555). There, in construing a reservation in a conveyance in fee of "all mines of coal, culm, iron, and all other mines and minerals whatsoever except stone quarries," he said, "I think that the words 'all other mines and minerals whatsoever' are intended to mean that which they express, and where you find the word 'whatsoever' following as it does upon certain substantives it is often intended to repel, and in this case does effectually repel, the implication of the so-called doctrine of *ejusdem*

generis which I think has often been urged for the sake of giving not the true effect to the contract of the parties, but a narrower effect than that they were intended to have. That is really the suggestion that was made here by Mr. Atkin in his argument. He argued to us, speaking of the history of a clause of this nature in a bill of lading, that really these words which used not to appear in this common clause—that is to say, these words "or any other cause"—were introduced, and he suggested that they were of modern introduction, that they used not to be there, and were put in in this particular case for the very reason that the parties wished that this exception should extend more widely than it had previously done—that it should not be limited to the particular insecurity which was caused by war or by a civil disturbance. He suggested that these words were put in for the express purpose of repelling the limitation of the exception to war and disturbance, and things akin to war or disturbance, thus making the clause apply to every cause of insecurity in the entry and discharge at a port. In order to enforce that contention upon us, he read some passages, which by the way I think he had no right to read, from Scrutton on Charter-parties, in which he certainly gives a history of the growth of this clause, very much of the same character. But he gave no evidence, and, as far as I can make out, nobody was called who, being an expert in such matters, could prove how the clause gradually came to take its present shape. It was a ground somewhat like this upon which Lord Ellenborough acted in *Cullen* v. *Butler* (5 M. & S. 461), where he pointed out that the court could not accept one of the arguments put before them because of the history of the clause, which showed that underwriters and shipowners had long accepted the clause as having a particular meaning. Now, there are many other cases which I have looked at, but which I did not think it necessary to bring into court with me, which show that the strict application of the *ejusdem generis* rule as limiting the general words to something akin to the antecedent enunciation of particular words, has been much less frequently applied of late years than it used to be. It is unnecessary for me to cite those cases, because I do not think anybody questions the fact. But the real contest comes in here.

In *Anderson* v. *Anderson* (*sup.*) there cannot be any doubt about what the Court of Appeal laid down, and, of course, unless there is some other decision of equal authority, we are bound by that decision unless the facts and circumstances are different. Undoubtedly the court in that case held that *primâ facie* you must treat the general words, even when following the antecedent enumeration of particular cases, as having their wide application and construction, and not narrow them by the antecedent words. But my difficulty arises in this way. I have in my hand Maxwell on the Interpretation of Statutes (4th edit.), but I am not going to read anything that he says as authority that I can act upon, I am only going to use the book because it is a convenient frame on which to hang a series of cases to which I propose to refer. He says at p. 499: "There is no doubt whatever that the general word which follows particular and specific words of the same nature as itself takes its meaning from them and is presumed to be restricted to the same genus as those words; or, in other things, as comprehending only things of the same kind as those designated by them, unless, of course, there be something to show that a wider sense was intended." It will be observed that the course of reasoning which is adopted there exactly inverts what Lord Esher, M.R., Lopes and Rigby, L.JJ. say is the proper way in which to approach the matter. They approach the matter by saying that you must give these general words, even when following the particular enumeration, the natural meaning unless there is something that you could find in the instrument to be construed which should prevent your doing so. Mr. Maxwell's book in the passage cited above shows that you ought to begin by assuming that the general words are limited by the immediately preceding particular words, unless you can find something on the face of the instrument which ought to lead you to refuse to apply the *ejusdem generis* rule. It is no good citing many authorities upon this point. The first which I shall cite is *Fenwick* v. *Schmalz* (3 Mar. Law. Cas. O. S. 64 (1868); 18 L. T. Rep. 27; L. Rep. 3 C. P. 313). I am now going to cite from the judgment of Sir James Shaw Willes, who has always been recognised as one of the greatest lawyers who ever sat as a judge in the English courts, and who, from his experience at the Bar and on the Bench, had an unrivalled experience in the construction of commercial documents. In that case the defendant agreed by charter-party to load the plaintiff's ship with coal in the regular and customary turn, "except in cases of riots, strikes, or any other accident beyond his control" which might prevent or delay her loading. To an action for breach of the above covenant in the charter-party the defendant pleaded that he was prevented from loading the vessel by a snowstorm, which rendered it impossible to bring the cargo to the agreed place of shipment. It was held on demurrer that the snowstorm was not an accident within the meaning of the exception, and that the plea was void. Willes, J. said in the course of the argument, on p. 315: "I should have thought that the words 'other accidents' meant accidents *ejusdem generis* with riots and strikes, in which human instrumentality is concerned." That is very like the suggestion that was made here by Mr. Hamilton as to the genus, if I recollect rightly. In delivering judgment Willes, J. says: "I am of opinion that the plaintiff is entitled to judgment. This was a contract to load in a reasonable time except in cases of riots, strikes, or any other accidents beyond the defendant's control which might prevent or delay her loading. The vessel appears to have been in her turn to load, and the time went by during which we must assume she should have been loaded, if nothing had happened." Then he says: "The defendant says that the cause of his delay was a fall of snow. Was the snowstorm, however, 'an accident beyond the control' of the defendant? No doubt it was beyond his control, but was it an accident? I think not, because an accident is not the same as an occurrence, but is something that happens out of the ordinary course of things. A fall of snow is one of the ordinary operations of nature, and is an incident rather than an accident; and therefore, without going into the rule that general words are to be restricted to the same genus as

the specific words which precede them, I think this natural occurrence did not come within the terms of the exception in the charter-party." I have read the judgment, and it is quite true that when Willes, J. comes to his judgment he does not give his decision upon a ground which does not involve the propriety of the application of the *ejusdem generis* rule, but the little passage that I read in the course of the argument leaves no doubt as to what Willes', J. view was, and if there had been a rule of construction by which you ought *primâ facie* to give the general words following the preceding particular words their wide unlimited construction, you may be quite sure that Willes, J. would not have made that observation which I have just read. But this is only one of a series of cases. I am not going to read them now, although I had the actual authorities in the great bulk of the cases out this morning myself to look at. They are cases which really do not show the slightest trace of a rule that you must begin by assuming that the general words have their wide natural meaning, notwithstanding their following preceding particular words, unlimited by those particular words, unless you find on the face of the instrument something that justifies your application of this *ejusdem generis* rule. Then Maxwell goes on at p. 507 and says: "Of course, the restricted meaning which primarily attaches to the general word in such circumstances is rejected when there are adequate grounds to show that it was not used in the limited order of ideas to which its predecessors belong."

I say that this series of cases are all cases which go to show that the true rule is that which is mentioned here on this page, which shows that the restricted meaning is the meaning which primarily applies. Now, that being so, he cites his authorities, which I think I ought to mention, in which that order of reasoning is adopted. One is *Gibbs* v. *Lawrence* (30 L. J. 170, Ch.), and it is a judgment of Wood, V.C. It will be seen that Wood, V.C. deals with the whole case upon the basis that this proposition that primarily you are to treat the general words as limited by the preceding words is the right sequence of thought. "I think the cases," says Wood, V.C., "which are very numerous on this subject, have some common principle upon which they all seem to have been decided, and which is not difficult of application with reference to gifts in general." Of course, it is more difficult of application when you come to a contract and remember that *Anderson* v. *Anderson* (*sup.*) was a case of a gift by a husband by a settlement on his wife, the words following a specific enumeration being confined to things *ejusdem generis*. I have been so long dealing with this matter that I will not read the judgment at length, but he does deal with the matter at very considerable length, and nowhere gives a hint that you are to start on the assumption that the general words have their wider natural meaning, unlimited by the preceding words, unless and until you find something within the four corners of the document which compels you to take another view.

Under these circumstances I am not prepared to say that the construction which has been put by Channell, J. on these words is wrong. In this case it is quite possible that another conclusion might have been arrived at if there had been evidence of experts showing the way in which this clause had previously been accepted by underwriters, and by shippers and shipowners and others interested in these matters. But there was no such evidence. I should like to say one word on one argument of Mr. Hamilton that these words "deemed by the master" required the master to exercise his personal discretion, as to which I quite agree, and that he really threw up his conventional jurisdiction to determine this question, and handed it over to the time charterers. I do not think the evidence shows that at all. Under these circumstances I have only to say that this appeal must be refused, and that the appellants must pay the costs of this appeal.

FARWELL, L.J.—In my opinion Channell, J. has come to a right conclusion. The first point dealt with by Mr. Hamilton—and I will take the points in the same order—was his finding of fact that the port was not inaccessible. Clause 4 of the bill of lading is divided into two heads. The first is, "Should a port be inaccessible on account of ice, blockade, or interdict"; the second is, "Or should entry and discharge at a port be deemed by the master unsafe in consequence of war, disturbance, or any other cause." In my opinion the first part deals with a matter of fact common to all the world, and not peculiar to this particular vessel—that is to say, the inaccessibility is to be determined by the fact whether vessels could or could not get in, and not whether the particular vessel could or could not so get in. Vladivostok, it is well known, is ice-bound during a certain portion of the year for vessels sailing to that port, and this points to the fact that the port would be ice-bound and inaccessible to all persons at a particular period. On the evidence here, four vessels during the three material days—viz., between the 12th Feb. and the 15th Feb.—got into Vladivostok and eight or nine got out. In my opinion Channell, J. was quite right when he held as a matter of fact that the port was not inaccessible.

The second point is this question of *ejusdem generis*. I have felt myself considerably embarrassed by the superfluity of authority on the question, and the conclusion that I have arrived at I will put as shortly as I can. The rule of *ejusdem generis* is merely one of the rules of construction applied by the court for its own assistance in construing documents. It is perhaps not desirable in the construction of Acts of Parliament and mercantile documents to cite authorities on wills, because a testator is of his own bounty doing what he pleases, and there is no presumption that he will not be capricious. In an Act of Parliament or a mercantile document you start with the presumption that business men do not intend to do anything absurd and so you have some little guide at any rate. But however you may regard it, it is in all cases a question of construction. Now, there is no room for any application of the doctrine of *ejusdem generis* unless you find what is sometimes called a genus, which I will call a class or category. I think I had better say category because "class gift" has a technical meaning in wills and might lead to confusion. Unless you can find a category there is no room for the application of the doctrine of

ejusdem generis, and to my mind *Anderson* v. *Anderson* (*sup.*) is inapplicable on the ground that there really was no category at all in the case. That case is an illustration of this doctrine, and I think that is what Lord Esher meant. If you once find clear unambiguous words of gift in general terms, you cannot cut those words of general gift down by an enumeration of particulars preceding or following. You have there on the construction of that document to my mind as clear an intention to give all the chattels and effects in and about not only the house, to which it was intended to be restricted, but the stables themselves which were actually mentioned in the schedule. It would have been a very strong thing to say that you can cut down the ordinary meaning of the words of general gift in an unambiguous sentence by reference to an enumeration of particulars. It is perhaps rash to say so in face of the fact that the court did talk about *ejusdem generis*, but, to my mind, the true doctrine of *ejusdem generis* was excluded altogether, and it was not a case that the doctrine is not to be applied because it is a bad doctrine, but that it was not to be applied because the circumstance of the particular case did not admit of it. I cannot believe that Lord Esher could have intended in any way to whittle down the doctrine, because I find that he himself in the same year, in the case of *Fuller* v. *Blackpool Winter Gardens Company Limited* (73 L. T. Rep. 242; (1895) 2 Q. B. 429), a case which I had occasion to refer to a week or two ago, applies the doctrine of *ejusdem generis* to the Dramatic Copyright Act and cuts down the generality of the word "entertainment" by the application of that doctrine to something of the same kind as the particular words. Moreover, the case of *Anderson* v. *Anderson* (*sup.*) has been referred to in the Court of Appeal in the case of *Stockport Ragged and Industrial Reformatory Schools* (79 L. T. Rep. 507; (1898) 2 Ch. 637) which case was also on the construction of the words "any cathedral, collegiate, chapel, or other schools" in sect. 62 of the Charitable Trusts Act 1853. The words "other schools" were cut down so as to be *ejusdem generis* with those immediately preceding. The truth is that you have first of all to find that the document with which you are dealing contains a category properly so called. If you have once determined that there is a category you then have to ascertain which are the items which fall within that category. Taking the words in the present case. "in consequence of war, disturbance, or any other cause," Mr. Atkin as I followed him was driven to say that "any other cause" meant any other cause of any nature or kind whatsoever, whether within or akin to the preceding words "war" or "disturbance" or not. Now the difficulty of doing that when you have got what is apparently a clear category to begin with and not absolutely clear unambiguous general words to follow is that you thereby violate a rule of construction, because you strike out and render meaningless two words which are inserted presumably for the purpose of having some meaning. Really if Mr. Atkin had been able to suggest some matters other than disturbance by violent human interference which are *ejusdem generis* with war and disturbance, it would be another thing altogether, but he has not. He is driven to say that it means every other cause, and Smith, L.J. in the case of *Re Richardson and Samuel* (*ubi sup.*), where he was dealing with a charter-party—it was a lock-out case—says this: "In my opinion the clause cannot be intended to cover all acts of the agent which he has carried for his own purposes. Of course there must be some limitation put upon these words, otherwise the words that precede would be mere surplusage. In my opinion this clause must be read as covering exceptions *ejusdem generis* with those that precede it." That, as I understand, is the meaning of the Court of Appeal in another case which was cited to us of *Baerselman* v. *Bailey* (*sup.*). The same reason to my mind is apparent in both judgments in that case. It is sufficient to refer to the judgment of Rigby, L.J., where at p. 304 of (1895) 2 Q. B. he says this: "During the argument I was disposed to put the limited construction upon the words 'or otherwise,' which is suggested in the latter part of the judgment of the court in *Norman* v. *Binnington* (*sup.*), probably because I did not recognise how much liability would remain if the wider construction is adopted"—meaning as I understand it—"If there had been nothing else, and you had had to say it means every other conceivable cause, then I should not have adopted this construction, but inasmuch as you do suggest a category containing other things beyond the limits of those suggested, and yet short of everything you can think of, you have got a category, and the question is whether it is within that category or not, and you do not restrict it necessarily to the two words which immediately precede, because you have found something else."

Now, if the words in this case had been "in consequence of war, disturbance, or any other cause whatsoever, whether similar to those preceding or not," there would have been no room for argument, because you would have got an illustration of what I began with, that there is no real category at all; it is universality, and not a category; it is the whole range of causes. But, inasmuch as you have simply the words "any other cause," which are ambiguous, then to my mind the rules which I understand have been laid down for many years do apply. I will take the rule as stated by Lord Tenterden in a case on the construction of statutes (*Sandiman* v. *Breach*, 7 B. & C. 96, at p. 100), where he says: "Where general words follow particular ones, the rule is to construe them as applicable to persons *ejusdem generis*." The same rule was applied by the court in *Reg.* v. *Cleworth* (4 B. & S. 927), where again was in question the construction of a statute enacting that no tradesman, artificer, workman, labourer, or other person whatsoever shall do or exercise any worldly labour, and so on, on the Lord's Day. Cockburn, C.J. says: "Then there is a general expression 'other person whatsoever,' but, according to a well-established rule in the construction of statutes, general terms following particular ones apply only to such persons or things as are *ejusdem generis* with those comprehended in the language of the Legislature. Crompton, J. and Blackburn, J. both agree. If, therefore, you once arrive at the fact that there is a category then these old rules still apply. I do not call them old except in the sense that they have come down to us from generations ago and still remain in full force, as is shown by

the case of *Baerselman* v. *Bailey* (*sup.*) that I have just referred to. Lord Esher never would have intended to overrule or to attempt to overrule any of those. If you once get your category, then you have to ascertain in the best way you can what is the extent of the limit which you are to apply. If no limit can be suggested other than that which is naturally to be inferred from the preceding words specified, and apparently specified for that purpose only, and the only alternative is to strike those words out; then, in my opinion, the general rule which I have read from two of these cases does still apply.

Now, in the present case I myself applying that rule, should have held that you were restricted to the immediately preceding words "war" and "disturbance" and the category would contain war and disturbance and other violent acts attributable to human agency. I think in this particular case that is further assisted by the reference to "ice" two lines above in the same clause. It seems to me almost impossible to impute to the contracting parties an intention to insert the word "ice" when they have said "should the port be inaccessible on account of ice, blockade, or interdict"—that is, ice and warlike operations—having omitted it (though intending it to apply) in the very next paragraph "or should entry and discharge at a port be deemed by the master unsafe in consequence of war, disturbance, or any other cause," I think ice was intentionally omitted there because it was not intended to apply. The result is that, in my judgment, this clause is to be construed according to the doctrine of *ejusdem generis*, and that the expression "any other cause" is so restricted.

The third point is a simpler one, and I would simply say that I agree with Channell, J. in thinking that errors of judgment do not include in this case a mistake in construing the bills of lading. The other point is one upon which my Lord felt more doubt. Again, I see no reason myself to differ from Channell, J., who has taken the view that, inasmuch as the charterers, instead of directing, as they were entitled to do, the captain to sign, signed it themselves for the captain, they were well within their rights. I cannot see that any hardship arises, because they, the charterers who have done this under the bill of lading, have agreed to indemnify the owners from all consequences. Whether they held the captain's hand, as Channell, J. suggests, and guided it, or whether they wrote it themselves for the captain, appears to me to be immaterial. The result is that, in my opinion, this appeal fails. There is one other point that I ought to mention, as my Lord referred to it. I would only say that I am not satisfied in this particular case that the captain did surrender the discretion that was given to him under clause 4 to discharge at some other safe port or place, but I will also add that as at present advised I think he was bound to exercise that discretion fairly as between both parties, and not merely to do his best for the shipowners, his masters, disregarding altogether the interests of the charterers.

KENNEDY, L.J.—I am of the same opinion, and I will the more shortly, after the very full judgments that have been delivered, state my view upon the points that have been dealt with, because they are points of general interest, and not merely points arising in this particular case. With regard to the first question which I need only refer to, that of the validity of the signature of the bill of lading signed, not by the captain, but by the charterers for the owners and captain, I have shared very much the feeling of doubt which Vaughan Williams, L.J. has expressed, but upon the whole I have come to the conclusion that the judgment of my brother Channell is right. Having said that I felt a doubt, I think I ought to say how that doubt has been resolved. It does not lie in the mouth of the present defendants to deny the authority of the signature as one made on behalf of the captain and owners, because they have themselves by the contract agreed that the captain shall act as the charterers shall direct, and therefore as against them a signature which the charterers have made as on behalf of the captain and owners must, I think, as against them be treated when they are sued by the shippers who put their goods on board as a signature which they cannot repudiate, because they gave the charterers, in the express terms of their contract, the right of directing the signature to the document to be made, and therefore must be taken impliedly to have given both as against the captain and against themselves an authority to the charterers to sign on behalf of either or both of them. With regard to the other short and comparatively easy question as to whether or not error in judgment includes the misconstruction by the captain of the mercantile document by which he was bound, I add nothing to what has been said. It seems to me clear that error in judgment could never be intended to mean misconstruction of the document. It means an error which certainly does not include a mistaken view of the legal rights relating to the duty to the shippers under the charter-party or bill of lading. I also think with my brother Channell that the error in judgment in merely going back to Nagasaki, as pleaded, would not in itself be sufficient to excuse that which was really the act which did the mischief—namely, discharging the goods at Nagasaki, as Mr. Hamilton pointed out.

I then come to the points which are more material, and I desire carefully to express my view as to these mercantile matters which come into discussion. Inaccessibility is a question of fact. As something was said, if I followed it, by Farwell, L.J., which, speaking with great respect, I desire for myself to qualify, I would say that I do not think inaccessibility, as a fact, excludes reference to a particular ship. It means inaccessibility for a ship such as this. For example, inaccessibility might be one thing for a steamer and another thing for a sailing ship, but, subject to that, it is a fact, relating to the conditions existing which affect the access of the vessel to the port for which she is destined, and it means, it appears to me, either something which is a permanent obstacle to access, or if the nature of the obstacle is not absolutely permanent, it means an impossibility of access in respect of the duration of time which is so far lasting as to make the delay of the ship until the obstacle shall have ceased to exist, a delay which would practically and in a mercantile sense frustrate the adventure of the charter-party. That state of things has been found by my brother Channell not to have existed here.

It is not a question which under the terms of the bill of lading was a question for the opinion of the captain, but it is a question of fact to be decided, I think, upon the principle which I have stated, and in finding, as he did, that the inaccessibility did not exist, I think Channell, J. was perfectly right.

Now comes the matter which is really, to my mind, the only difficult matter among the larger points in this case. We have to construe and construe carefully the 4th clause of the bill of lading: "Should a port be inaccessible on account of ice, blockade, or interdict, or should entry and discharge at a port be deemed by the master unsafe in consequence of war, disturbance, or any other cause, it shall be competent for the master to discharge," and so on. There are two limbs or conditions to the process in the sentence: first, one of fact, should a port be inaccessible for three definite causes operating to prevent his going in Secondly, one of opinion of the master, should he deem entry and discharge unsafe. We have only got in regard to this question as it is called of *ejusdem generis* to deal with the second limb of the sentence. With regard to *ejusdem generis*, the very expression shows that what you have to look to is a genus. The doctrine of treating words which might, under certain circumstances, have a wider meaning as being restricted, is when you use that phrase, that you find them to be according to the true construction of the expression words belonging to the same genus as words which are to be found in the immediate context. I am content, without going into the references to earlier cases, to take the statement of law given in the House of Lords by Lord Halsbury as regards "two rules of construction, now firmly established as part of our law," which may be considered as limiting general words. "One is, that words, however general, may be limited with respect to the subject-matter in relation to which they are used; the other is that general words may be restricted to the same genus as the specific words which precede them." Those are the statements made very clearly and tersely by Lord Halsbury in giving judgment in *Thames and Mersey Marine Insurance Company* and *Hamilton, Frazer, and Co.* (*sup.*), and similar language is used, especially in the judgment of Lord Macnaghten. In this particular case have we any words that immediately precede? It is clear that the limb of the sentence does commence with the word "or." It is, "should entry and discharge at a port be deemed by the master unsafe in consequence of war, disturbance, or any other cause." The context therefore is that limb and that limb only. Is there a genus in the words war and disturbance, which are the two words used? I think there clearly is. It has been expressed by Vaughan Williams, L.J. in the words "human instrumentality" and if it is needed to extend them at all I should have said "human instrumentality acting either in an orderly and regular fashion, as war, or in a disorderly and irregular fashion, as disturbance, riot, or mutiny," such as in fact we know, as a matter of history, has happened at Vladivostok. Now, that being so, you have that which is requisite—namely, a genus. You would not have found it had you found a third word, such as snowstorm, introduced. Had it been "In consequence of war, disturbance, or winter snowstorms," you would have had then no genus of a kind which you could recognise, because it is too wide to say that genus means anything that prevents the vessel entering. You would have had three different things followed by the words "or any other cause." Speaking for myself I should have said it was impossible then to treat "any other cause" as meaning any other than such cause as might cause unsafety to the ship, whatever the nature of that cause might be. But when you have a genus in the words "war" and "disturbance" you then, I think, ought to be guided in the way in which it has been decided in many cases that the courts should be guided in construing words. I referred to that when I was pointing out this case to Mr. Atkin. It is dwelt upon still more fully by Lord Halsbury at p. 491, when he is pointing out what he thinks is the mistake in the earlier judgment in *West India and Panama Telegraph Company* v. *Home and Colonial Marine Insurance Company* (4 Asp. Mar. Law. Cas. 341 (1880); 43 L. T. Rep. 420; 6 Q. B. Div. 51). The mistake of the judgment was that, instead of looking for a genus, they looked for analogy, which is wrong. You must first find a genus and then find whether or not the words that follow are applicable to the species enumerated belonging to the one genus but not to the analogy. In the same way Lord Macnaghten, in the passage at p. 206 of 6 Asp. Mar. Law. Cas. in *Thames and Mersey Marine Insurance Company* v. *Hamilton, Frazer, and Co.*, says: "According to the ordinary rules of construction these words"—the words in the particular case—"must be interpreted with reference to the words which immediately precede them. They were no doubt inserted to prevent disputes founded on nice distinctions. Their office is to cover in terms whatever may be within the spirit of the cases previously enumerated, and so they have a greater or less effect as a narrower or broader view is taken of those cases." In that case it was argued that perils of the sea practically meant perils of any kind affecting people on the sea, and that was rejected. Here you have no difficulty of that kind, because the only preceding words in the same context are "war" and "disturbance," which are of the same genus in the sense that they both represent violent human action, orderly or disorderly, possibly rendering the entrance or discharge of the cargo insecure, and under those circumstances it seems to me that you have every requisite here for finding as the learned judge below has found, that you have got the genus. Ice does not belong to that genus. Apart from that which Farwell, L.J. pointed out, which was that one would have expected, as ice was used in the other limb of the sentence, if it was really intended to introduce something so different from war and disturbance, ice would have been specified, you are really bound in my view to look at the clause as it stands, and so standing it represents a genus to which these more general words that conclude the clause are properly referable. Under those circumstances it appears to me that the decision which was given by the learned judge is perfectly right and reasonable, as my brethren have also shown upon the authority of the cases, these being properly understood, and the particular documents in their nature

considered, although sometimes an apparent variation has existed. I have no doubt at any rate according to mercantile documents that the judgment below is right.

The shipowners appealed to the House of Lords.

J. R. Atkin, K.C. and *Lewis Noad* appeared the appellants.

J. A. Hamilton, K.C. and *A. Adair Roche* the respondents.

The same arguments were used and the same authorities cited as in the courts below.

J. R. Atkin, K.C. was heard in reply.

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

The LORD CHANCELLOR (Loreburn). — My Lords: I am clearly of opinion that this judgment ought to be affirmed. What took place was this. A vessel went from Middlesbrough to Japan to deliver most of her cargo, and then she was to go forward to Vladivostok. When she arrived within forty miles of Vladivostok she found that she could not get into the port by reason of ice. There was some danger to her propeller, it is said, from ice. There was also some fear—rather a vague fear—of submarine mines, and there was some danger, if the wind changed, from a lee shore. The vessel tried for three days in vain to get through the ice and then went back to Nagasaki, and, by order telegraphed from England, there discharged her cargo. The next day after her turning back the ice cleared off, the access was as safe as ever it was or ever will be, and other vessels entered there, while this vessel went back to Nagasaki, and it is asserted that she was entitled to do so. Is this conduct justifiable within the terms of the fourth clause of the bill of lading? Was the port of Vladivostok "inaccessible" on account of ice? At the moment and for two or three days, undoubtedly it was; but the meaning of this bill of lading, in my opinion, is that the port must be inaccessible in a commercial sense, so that a ship cannot enter without inordinate delay. There is no ground whatever for saying that a delay of three days on a journey so long as the one from England to Japan could be regarded as inordinate delay.

The next point taken was that by the bill of lading she might discharge at the nearest port, "should the entry and discharge at a port be deemed by the master unsafe in consequence of war, disturbance, or any other cause." That, also, does not mean unsafe at the moment, but it means unsafe for a period which would involve inordinate delay. The master never decided that the port was unsafe in that sense, and never could have decided anything of the kind. Accordingly, the shipowner is not entitled to the benefit of those words either. Then it was said that there was an error of judgment within the second clause of the bill of lading I think that it is inapplicable. I do not see that the master ever exercised his judgment upon either of those points. What he did was this: He thought (no doubt, admittedly, acting in good faith) that he could go back; and he went back. He simply broke his contract—that is all that he did. The other point—namely, that one of the bills of lading was signed by Messrs. Watts instead of by the captain, to my mind is destitute of validity in law, and even more destitute in merits. If the captain had been directed to sign it, he was obliged to sign it. The point is a merely technical point, that the proper signature was not there. As a matter of fact, I should be very sorry to lay down any rule that under such a contract the charterer or shipowner could always sign; but I am not satisfied that the captain did not know perfectly well of this signature and sanction it. I think that there is absolutely nothing in that point also. Accordingly I am of opinion that this appeal should be dismissed with costs.

Lord MACNAGHTEN.—My Lords: I agree with my noble and learned friend on the Woolsack on all the three points. One of them I think ought not to have been raised, and about that I will not say anything. With regard to the other two, after the very full and able arguments which we have had, I think that the judgments of Channell, J. and the Court of Appeal are quite right. I do not think that the port of Vladivostok was inaccessible within the meaning of the documents, as a matter of fact, although the captain could not make his way there through the ice for three days. I do not think that he was justified in giving up the attempt after so short a trial, considering that he had plenty of coal on board, and I do not think that, having regard to the fact that the whole of the freight had been paid in advance, he was justified in landing the goods at Nagasaki. While the goods were still on board he heard that the port of Vladivostok was accessible, and I think that he was bound to prosecute his voyage to the destination mentioned in the bills of lading. As regards the last point, I think that the rule of *ejusdem generis* applies as laid down in *Thames and Mersey Marine Insurance Company* v. *Hamilton* (*ubi sup.*), and I prefer to take the settled rule on a point of that sort from a case which did deal with bills of lading and shipping documents rather than from cases that dealt with real property and settlements. On the whole I think that the appeal ought to be dismissed.

Lord JAMES OF HEREFORD.—My Lords: The main question in this case is entirely, I think, one of fact, and I concur in the judgment which has just been delivered by my noble and learned friend Lord Macnaghten on that point. It seems to me that the master when he gave up the attempt to enter Vladivostok and went to Japan, and there delivered his cargo, was acting in the interests of the shipowners so as to get rid of the burden of that cargo, and not in the interests of the charterers. He did not wait the time which a person acting in the interests of the charterers would have waited near the mouth of the river to see whether the ice did or did not pass away. If he had done so for a short time, or a reasonable time, none of this litigation would have arisen. As I have said, for the reasons given by my noble and learned friend, I concur in the judgment proposed.

Lord DUNEDIN.—My Lords: The appellants were bound by at least three of the bills of lading to deliver this cargo at Vladivostok. Admittedly they did not do so, but delivered it at Nagasaki. They must, therefore, be liable in damages for the failure, unless they can show that they are excused in respect of any of the exceptions in the

bills. Their principal defence was based on art. 4, the terms of which I need not again read to your Lordships. They plead the protection of both members of the clause. As to the first, have they shown that *de facto* Vladivostok was inaccessible on account of ice? It is obvious that inaccessibility must be judged of reasonably. Here the practical inaccessibility lasted but three days, and, though the captain may have been right, in view of the danger of his anchorage under the lee of Askold Island, to give up the attempt to enter Vladivostok when he did, I see no reason why he should not have renewed his attempt when the weather conditions changed, as they did on the very next day. As to the second part of the clause, I have come, after consideration, to agree with the learned judges of the Court of Appeal in thinking that "any other cause" must be limited there to causes *ejusdem generis* as war and disturbance, and cannot apply to ice, which is specially dealt with in the first portion of the clause. But even were that not so, I think that the same considerations as to the facts which prevent the appellants from sheltering themselves under the first portion apply here also. In other words, I should hold that the condition of unsafeness must at least endure until the delivery at the alternative port has been effected. The other clause appealed to was the general enumeration in clause (2), in which, *inter alia*, figures 'error in judgment of the master, &c. . . . whether in navigating the ship or otherwise." I can only say that this seems to me to have no application. The non-delivery of the goods at Vladivostok was not due to an error in judgment of the captain. The proper application of the clause is sufficiently indicated by the words "in navigation or otherwise." It seems to me fantastic to extend it to the idea of a captain forming a wrong legal opinion on the meaning of a clause in the bill of lading and then proceeding to act upon it. The only point remaining is whether the appellants are bound in respect of the fourth bill of lading. The point is a narrow one, but I am content with the judgment of Channell, J., and I cannot think that your Lordships would regard with any favour a defence which, unless it were accompanied by an allegation that the charterers were not in a position to indemnify the owners, amounts to a mere multiplication of procedure, it being clear that the shipper could recover against the charterers either as upon a contract or in respect of warranty of authority. Nor do I think that any new and dangerous liability, as was urged, is being imposed on owners, because it must be clearly understood that the condition of the argument is that it is admitted that this was a bill of lading which the master could rightly have been called on to sign. Had the bill of lading contained stipulations of such an extraordinary character that the master might have refused to sign, then that defence would have been equally open upon the question of whether the signature of the charterers bound the owners.

Judgment appealed from affirmed, and appeal dismissed with costs.

Solicitors: for the appellants, *W. A. Crump* and *Son*; for the respondents, *Botterell* and *Roche*.

Supreme Court of Judicature.

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Thursday, June 18, 1908.

(Before PICKFORD, J.)

REPUBLIC OF BOLIVIA *v.* INDEMNITY MUTUAL MARINE ASSURANCE COMPANY LIMITED. (*a*)

Marine insurance — "Piracy" — Insurgents — Robbery on river — River transit — Non-disclosure of material facts—Cover usable for goods of different owners—Materiality of facts as to one owner's goods.

An armed operation against the property of a particular State for a public end—e.g., *of establishing a Government—although it may be illegal or criminal, and although carried out by persons not acting on behalf of a society which is politically organised, does not amount to piracy within the meaning of that word in a policy of insurance.*

To determine the meaning of the word "pirate" in a policy of marine insurance, the natural clear meaning of the word as used by business men for business purposes should be adopted. A more popular meaning should be attached to it than that used by writers on international law.

Semble: *If a person opens a cover which may be used for the goods of different owners and he knows facts which are material to the insurance of the goods of one and not material to the insurance of the goods of another—though possibly when he declares the goods to which the facts are not material it may not be necessary for him to disclose those facts which are material to the goods of the other—as soon as he uses that cover for the purpose of insuring goods, to which the facts he knows at the time of opening the cover are material, it his duty to disclose them.*

COMMERCIAL LIST.

Action tried before Pickford, J. sitting without a jury.

The action was brought upon two policies of insurance, and brought alternatively upon the two policies because the one policy was effected to cover the risks which were excepted from the other. The defendants raised the defence of concealment of a material fact, and denied that the loss fell within the one or the other of the policies. The first policy, dated the 20th Nov. 1900 and effected by Suarez, Hermanos, and Co., was a policy for 375*l.*, part of an insurance of a larger amount, and was declared to be "upon goods and (or) merchandise valued at 7500*l.* (say A. M. 1775 packages provisions, preserves, and merchandise so valued belonging to the Bolivian Government) . . . by vessel called the *Labrea* and conveyances . . . at and from Para to Puerto Alonzo and (or) other places on the river Acre and (or) in that district. To include all risks of or incidental to inland carriage by land and (or) water and (or) by any conveyances whatsoever . . . including the risk of craft to and from the vessel. . . . Warranted free of capture, seizure, and detention, and the conse-

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

quences thereof, or any attempt thereat, piracy excepted, and also from all consequences of riots, civil commotions, hostilities, or warlike operations, whether before or after declaration of war."

The second policy was a policy for 7500*l.*, which was an insurance "against war risk only to cover such risks as are excluded from original marine policies by the following clause"—then the words of the free of capture and seizure clause were set out.

The first policy was issued by virtue of a slip dated the 3rd March 1900. The second one was issued on a slip dated the 8th Nov. 1900. The dates were material, because the defence of concealment which was raised by the defendants was admitted not to apply to the first policy, but it was contended it did apply to the second.

The question on the first policy was whether in the events that happened there was a loss by piracy; and if that was decided in favour of the plaintiffs no further question would arise. If it was decided in the negative against the plaintiffs, then two questions arose upon the policy on the later slip; first, whether it was void by reason of the concealment of a material fact; and, secondly, if not void, whether the loss was within the terms of that policy. If the policy was void by reason of the concealment of a material fact, it would not be necessary to consider the second question upon the second policy. As to the question on the first policy—namely, whether there was a loss by piracy—the matter arose in consequence of a certain state of affairs which existed in a territory that was called Colonias or the free territory of El Acre, on the borders of Brazil and Bolivia.

In 1867, by a treaty between Brazil and Bolivia, the territory of Colonias was either ceded or assured to Bolivia. That treaty between Brazil and Bolivia decided that that territory was Bolivian territory, but there was no demarcation of the frontier until 1898, when a commission of delimitation was appointed by the two Governments, and a frontier line was fixed. There is a place called Puerto Alonzo, which is just on the Brazilian side of that line, and situated upon a river called both the Aquiry and the Acre, a tributary of the Pursus, which in its turn is a tributary of the Amazon.

Before 1898 Bolivia had not exercised any effective jurisdiction in this territory, but there was valuable property there; rubber was produced of considerable value, and both Brazilians and Bolivians, but chiefly Brazilians, had settled there and traded in rubber. What the exact nature of the Government of that territory was in those days was not clear, but there was a Custom House at Manaos, on the Amazon, a very considerable way down, and another Custom House at Para, at the mouth of the Amazon, and customs were exacted in respect of the goods which came down the Amazon from the territory of Colonias at those Custom Houses. But there was no Bolivian Custom House, no Bolivian Government, set up there, and if there was any Government at all, it was exercised apparently by certain magistrates appointed by the Brazilian Government, some of whom may have been stationed on what is now the Bolivian side of the frontier line.

After that line was fixed and the demarcation of the frontier was effected the Bolivian Government determined to take effective possession of the territory, and to establish proper Bolivian Government administration there. They first established a Custom House at or near Puerto Alonzo, but the representatives that they sent there were turned out, and apparently one of them was killed by certain persons, chiefly Brazilians, but there may have been some Bolivians among them, who were discontented with the state of affairs that would produce a Bolivian Government there and had joined in establishing what they called the Free Republic of El Acre. One of the leading spirits was one Galvez, and about the same time as the establishment of the Customs at Puerto Alonzo and the establishment of the Free Republic of El Acre, the Bolivian Government sent an expedition from La Paz, the capital of Bolivia, under the command of one Munoz, in order to take possession.

It was a long and difficult march from La Paz, and the expedition was several months on the way, but it did eventually arrive in the territory of Colonias. When it arrived the Free Republic of El Acre for the time disappeared.

It was suggested that Galvez went to Buenos Ayres, and according to the evidence of a Mr. Suarez, who was the representative of the Bolivian Government in England, he took with him, no doubt for safe custody, the contents of the Republican treasury.

It was not clear where the rest of the Republicans went, but some of them crossed the Brazilian frontier, and in Brazilian territory set themselves to work either to re-establish the original Republic of El Acre or to establish a Government of their own, at any rate to oust the Bolivians. The Brazilians who were near the frontier line seem to have been in sympathy with the Republicans—the persons resisting the establishment of the Bolivian Government. That appeared from a speech of the Governor of Manaos, which is the capital of the province of Arizonas, the Brazilian province next adjoining this territory.

The Bolivian expedition, although it had arrived and taken possession of the territory, was in a difficult position. It was a very long way from the base or from the capital, and it was very difficult to supply it with provisions and stores. The traders could not very well get them from the Brazilian side of the frontier because the Brazilians were not well affected to this taking possession by the Bolivian Government. It was very difficult to provision the expedition from Bolivia because the distance was so great, and the means of getting it to the place so difficult.

Accordingly it was arranged between the Brazilian and Bolivian Governments that the expedition should be provisioned from Brazil by sending the stores and provisions up the Amazon from Para. This was done on a vessel called the *Labrea*. These stores and provisions were the subject-matter of the policies.

At this time the Bolivian Government was represented in England by Senor Aramayo, and their agents were a firm of Suarez, Hermanos, and Co. Suarez, Hermanos, and Co. had a house in Para, and there they acted for the Bolivian Government together with a gentleman of the name of Ballivian, who had been sent for the purpose of seeing to the sending up of the provisions to the Bolivian Government, and a certain

representative, Monteiro da Silva, was acting probably in conjunction with them also.

The second slip was effected in England by the then representative of the Bolivian Government—Senor Aramayo—who employed Suarez, Hermanos, and Co. for that purpose.

Senor Aramayo had no personal knowledge of the matter.

The English house of Suarez, Hermanos, and Co. did not have knowledge, though their Para house had, of an expedition being fitted out to intercept these provisions.

The head of the firm of Suarez, Hermanos, and Co. in Para was a Don Nicolas Suarez, and he owned houses or places from which rubber was obtained in Acre. One of the persons who had been concerned in the Free Republic of El Acre was a gentleman of the name of Carvalho, He had been manager in Acre for Don Nicolas Suarez, and when the Republic was set up, or after it was set up, Carvalho was alleged to have used Don Nicolas Suarez's property either for the purposes of the Republic or for his own purposes, and to have destroyed a considerable part of the place. He alleged that Galvez was responsible for this. He was called to account for what he had done when he got to Para.

According to the evidence it was important for him that the Bolivians should not establish any stable Government in Acre, and he started or assisted in a movement either for the purpose of the re-establishment of the Free Republic of El Acre, or, it had been said, to establish another Republic on his own account. Whatever the reason might have been, he and others fitted out an expedition in Para to intercept the supplies that were being sent up to the Bolivian expedition. His intention was to intercept them at or near Puerto Alonzo, and then, having got possession of the stores which had been sent up for the Bolivian expedition, to attack the Bolivian expedition and to make himself master of the place and establish a Government there if he could. That seems to have been his intention. For this purpose he and the others fitted out either two or three vessels which were armed, and one of them was the *Solimoes*. She was fitted with a quick-firing gun and she carried armed men. This expedition went up the Amazon and got somewhere in the neighbourhood of Puerto Alonzo, and there they stopped a number of steamers, but they did not interfere with any except the *Labrea*. They did not take goods from any of the others when they ascertained that they were not carrying goods for the Bolivian Government, but when the *Labrea* arrived they stopped her, and, finding that she was carrying goods for the Bolivian Government, they took possession of her. She was flying a flag of some sort which the persons on board the *Labrea* supposed was the Acrean flag. They took it to be intended to be the flag of the Republic of El Acre. They took those stores and then crossed the Bolivian frontier, and they attacked or were attacked by the Bolivian forces, with the result that the expedition was defeated; their quick-firing gun was taken from them, and they dispersed.

Scrutton, K.C. and *F. D. Mackinnon* for the plaintiffs.—What was done amounted to piracy. What constitutes piracy *jure gentium* is discussed in *Attorney-General of Hong Kong* v. *Kwok-a-sing*, 1873, L. Rep. 5 P. C. 179, at p. 199). Definitions of piracy are set out in note (*e*) in Chalmers and Owens' Marine Insurance Act 1906, p. 168. In Hall's International Law, 5th edit., at p. 261, it is said that "piracy may be said to consist in acts of violence done upon the ocean or unappropriated lands, or within the territory of a State, through descent from the sea, by a body of men acting independently of any politically organised society." That definition shows that piracy is not confined to robbery on the high seas. Piracy is robbery within the Admiralty jurisdiction, which jurisdiction, by virtue of 28 Hen. 8, c. 15, extends to rivers where the Lord High Admiral has jurisdiction. In *Reg.* v. *Anderson* (19 L. T. Rep. 400; L. Rep. 1 C. C. R. 161), an offence having been committed some miles up the river Garonne, it was held that the Lord High Admiral had jurisdiction. The Lord High Admiral therefore had jurisdiction up the river Amazon. Seizure of a ship by persons coming from land amounts to piracy:

Nesbitt v. *Lushington*, 1792, 4 Term Rep. 783, at p. 787, per Lord Kenyon.

There was no concealment of material facts. To ascertain whether there has or has not been any concealment, it is necessary to look at the date of the initialling of the slip:

Cory v. *Patton*, 2 Asp. Mar. Law. Cas. 302 (1874) 26 L. T. Rep. 161; L. Rep. 7 Q. B. 304;
Ionides and Chapeaurouge v. *Pacific Fire and Marine Insurance Company*, 1 Asp. Mar. Law. Cas. 141, 330 (1872); 26 L. T. Rep. 738; L. Rep. 7 Q. B. 517;
Carter v. *Boehm*, 1766, 3 Burr. 1905.

When Suarez, Hermanos, and Co. insured by an open cover, it was in respect of goods to be shipped for themselves. It was subsequent to that that the shipment for the Bolivian Government was declared. Therefore the knowledge possessed by Suarez, Hermanos, and Co. at the opening of the cover cannot be imputed to the plaintiffs when their risk was declared subsequently, for when the slip was initialled it was not intended for the shipment for the Bolivian Government, but for Suarez, Hermanos, and Co.'s goods, and the fact of the knowledge of the expedition was not material to the insurance of Suarez, Hermanos, and Co.'s goods, and, as the date of initialling is the important date, subsequent non-disclosure makes no difference.

J. A. Hamilton, K.C. and *Leck* for the defendants.—What took place was not an act of piracy, but a military and political movement, the inhabitants of the State of Amazonas being opposed to the occupation of Acre by Bolivia. The mere fact that stores were seized whilst on a vessel in the river does not amount to piracy. To establish piracy, which is specifically defined in English law, it is necessary to prove (1) an act committed at sea; (2) no responsibility of any one State in particular for the act of the persons, any State being able to bring them to justice; (3) *mens rea*. In the present case (1) the acts complained of took place up a river; (2) the persons were Brazilians, and Brazil was under a duty to bring them to justice; (3) there was no *mens rea*, since the persons were not engaged in rapine, but in military operations in furtherance of political measures. "Piracy" in a policy of insurance does not apply to capture by revolu-

tionary forces. The second policy is avoided because there was non-disclosure of material facts. That an expedition to intercept the supplies was being fitted out at Para was well known to the agent Ballivian and the Para house of Suarez, Hermanos, and Co. Further, Bolivia made diplomatic representations to Brazil upon the subject. Senor Suarez, who gave orders for the insurance to be effected, might not know of this expedition; but his firm in Para knew, and that would be sufficient:

Proudfoot v. *Montefiore*, 2 Mar. Law. Cas. O. S. 512 (1867); 16 L. T. Rep. 585; L. Rep. 2 Q. B. 511;

Blackburn, Low, and Co. v. *Vigors*, 5 Asp. Mar. Law. Cas. 597 (1886); 55 L. T. Rep. 731; 12 App. Cas. 531.

Scrutton, K.C. in reply.—The persons on board the *Solimoes* were not belligerents. It is "a customary rule of the law of nations that any State can recognise insurgents as a belligerent power provided (1) they are in possession of a certain part of the territory of the legitimate Government; (2) they have set up a Government of their own; (3) they conduct their armed contention with the legitimate Government according to the law and usages of war":

Oppenheim's International Law, vol. 2, p. 86.

Here these people had not been recognised as belligerents by any State; they were within the limits of a friendly State; they were robbers. It makes no difference that the robbery was committed on fresh water. "If a robbery be committed in creeks, harbours, ports, &c., in foreign countries, the Court of Admiralty indisputably has jurisdiction of it, and such offence is, consequently, piracy":

Russell on Crimes, 6th edit., vol. 1, p. 10.

"Piracy is only a sea term for robbery, piracy being a robbery within the jurisdiction of the Admiralty":

R. v. *Dawson*, 13 State Trials, 451, at p. 454.

That is piracy by the *jus gentium*:

Attorney-General of Hong Hong v. *Kwok-a-sing* (*sup.*).

The policies refer to river transit, and, if the defendants' contention is correct, the word "piracy" can have no application.

Pickford, J., in delivering a considered judgment, after stating the facts, continued:—The question is whether under these circumstances this is a loss by piracy? These persons professed at any rate to act on behalf of a Republic that they either were re-establishing or were seeking to establish, and they were flying a flag which was supposed to be the Acrean flag, although its description is very vague. Is this a loss by piracy? The plaintiffs say it is, and they refer to some definitions given by writers on international law, and some definitions given by writers on criminal law. I am not sure that the definition which may be arrived at by writers on international law and the definition arrived at by writers on criminal law is necessarily the same. The question is, What is the meaning of the word "pirates" in a policy of insurance? One definition which was relied upon is that contained in Russell on Crimes, vol. 1, p. 260, taken from Hawkins' Pleas of the Crown and Blackstone. It is this: "The offence of piracy at common law consists in committing those acts of robbery and depredation upon the high seas which, if committed upon land, would have amounted to felony there." It is said that in this case the goods were forcibly stolen, and therefore the act would have amounted to felony, and comes within this definition because the high seas must be extended to all waters over which the Admiralty has jurisdiction. In *Reg.* v. *Anderson* (L. Rep. 1 C. C. R. 161) the jurisdiction of the Admiralty was held to extend some distance up the river Garonne, and it is said in this case that this place was within the English Admiralty jurisdiction. All I say about that at the moment is that I am not satisfied that an act, though it may be an illegal act of Brazilians in a place situated upon a tributary of a tributary of the Amazon, an act which consists in taking from a Brazilian ship goods which belonged to the Bolivian Government, is within the English Admiralty jurisdiction, but in the view I take it is not necessary to decide it. All I say is I am not satisfied that that is so.

I was also referred to the definitions which are given in Hall on International Law, and also in Oppenheim on International Law. I am not sure that the definition given by the latter writer is of any assistance to the plaintiff. He is very emphatic that piracy must be on the open sea. The definition given in Hall on International Law is no doubt very wide, but I am not at all clear that what may be piracy within the meaning of international law is necessarily piracy in a policy of insurance. I think one has got to look at what is the natural and clear meaning of the word "pirate" in a document used by business men for business purposes. I think that in looking at that one has to attach to the word "pirate" a more popular meaning which would be attached to it by ordinary persons than the meaning to which it may be extended by writers on international law. I was referred to what the parties themselves have called this act or this expedition: it is spoken of variously as a "revolutionary movement," as a "pretext of revolution," and as an "act of hostility" against Bolivia, and as an "act of piracy," and therefore I do not think that what the parties called it is of very much guidance to me. They seem to have called it more emphatically "piracy" as time went on, and no doubt their intention in effecting these policies was, or the intention of the Bolivian Government was, to secure themselves against loss, whether this should be held to be piracy or revolution. I do not think it is necessary to decide the question as to the Admiralty jurisdiction, and for this reason—this policy is a policy in respect of a river transit by the Amazon. It was contended that the word must be read in connection with river transit, and that, therefore, pirates must be considered pirates in respect of the voyage, although they were not upon the open sea, and although they might not be held to be within the Admiralty jurisdiction, if in other respects they satisfy the definition of "pirate." I will assume, although I am not sure it is a correct assumption, for the purposes of my judgment that that is so. If these people had in other respects the attribute that I think ought to be attached to pirates in a

case of a policy of marine insurance, I should hold this a loss by piracy, although it was not upon the open sea, and although it might not be within the Admiralty jurisdiction. Now the facts show an organised expedition for the, purpose of establishing a Government in a particular territory, and they also show that interference was only intended and only effected with property so far as was necessary for that object, and not for plunder of everyone indifferently. It is said that Carvalho's motives were private and personal motives, but I do not think I can go into that. Probably in every revolution it is not possible to say that all the persons acted simply from purely disinterested motives, and I have to look at what was done. Now, does what was done constitute these people pirates within the meaning of this policy? I do not think it does. As I have said, I think you have to look at what is not a very good expression, but the popular meaning of the word "pirates"—I do not know that it takes us much further—but I might say the business meaning of the word "pirates." I do not know that that can be better expressed than it is in Hall on International Law, at p. 259, where he says this: "Besides, though the absence of competent authority is the test of piracy, its essence consists in the pursuit of private, as contrasted with public ends. Primarily the pirate is a man who satisfies his personal greed or his personal vengeance by robbery or murder in places beyond the jurisdiction of a State. The man who acts with a public object may do like acts to a certain extent, but his moral attitude is different, and the acts themselves will be kept within well-marked bounds. He is not only not the enemy of the human race, but he is the enemy solely of a particular State."

That, I think, expresses what I have called the popular or business meaning of the word "pirate," and I find in the definitions which are cited in a note at p. 260 of Hall on International Law that several of the definitions contain words which carry out that idea, but by no means all of them do. Several, but not all, of the definitions cited in the note to that passage in Hall embody that idea—viz., a pirate is a man who is plundering indiscriminately for his own means, and not a man who is simply operating against the property of a particular State for a public end. the end of establishing a Government, although that act may be illegal, and although that act may be criminal, and although he may not be acting on behalf of a society which is, to use the expression in Hall on International Law, politically organised. This may be piracy within the meaning of the doctrines of international law, but, in my opinion, it is not piracy within the meaning of a policy of insurance, because, as I have already said, I think you have to attach to "piracy" a popular or business meaning, and I do not think, therefore. that this was a loss by piracy.

There is another passage in Hall on International Law, at p. 262, which throws some light upon the matter; the one speaking of "Depredations committed at sea upon the public or private vessels of a State, or descents upon its territory from the sea by persons not acting under the authority of any politically organised community, notwithstanding that the objects of the persons so acting may be professedly political," and he says such acts as those are, within the meaning of international law, piratical. But he goes on to say this, that some of these acts "Are wholly political in their objects and are directed solely against a particular State, with careful avoidance of depredation or attack upon the persons or property of the subjects of other States. In such cases, though the acts done are piratical with reference to the State attacked, they are for practical purposes not piratical with reference to other States, because they neither interfere with nor menace the safety of those States, nor the general good order of the seas. It will be seen presently that the difference between piracy of this kind and piracy in its coarser forms has a bearing upon usage with respect to the exercise of jurisdiction." I think the meaning of "piracy" in a policy of insurance is what is called in this book piracy in its coarser sense, and, therefore, I do not think this is a loss by piracy within the meaning of this policy.

It becomes necessary to consider the second policy, and before dealing with the question of the construction of the second policy there is a very serious question to be disposed of on the question of concealment. Now, as to that, the facts which were concealed, which were said to be material, were to the effect that an expedition was being organised against Puerto Alonzo and that an expedition had been and (or) was being fitted out by Rodrigo Carvalho to stop supplies for El Acre, and that the said Rodrigo Carvalho had enlisted men—had two vessels for that purpose. Were these facts material? In my opinion they were clearly material. The fact that an expedition was actually at that moment being fitted out for the very purpose of intercepting the goods shipped by the Bolivian Government upon the *Labrea*, it seems to me, must be material to the mind of anybody who was considering whether he would effect an insurance upon these goods. It may be that the insurer ought to be taken to have had knowledge of there being disturbances in the territory of Colonias or El Acre — I do not decide, but I will assume that. But even assuming he had, it seems to me that the additional fact that there was at that moment an expedition fitting out for the purpose of intercepting the goods was an additional fact which he cannot be taken to have had knowledge of, and a very material fact. I have had evidence that it was material; and I agree that it was a most material fact to be disclosed. Had the persons who effected the insurance knowledge of it at the time the second slip was initialled? The position was this. The slip was effected in England by the representative of the Bolivian Government in England; the representative then was Senor Aramayo. I do not think there is anything that shows that he had personal knowledge of this matter. He employed for the purpose of doing it the firm of Suarez, Hermanos, and Co., and I am not sure that there is anything that brings the knowledge quite clearly home to Suarez, Hermanos, and Co. in England; but, as I have said, the matter was being transacted on behalf of the Bolivian Government at Para by Senor Ballivian and the firm of Suarez, Hermanos, and Co., in Para, acting in conjunction, and what knowledge they had I think they ought to have communicated to the person effecting the insurance in England. What their

knowledge was appears from the correspondence, which seems to me to show quite clearly that they had the clearest possible knowledge of the fitting out of the expedition. But it is said even though this may be material, and though they had the knowledge of it and did not disclose it, that does not avoid this insurance, because at the time the slip was initialled it was not intended for the purpose of this shipment for the Bolivian Government, but only for Suarez, Hermanos, and Co.'s own goods, and that, as this fact was immaterial to any insurance of the goods of Suarez, Hermanos, and Co., it was not necessary to disclose it, it was not material, and that when the insurance upon the goods of the Bolivian Government was effected later on, the fact of it not being disclosed then does not matter because the date of the initialling of the slip is the date when the disclosure ought to be made. I doubt very much whether it can be said that the intention of opening this cover by the initialling of the slip was simply to cover Suarez, Hermanos, and Co.'s goods. They had at that time in contemplation the chartering of a steamer in connection with Suarez, Hermanos, and Co. for the purpose of carrying both the goods of Suarez, Hermanos, and Co. and also goods for the Bolivian Government, and Suarez undertook to hand over goods which were going up for themselves to the Bolivian Government if necessary. The inference I should draw is that they were intending to use this cover for either one or other, according as it might be expedient, and therefore I think this contention as to immateriality fails. I do not think it was a cover opened simply for Suarez, Hermanos, and Co.'s goods. There seems from the correspondence to have been, at any rate, apprehension that Carvalho might interfere not only with the Bolivian Government's goods but also with the goods of Suarez, Hermanos, and Co. for his own benefit possibly, and possibly not for the purpose of his revolutionary movement. Therefore I do not think it clear that the fact was immaterial even for the insurance of Suarez, Hermanos, and Co.'s goods. It seems to me if a person opens a cover which may be used for the goods of different owners, and he knows facts which are material to the insurance of the goods of one and not material to the insurance of the goods of another—though possibly when he declares the goods to which the facts are not material it may be not necessary for him to disclose these facts which are material to the goods of the other—as soon as he uses that cover for the purpose of insuring goods, to which the facts he knows at the time of opening the cover are material, it is his duty to disclose them, and he cannot say that the first declaration he made upon the cover was in respect of goods to which the facts are not material. As the date of the initialling of the slip has to be looked at as the date at which the concealment must take place to avoid the policy when goods are afterwards declared upon it, to which the facts are material, he cannot say he is not bound to disclose them, and his policy is not void. I think there was a concealment which avoids the second policy. That being so, it is not necessary to consider the effect of it, or whether the loss, if there was no concealment, would come within it or not.

Judgment for the defendants with costs.

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

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

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

May 19, 20, *and July* 20, 1908.

(Present: The Right Hons. Lords MACNAGHTEN and ATKINSON, Sir J. H. DE VILLIERS, Sir ANDREW SCOBLE, and Sir ARTHUR WILSON.)

FOONG TAI AND CO. *v.* BUCHHEISTER AND CO. (*a*)

ON APPEAL FROM THE SUPREME COURT FOR CHINA AND COREA AT HONG KONG.

Necessaries — Maritime lien — Action in rem— *Form of accounts—Admiralty Court Act* 1861 (24 *& 25 Vict. c.* 10), *s.* 5.

A person who has made advances in order to supply necessaries to a ship on the credit of the ship may sue in rem *to recover those advances although the* res *may belong to a person or persons who are not liable* in personam *as debtor or debtors for the sum so sought to be recovered.*

An agent may sue for necessaries supplied under sect. 5 *of the Admiralty Court Act* 1861, *and does not lose his right so to sue by giving credit in the account furnished to his principal for sums received.*

Judgment of the court below affirmed.

The Twentje (13 *Moo. P. C.* 185) *and* The Underwriter (1 *Asp. Mar. Law Cas.* 127 (1868) *explained.*

APPEAL from a judgment of Bourne, J., judge of His Britannic Majesty's Supreme Court for China and Corea at Hong Kong in favour of the respondents in an action *in rem* brought by them against the steamship *Draco*, of which the appellants were owners, under circumstances which are fully set out in the judgment of their Lordships.

J. A. Hamilton, K.C. and Hon. *J. Mansfield*, for the appellants, argued that the claim was not for necessaries supplied to the ship, but only for the balance of an ordinary mercantile account. The disbursements were voluntary, and not made on the credit of the ship, and there being no maritime lien for necessaries, the plaintiffs cannot recover unless, at the time of the institution of the action, the *res* was the property of the defendants, which was not the case. They referred to

The Onni, 1 Asp. Mar. Law Cas. 6 (1860); 3 L. T. Rep. 447; Lush. 154;
The Comtesse de Frègeville, Lush. 329;
The Heinrich Bjorn, 5 Asp. Mar. Law Cas. 145 (1883); 49 L. T. Rep. 405; 8 P. Div. 151, which decision was reversed on another ground, 5 Asp. Mar. Law Cas. 391 (1885); 52 L. T. Rep. 560; 10 P. Div. 44; 6 Asp. Mar. Law Cas. 1 (1886); 55 L. T. Rep. 66; 11 App. Cas. 270;
Frost v. *Oliver*, 2 E. & B. 301;
The Two Ellens, 1 Asp. Mar. Law Cas. 40, 208 (1872); 26 L. T. Rep. 1; L. Rep. 4 P. C. 161.

Scrutton, K.C. and *Mackinnon*, for the respondents, maintained that there was abundant evidence that the respondents made the advances on

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

the credit of the ship, and that they were for necessaries within the meaning of sect. 5 of the Admiralty Court Act 1861. See

The Riga, L. Rep. 3 A. & E. 516.

The fact that the respondents supplied other things for which they have no claim *in rem* does not take away their right to proceed *in rem* for necessaries. They referred to

The West Friesland, Swa. 454; 13 Moo. P. C. 197;
The Anna, 3 Asp. Mar. Law. Cas. 237 (1876); 34 L. T. Rep. 895; 1 P. Div. 253;
The Underwriter, 1 Asp. Mar. Law. Cas. 127 (1868).
The Perla, Swa. 353.

J. A. Hamilton, K.C. was heard in reply.

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

July 20. — Their Lordships' judgment was delivered by

Lord ATKINSON.—This is an appeal from a decree, dated the 10th Jan. 1907, of the Supreme Court for China and Corea, in a suit in which the respondents, a German firm carrying on business at Shanghai, were plaintiffs, and the appellants, a Japanese firm carrying on business at Kobe in Japan, and also at Shanghai, were defendants. The action out of which the appeal arises was an action *in rem* brought against a steamship named the *Draco* under the provisions of sect. 5 of the Admiralty Court Act 1861, as applied to Shanghai by sect. 100 of the China and Corea Order in Council 1904, and sects. 2 (2) and 3 (*a*) of the Colonial Courts of Admiralty Act 1890, to recover a sum of 2750*l.* with interest, for necessaries—*i.e.*, for repairs done to, stores and equipment provided for, and disbursements made on account of, the above-mentioned vessel at certain ports in England, at Shanghai, and at Port Said, Aden, Colombo, Singapore, and Hong Kong, at which latter ports she called on a voyage from Cardiff to Shanghai. The writ was issued and served on the 22nd Sept. 1906. The ship was arrested by the marshal of the court on the 14th Nov. 1906 and released on the 2nd April following. The ship not having been arrested till after the institution of the suit, sect. 4 of the Act of 1861 does not apply. Sect. 5, however, confers on the High Court of Admiralty jurisdiction "over any claim for necessaries supplied to any ship elsewhere than in the port to which the ship belongs, unless it be shown to the satisfaction of the court that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales." Sect. 10 gives the court jurisdiction over, amongst other things, any claim of the master of any ship for wages earned on board of her, and for disbursements made on her account. By sect. 8 the court is empowered to decide all questions arising between co-owners or any of them touching the ownership, possession, or employment, or the earnings of any ship registered at any port in England or Wales "or any share thereof," and to "settle all accounts outstanding . . . in relation thereto," and to "direct the said ship or any share thereof to be sold" and to "make such order in the premises as to it shall seem fit." Sect. 35 provides that the jurisdiction conferred by the Act may be exercised either by proceedings *in rem* or by proceedings *in personam*. The expenditure in respect of which the plaintiffs claimed to recover may be divided into three heads, according as it took place in England, or at Shanghai, or at the intervening ports of call already mentioned. The disbursements in England were made by Messrs. Palmer and Co. direct, those at ports of call were made by the captain's drafts on Messrs. Palmer and Co., which drafts were duly met. Messrs. Palmer and Co. in turn rendered accounts of both these classes of disbursements, and drew on the plaintiffs for the amount thereof, after giving credit for advances on account of freight. The Shanghai disbursements were made by the plaintiffs direct. The contentions put forward at the trial on the part of the defendants were apparently: 1. That the plaintiff's claim was not in reality a claim for necessaries within the meaning of sect. 5 of the Act of 1861, but merely a claim for the balance of an ordinary mercantile account. 2. That there being no maritime lien for necessaries, a suit *in rem* could not be maintained under that section, unless at the time it was instituted the *res* proceeded against belonged to a person or to persons personally liable to the plaintiffs in that suit as a debtor or debtors in the sum sought to be recovered. 3. That owing to the relations *inter se* of the several parties concerned in the transactions connected with this ship, and to the notice and knowledge which the plaintiffs had of the defendants' equitable interest in, or claim upon, her, before any of these disbursements were made, it would be inequitable to enforce the plaintiffs' claim against the ship to the prejudice of this interest of the defendants. The learned judge who presided at the trial held that these contentions were not sustained, and that the plaintiffs were entitled to recover under sect. 5 for necessaries. He referred it to the registrar and merchants to inquire and report which, amongst the several items charged for, were necessaries, and what was the reasonable and proper amount to allow in respect of these. The registrar reported that the proper amounts to allow, after making all deductions and allowances, were 1117*l.* 8*s.* and 1830.85 dollars. Upon a motion to the learned judge to vary these amounts an addition of 102*l.* 5*s.* was made to them, and a sum of 52*l.* 8*s.* 1*d.* was referred to the registrar for consideration. In the present appeal their Lordships have not to consider the propriety or sufficiency of the amounts thus found in the plaintiffs' favour.

The facts are somewhat complicated, and, so far as material, are as follows: — One John Baessler, a German subject, who carried on at Shanghai the business of shipbroker, and was, in the opinion of the plaintiffs, a man living from hand to mouth, to whom nobody acquainted with him would give credit, in the month of Dec. 1905 desired to purchase from Messrs. T. Wilson, Sons, and Co., the well-known shipowners of Hull, a steamship belonging to them, registered of that port, named the *Draco*. He was not acquainted with Wilson and Co., and for that reason, as well, perhaps, as because of his financial position, he approached the defendants, and requested them to act as his agents in procuring through Palmer and Co., of London, the purchase of this ship. He also, according to the statement contained in his affidavit of the 12th Oct. 1906, employed them as his "agents"

to finance the ship on her voyage from England to Shanghai. This the defendants agreed to do on receiving 2½ per cent. commission on the purchase money of the ship. No formal agreement was drawn up, but divers letters and telegrams passed between the several parties concerned, with the result that the *Draco* was on the 30th Dec. 1905 purchased by Palmer and Co. from Wilson and Co. for the sum of 5000*l.* Baessler, on the 12th Jan. 1906 paid to the plaintiffs 4000*l.*, part of the price of the vessel, and on the 3rd Feb. paid 1000*l.*, the balance. These sums were immediately on receipt transmitted by the plaintiffs, by wire, to Palmer and Co., and by the latter paid over to Wilson and Co., who, having received the price of the vessel from the firm with which alone they dealt, by bill of sale, dated the 20th Jan. 1906, transferred her to them. Palmer and Co. thus became the registered owners of the *Draco*, and she remained a British ship, registered, as theretofore, as of the port of Hull. If matters had rested there, Palmer and Co. would, in equity, have been mere trustees of the ship for Baessler, her beneficial owner.

Any complication that has arisen in the case is due to the fact that on the 3rd Jan. 1906 Baessler had, to the knowledge of the plaintiffs, entered into an agreement in writing with the defendant firm, who purported to act as agents for some undisclosed Japanese principals, for the sale to them of the same ship, the *Draco*, for the sum of 6250*l.*, of which 6000*l.* was to be paid on the signing of the agreement, and the balance 250*l.*, on the ship's arrival at Kobe in Japan, where Baessler was bound to deliver her in the month of March or April 1906. This agreement is signed by R. Tatlock (an assistant in the plaintiffs' firm) "per pro Buchheister and Co. Limited." Some controversy arose at the trial as to whether the signature of Tatlock was attached before or after that of the defendants. It is not a matter of importance, as Hsi Chung Yu, one of the two partners composing the defendant firm (one residing at Shanghai and the other at Kobe), stated in his evidence at the trial that he knew "Baessler was going to treat through Buchheister for the purchase of the ship," that he had himself "no direct negotiations with Buchheister" about the ship, and that he "left it to Baessler." And Baessler himself deposed that he informed the defendants that he was transacting the business through Buchheister and Co., that they were acting as his agents in the transaction, and that this was the reason why the defendants asked to have the contract witnessed and signed by Buchheister and Co. He also stated that "Buchheister signed as security to them," and that "No doubt they (the plaintiffs) knew who the purchaser was." On the 8th Jan. 600*l.* was paid by the defendants to Baessler; on the 12th, 4000*l.*; on the 2nd Feb., 1400*l.*, making 6000*l.* in all. And there can be little doubt that the whole of the second payment and 1000*l.*, part of the third, were paid over by Baessler to the plaintiffs on the 12th Jan. and the 3rd Feb. respectively, the remaining 1000*l.* being applied by him to his own purposes. On the 18th Sept. Baessler had drawn up a document in which he had estimated approximately the expenses of the ship on her voyage from England to Shanghai at 2385*l.* He showed this document to Tatlock before the latter agreed to bring out the ship. No doubt at that time Baessler hoped and expected that the vessel would earn on the voyage freight to the amount of about 3000*l.*, sufficient, as he thought, to meet her expenses; but from the telegrams which passed it is perfectly clear that even before the ship was purchased these hopes had proved delusive. To use Baessler's own words, they "had to take any freight to bring the ship out to China," and ultimately the *Draco* had to be chartered to carry a cargo of coals from Cardiff to Singapore, at a freight which only amounted to about 1440*l.*, four-fifths of which was to be paid in England. Before the vessel ever set sail on the 21st Feb. 1906, a sum of 1076*l.* 8*s.* 7*d.* had been expended on her account, leaving only a balance of the freight of between 300*l.* and 400*l.* to meet the subsequent expenses of the voyage to Singapore. Yet the plaintiffs paid, apparently without murmur and without demanding any payment or security from Baessler, four drafts of the captain drawn at Port Said, Aden, Colombo, and Singapore respectively, for four sums amounting in the aggregate to 1661*l.* 1*s.* 6*d.* It is scarcely conceivable that any commercial man of ordinary intelligence would, for a commission of 125*l.*, advance sums such as these on the personal credit of a person in Baessler's position. Mr. Tatlock stated in his evidence that his firm always looked to the steamship as security, that no one would give credit to Baessler, and that they regarded the business as safe because they had the steamer in hand. The trial judge who saw the witness believed him. Their Lordships see no reason to disagree with the conclusion at which the judge arrived. It is not disputed that necessaries, within the meaning of sect. 5 of the Act of 1861, are such things as the owner of a vessel, as a prudent man, would have ordered, had he been present at the time they were ordered as being fit and proper for the service on which the vessel was engaged (*Webster* v. *Seekamp*, 4 B. & Ald. 352; *The Riga*, L. Rep. 3 A. & E. 516), nor that some, at all events, of the things supplied to this ship at the several ports were *primâ facie* of the character of necessaries. If so, the quantum is not a matter for consideration on this appeal. It cannot be questioned that the cases of *The Rio Tinto* (5 Asp. Mar. Law Cas. 224 (1883); 50 L. T. Rep. 461; 9 App. Cas. 356) and *The Heinrich Bjorn* (5 Asp. Mar. Law Cas. 391 (1885); 52 L. T. Rep. 560; 10 P. Div. 44) amongst others, establish that the person who pays for necessaries supplied to a ship has, as against that ship and her owners, as good a claim as the person who actually supplied them, and further that he who advances money to the person who thus pays, for the purpose of enabling him to pay, stands in the same position as the person to whom the money is advanced. The plaintiffs, therefore, on the facts found, stand in the position of one who has supplied necessaries to a ship on the credit of the ship. That, no doubt, does not give them any maritime lien for the sums so advanced, or any rights against the ship till action brought: (*The Rio Tinto, ubi sup.*; *The Heinrich Bjorn*, 6 Asp. Mar. Law Cas. 1 (1886); 55 L. T. Rep. 66; 11 App. Cas. 270). But having regard to the wide words of the above-mentioned sections of the Act of 1861, it by no means follows that they cannot sue *in rem* to recover these advances

unless, as is contended, they are at the same time in a position to sue at law *in personam* for the same sums every person having a proprietary interest in equity in the ship. The position of the defendants in the present case is entirely different from that of the defendants in any of the authorities cited, for, though the plaintiffs could have sued Baessler *in personam* on his contracts for the sums they expended, the liability of the ship, in this case, does not at all depend upon the existence of any maritime lien in the ordinary sense, so much as on the effect of the transactions which took place between the several parties concerned on their respective proprietary rights and interests to and in the ship. This effect was in equity, in their Lordships' opinion, to transfer to the defendants, subject to the agreement, almost the whole of Baessler's beneficial interest in the ship, and to make them joint beneficial owners of her with him, Palmer and Co. being trustees for both, not for Baessler alone. As on the 3rd Feb. before any of the expenditure which the plaintiffs seek to be repaid, other than some three or four insignificant items, had taken place, Baessler had been paid by the defendants 6000*l.* of the stipulated price of 6250*l.*, all but a remnant of his beneficial interest in her had in equity passed to them. The defendants could not sell the ship without the concurrence of Palmer and Co. and Baessler. Their own interest in her, though valuable, was not of a very marketable kind. It was in Japan that she became valuable to them. It was there that they desired to have her brought. To bring her there without the provision of adequate necessaries was impossible. Baessler, apparently, could not or would not provide them. He swore, in effect, that he had appointed the plaintiffs to do that. If provided at all they must have been provided by the plaintiffs or by the defendants themselves. The expenditure incurred in respect of them, so far as it was reasonable and proper, was, therefore, *quoad* the defendants, in the nature of salvage expenditure incurred in their interests, to protect their property, and so enhance its value to them. There can be little doubt that the defendants could have instituted a suit in Shanghai in any court having equitable jurisdiction, if such there be, to have it declared that almost all the beneficial interest of Baessler in the ship had passed to them, and possibly that, on their taking delivery of the ship at that port, the balance of the purchase money should, *pro tanto*, be set off against their claims against Baessler for damages, that he should be directed to transfer to them the residue of his interest in the ship, and that Palmer and Co. should be directed to perfect the defendants' title by executing a formal transfer, or bill of sale, of the ship to them. Sect. 8 of the Act of 1861 seems to confer on the High Court of Admiralty a jurisdiction wide enough to enable it to deal with such a suit between co-owners beneficially interested, but it scarcely admits of question that, if such a suit were instituted before a tribunal competent to entertain it, the plaintiffs in this action would be allowed to intervene, and the relief prayed for would only be granted on the terms that they should be repaid the expenditure incurred by them in providing those necessaries without which the ship could never have reached Shanghai at all.

Their Lordships are, therefore, of opinion that there is no reason why the plaintiffs' claim for the money so advanced on the credit of the ship, so far as it was employed to procure necessaries for her voyage reasonable and proper in character and amount, should, in this action, be postponed to the defendants' claim on the ship under the agreement, and that the second and third contentions put forward by the defendants at the trial cannot be sustained. It remains to consider the first contention—namely this, that the plaintiffs sue, not for necessaries, but for the balance of an ordinary mercantile account. The accounts furnished to Baessler are solely concerned with one ship, the *Draco*, and with disbursements made for her in one adventure, her voyage from Cardiff to Shanghai. Those dealing with expenditure at the several ports of call and at Shanghai do not contain a single credit item. They are little more than lists of items of disbursements. It is only in the account dealing with the expenditure in England before the vessel sailed that credit items are to be found and a balance is struck. Two of these credit items are for sums of 4000*l.* and 1000*l.*, obviously the purchase money of the ship received and paid over before any expenditure had been incurred. The remaining credit item is 813*l.* 13*s.* 6*d.* (four-fifths of the freight to Singapore) paid in England on the 23rd Feb., less deductions, leaving a balance of 414*l.* 13*s.* 8*d.*, which balance the plaintiffs paid Palmer and Co. No accounts, therefore, have been rendered in this case which in fact resemble ordinary mercantile accounts. But on an examination of the authorities to which their Lordships have been referred, and especially of the cases of *The Twentje* and *The Underwriter* (*ubi sup.*), it will be found that what they really decide is this, that, as necessaries supplied to a ship are *primâ facie* presumed to have been supplied on the credit of the ship, and not solely on the personal credit of her owners (*The Perla*, Swa. 353) the form in which accounts are rendered by an agent, who has supplied or paid for necessaries, to his principal is evidence to rebut that *primâ facie* presumption, and show that the agent looked for payment to the principal alone. There is nothing in the Act of 1861 to prevent an agent suing for necessaries under sect. 5, nor is there any rule or principle of law that an agent loses his right so to sue if in the account he furnishes to his principal for those necessaries he gives credit for sums received. In the case of *The Underwriter* the governing consideration on which the judgment of Sir R. Phillimore in favour of the plaintiff turned was this, that there, as here, the suit was instituted, "not to recover any particular or selected item of a general account, but the whole of the sum expended upon this particular occasion in payment of the necessaries required by the exigencies of the ship and without which she could not have continued her voyage." Their Lordships think that the form in which the accounts were furnished in this case affords no evidence that the plaintiffs intended to look to Baessler alone for repayment of the large sums advanced by them, and that even if it did afford such evidence, that evidence is outweighed by the other evidence in the case. They are, therefore, of opinion that the judgment appealed against was right, and should be affirmed, and this appea

dismissed. They will humbly advise His Majesty accordingly. The appellants will pay the costs of this appeal.

Solicitors to the appellants, *Wadeson* and *Malleson*.

Solicitor for the respondents, *A. P. Stokes*.

Supreme Court of Judicature.

COURT OF APPEAL.

Monday, March 9, 1908.

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

Workman, Clark, and Co. Limited *v.* Lloyd Brazileiro Company. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Practice—Contract to build a ship—Price payable by instalments—Default in payment of instalment—Action for instalment—Judgment on specially endorsed writ—"Debt or Liquidated demand in money"—Order III., r. 6; Order XIV., r. 1.

By an agreement in writing the plaintiffs, a firm of shipbuilders, undertook to build, launch, and complete a steamer for the defendants, a company of shipowners, for 89,800l. to be paid in five instalments by the purchasers to the builders at different stages of the construction of the steamer. The agreement further provided that the hull and materials of the vessel, whether actually on board or in the building yard, and whether wrought or not, should from time to time, after the first instalment of the purchase price had been paid, become the absolute property of the purchasers, subject only to the lien of the builders for any unpaid purchase money; and that, in the event of any instalment of the purchase money remaining unpaid for fourteen days after the same was due, the builders should be entitled to interest thereon at 5 per cent. per annum until payment, and, in the event of such default, the builders were to be at liberty to suspend the work, and the time of suspension was to be added to the contract time, or they might complete the vessel at any time after the expiry of fourteen days' notice given by builders to purchasers, and might sell her after completion, and any loss on such resale should be made good by the purchasers, and any balance of the proceeds of such sale which might remain after satisfying all lawful claims of the builders should be paid by the builders to the purchasers.

The first instalment of the purchase money having become due under the terms of the agreement, and the defendants having made default in payment of the same, the plaintiffs brought an action for the recovery thereof, and applied for leave to sign judgment for the amount claimed under Order XIV., r. 1.

Held, that in the circumstances an action for any instalment was an action for "a liquidated demand in money" within the meaning of Order III., r. 6, and that the plaintiffs were entitled to enter final judgment for the amount claimed under Order XIV., r. 1.

(*a*) Reported by Edward J. M. Chaplin, Esq., Barrister-at-Law.

Appeal by the defendants from an order made by Walton, J. at chambers affirming the order of a master whereby leave was given to the plaintiffs to sign judgment in an action under Order XIV., r. 1, for the amount claimed by the writ.

The plaintiffs were shipbuilders and the defendants were shipowners.

The plaintiffs' claim was for moneys due under three agreements in writing, dated respectively the 23rd Feb. 1907 as to two of such agreements, and the 16th April 1907 as to the third, and made between the plaintiffs and defendants, whereby the plaintiffs agreed to launch and complete certain steamers in the agreements specified for the defendants. The plaintiffs also claimed interest on such total amount.

The agreements were similar in form, and each of them contained the following clauses:

1. The builders shall build, launch, and complete, of the best and most substantial materials and workmanship, and to the reasonable satisfaction of the purchasers' engineer or surveyor, and the purchasers shall purchase, at the price and on the terms hereinafter mentioned, a steel and iron screw steamer, with boilers, engines, machinery, outfit, and appurtenances, the same to be in accordance with the specifications and plans signed by the parties hereto (with such modifications, if any, as may afterwards be mutually agreed upon) and in conformity with the rules of Lloyd's, 100 A 1, three decks.

4. The said steamer shall be completed and ready for trial trip on the 30th Nov. 1907, and shall be delivered to the purchasers afloat . . . fully completed and in all respects ready for sea within fourteen days after the date hereby fixed for trial trip. The builders' certificate of ownership in respect of the said vessel shall be handed over to the purchasers on delivery of the said vessel, and such delivery shall not be complete until such certificate is handed over to the purchasers and the builders shall have fully performed and done all acts and things necessary on their part to enable the purchasers to obtain the proper certificate of registration of the said vessel.

7. The hull and materials of the said vessel, her engines, boilers, machinery, and fittings, whether such materials shall be actually on board the vessel or in the building yard, and whether wrought or not, shall from time to time after the first instalment of the purchase price in respect of the vessel shall have been paid, and thenceforth until the vessel shall be completed and actually delivered to the purchasers, become and remain the absolute property of the purchasers, subject only to the lien of the builders for any unpaid purchase money, and immediately upon the payment of the first instalment of the purchase money, the builders shall affix the name of the purchasers upon the said vessel in a conspicuous place and manner, and shall not remove the same without the purchasers' consent.

9. In the event of any instalment of the purchase money remaining unpaid for fourteen days after the same is due the builders shall be entitled to interest thereon at 5 per cent. per annum until payment; and, in the event of such default, the builders are to be at liberty to suspend the work, and the time of suspension is to be added to the contract time, or they may complete the vessel at any time after the expiry of fourteen days' notice given by builders to purchasers, and may sell her after completion by public auction or private contract, and any loss on such resale shall be made good by the purchasers, and any balance of the proceeds of such sale which may remain after satisfying the lawful claims of the builders shall be paid by the builders to the purchasers.

12. During the construction and until the delivery of the said steamer to the purchasers the said vessel shall

be at the risk in all respects of the builders, and the builders shall at their own cost keep the said vessel insured against fire. . . .

13. The price of the said steamer shall be the sum of 89,800*l.*, which the purchaser shall pay to the builders by the instalments and in manner following—namely: 17,960*l.* in cash when the keel of the said steamer is laid; 17,960*l.* in cash when the said steamer is framed; 17,960*l.* in cash when the said steamer is plated; 17,960*l.* in cash when the said steamer is launched; 17,960*l.* in cash when the said steamer is finished and delivery accepted by the purchasers.

The defendants having made default in payment of the respective first instalments of the prices of this and other steamers which the plaintiffs were building for the defendants when they became payable, the plaintiffs brought the present action to recover all such first instalments with interest, the claim endorsed on the writ being for 131,326*l.* 16*s.* 9*d.*, and took out a summons for leave to sign judgment under Order XIV., r. 1, for the amount of the claim. In respect of this sum the master made an order on the 18th Jan. 1908 giving the plaintiffs leave to sign judgment for 113,159*l.* 6*s.* 9*d.* with stay of execution as to 25,000*l.*, part thereof, pending the trial of a counter-claim by the defendants on payment of that amount into court, or security to the satisfaction of a master within a month.

On the 24th Jan. 1908 Walton, J. made an order at chambers affirming the order of the master.

The defendants appealed.

Order III., r. 6, provides:

In all actions where the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising (A) upon a contract, express or implied (as, for instance, on a bill of exchange, promissory note, or cheque, or other simple contract debt); . . . the writ of summons may, at the option of the plaintiff, be specially indorsed with a statement of his claim, or of the remedy or relief to which he claims to be entitled. . . .

Order XIV., r. 1, provides:

Where the defendant appears to a writ of summons specially indorsed under Order III., r. 6, the plaintiff may, on affidavit made by himself, or by any other person who can swear positively to the facts, verifying the cause of action, and the amount claimed (if any), and stating that in his belief there is no defence to the action, apply to a judge for liberty to enter final judgment for the amount so indorsed, together with interest, if any, or for the recovery of the land (with or without rent or mesne profits), as the case may be, and costs. The judge may thereupon, unless the defendant by affidavit, by his own *viva voce* evidence, or otherwise shall satisfy him that he has a good defence to the action on the merits, or disclose such facts as may be deemed sufficient to entitle him to defend, make an order empowering the plaintiff to enter judgment accordingly.

Lush, K.C. and *Bremner* for the defendants.—There is no jurisdiction to grant leave to the plaintiffs to sign judgment under Order XIV., r. 1. That order only applies to actions coming under Order III., r. 6. In the present action the plaintiffs do not seek to recover "a debt or liquidated demand in money" arising upon a contract within the meaning of the latter rule. The property in the ship has not passed to the defendants because the first instalment of the price has not been paid. Under the old system of pleading an action of debt lay whenever the demand was for a sum certain, or was capable of being reduced to a certainty:

Chitty on Pleading, 7th edit., p. 121.

So that where a sum was payable by instalments an action of debt would not lie until the whole of the price had been paid. There is no debt here at all, because it cannot be said that everything has been done by the builders which entitles them to payment. The ship here is only in the process of building. The words "liquidated demand in money" in Order III., r. 6, are added to extend the operation of the rule so as to include sums due under covenants and other liquidated sums. The contract here between the parties is a contract to build a ship for one entire price, and the property in the ship is not to pass to the defendants until the first instalment of the price has been paid. This has not been paid, and the buyers are not to be entitled to delivery until completion of the work. If a contract provides for the price to be payable by five instalments and the first instalment is not paid you cannot sue for it as a debt. The contract is entire, and there can be no action for part of the price until the contract has been completed. There cannot be five actions of debt in respect of the five instalments. Default in payment of an instalment only gives rise to the action which was formerly called the action of *assumpsit*:

Chitty on Pleading, 5th edit., p. 116.

Thus an action of debt will not lie on a promissory note payable by instalments till the last day of payment be past:

Rudder v. *Price*, 1 Hy. Bl. 547.

The only remedy which the plaintiffs can have for nonpayment of an instalment is to bring an action of *assumpsit* for the damages actually sustained by the breach of contract:

Laird v. *Pim*, 7 M. & W. 474.

Such damages would not necessarily be equivalent to the amount of the instalment. They also referred to

Jaques v. *Cesar*, 2 Saund. 100;
Dunlop v. *Grote*, 2 Car. & Kir. 153.

Atkin, K.C. and *Holman Gregory* for the plaintiffs.—Leave to sign judgment under Order XIV., r. 1, was properly granted to the plaintiffs. They were entitled to sue for the entire sum, although the first instalment had not been paid. The rule of law which governs the present case is laid down in the notes to *Pordage* v. *Cole* (1 Saund. 320) (*c*) and in the notes to *Cutter* v. *Powell* (Smith's Leading Cases, 11th edit., vol. 2, at p. 12). Thus in *Mattock* v. *Kinglake* (10 A. & E. 50), where on an agreement for the sale of certain premises the purchaser covenanted to pay the purchase money on or before a fixed day as the consideration of such sale, it was held that the conveyance was not a condition precedent to, or concurrent with, the payment, and that the vendor might sue for the purchase money and interest without previously tendering a conveyance. And now it is provided by the Sale of Goods Act 1893 (56 & 57 Vict. c. 71), s. 49, sub-s. 2, as follows: "Where, under a contract of sale, the price is payable on a day certain irrespective of delivery, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price,

although the property in the goods has not passed, and the goods have not been appropriated to the contract." To bring a case within Order III., r. 6, it is not necessary to show that an action of debt strictly so called would have been maintainable under the old law. The rule extends to any "liquidated demand in money," and these words would cover an action of *assumpsit*, which is an action maintainable for one instalment of a sum payable by instalments. Where a promissory note is payable by instalments, one of the instalments may be recovered in *assumpsit* independently of the others:

Gray v. *Pindar*, 2 Bos. & P. 427.

Unless the present action is maintainable there is no means of recovering an instalment of the price until the entire sum falls due. The plaintiffs have carried out the amount of work which entitles them to payment of the first instalment.

Lush, K.C. in reply.

Lord Alverstone, C.J.—In this case the master in chambers and Walton, J., who has a great experience in dealing with these matters, have thought that the action was one in which the order giving leave to sign judgment might properly be made under Order XIV., r. 1, and on appeal against the order Mr. Lush has strenuously and ingeniously argued that there was no jurisdiction to make such an order, and he says that this is a contract to pay one entire price in a series of instalments. The claim is for the first instalment of the price of a steamer which is alleged to have become due from the defendants to the plaintiffs under a contract for the building of a steamer by the plaintiffs. By the terms of the contract the price of the steamer was to be the sum of 89,800*l*., which the purchasers should pay to the builders by five instalments to become payable respectively at different stages of the steamer's construction. The first instalment having become payable and not having been paid by the defendants the present action was brought to recover the amount of the same, and the plaintiffs have applied for leave to sign judgment under Order XIV., r. 1, but it was said that there was no jurisdiction under that order to give leave to sign judgment where a purchaser neglected to pay one of several instalments only. No point was made as to the property passing and nothing turns on it. The claim is really in respect of seven first instalments in respect of separate steamers. Now, whatever view may be taken of the old law with regard to the action of debt as applicable to the present claim the case is really governed by the language of certain provisions of the existing rules of the Supreme Court. Order XIV., r. 1, provides that an order empowering the plaintiff to enter final judgment may be made in cases where the defendant appears to a writ of summons specially indorsed under Order III., r. 6, and there is no jurisdiction to make such an order except in these cases. The words of the latter rule, so far as material to the present case, are as follows: "In all actions where the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising (A) upon a contract, express or implied (as, for instance, on a bill of exchange, promissory note, or cheque, or other simple contract debt) the writ of summons may, at the option of the plaintiff, be specially indorsed with a statement of his claim." Those words indicate the classes of cases in which the writ can be so indorsed that the master or a judge have jurisdiction to make an order under Order XIV., r. 1. Having regard to this rule it becomes material to consider what is the language of the contract in the present case as regards the payment of the price of the vessel. [His Lordship referred to clauses 7 and 13 of the agreement, and continued:] We are told that it was admitted before the master and the judge at chambers that the keel of the steamer was laid. There is no dispute of fact as to this—that the event has happened which made the first instalment payable in cash. It is, however, suggested that by some rule of law to be deduced from the old authorities as to the action of debt that the amount of the claim sued for in the present action—namely, 17,960*l*.—is not a "debt or liquidated demand in money" which comes within the words of Order III., r. 6. To that I cannot assent. One knows that clauses such as were inserted in the present case are inserted in the case of contracts of this kind where during the continuance of the work the builder or contractor would have to pay out large sums of money in wages and for materials. These clauses provide for payment of the contract price by instalments as the work progresses so that the builder or contractor is to be allowed to receive payment so as to recoup him for moneys paid out in wages and for materials. Under these circumstances I cannot understand on what principle it can be contended that because 17,960*l*. is to be paid in cash when the keel is laid this is not a "liquidated demand in money" payable by the defendants arising under an express contract within the meaning of Order III., r. 6.

In my judgment this is a singularly simple case. It is said that because the builders will have the keel of the steamer on their hands and be able to turn it into money if the purchasers eventually refuse to complete the contract, and may possibly sell the steamer when completed at a profit, the only claim for nonpayment of this instalment must be one for damages, and therefore does not come within the words of the rule. I cannot take that view. It seems to me clear from a business and common sense point of view, and if in consideration of the shipbuilders finding materials and labour and completing the ship up to the laying of the keel the purchaser agrees to make a certain payment on the happening of that event, it makes no difference in principle that four other instalments of the price are to be paid later on the happening of four other events. I think that this must be regarded as an express contract to pay five sums on the happening of five events. The question is whether we are precluded by any authority or rule of law from holding that the judge was not entitled to make this order. It is said that the case of *Rudder* v. *Price* (*sup.*) is a sufficiently strong authority to bring us to that conclusion. I am of opinion that that case turned and was decided on a point of pleading only. That, I think, appears if I take the last passage of the judgment only: "There is so little in reason in this that there is some difficulty to follow it; but the foundation of the opinion fails when it is admitted that the sum really due may be recovered, notwithstanding more is demanded

than can be made good in evidence. I cannot, indeed, devise a substantial reason why a promise to pay money not performed does not become a debt, and why it should not be recoverable, *eo nomine*, as a debt. But the authorities are too strong to be resisted. Though the law has been altered with respect to actions of *assumpsit* no alteration has taken place as to actions of debt. The note in question is for the payment of a sum certain at different times, must be considered as a debt for the amount of that sum, and, being so considered, no action of debt can be maintained upon it till all the days of payment be passed." I think that case depended on the distinction drawn between actions of debt and of *assumpsit*, and it does not help us to distinguish whether or not this action is one in which the plaintiffs are seeking to recover a "debt or liquidated demand in money" within the meaning of Order III., r. 6. I think that the same distinction was also taken in the extract from Bacon's Abridgment, tit. "Debt" B., which was read by Kennedy, L.J. in the course of the argument. I also think that a good enunciation of the law as it applies to-day is to be found in the following passage from Smith's Leading Cases, 11th edit., vol. 2, p. 12, which was read by Mr. Atkin: "If a day be appointed for payment of money or part of it, or for doing any other act. and the day is to happen, or may happen, before the thing, which is the consideration of the money or other act, is to be performed, an action may be brought for the money, or for not doing such other act, before performance." I think Mr. Lush was justified when he ingeniously tried to distinguish that class of case by referring to *Mattock* v. *Kinglake* (*sup.*), where on an agreement for the sale of land the purchaser covenanted to pay the purchase money on a day certain, and it was held that when that day arrived the vendor might recover the purchase money without tendering a conveyance of the land for which it was the consideration. Here the plaintiffs have only to prove the fulfilment of the condition to lay the keel of the steamer in order to entitle them to recover the instalment of the purchase money which is claimed in the action. We cannot well come to any other conclusion without overruling such cases as *Hoare* v. *Rennie* (5 H. & N. 19), *Simpson* v. *Crippin* (27 L. T. Rep. 546; L. Rep. 8 Q. B. 14), and *Honck* v. *Muller* (45 L. T. Rep. 202; 7 Q. B. Div. 92), which are authorities for saying that in the case of a contract for the sale of goods to be delivered in instalments, or the price of which is to be paid in instalments, in the event of non delivery or nonpayment of an instalment the seller may have a right to keep the contract alive as a whole and at the same time have a claim for damages in respect of the particular breach. In this connection reference may be made to sect. 49, subsect. 2, of the Sale of Goods Act 1893, which, of course, deals with the case of a sale for the whole price. That section provides that "Where, under a contract of sale, the price is payable on a day certain irrespective of delivery, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract." Mr. Lush urged for the defendants that that section could not apply where the price was payable by instalments. I fail to see why it should not. To my mind it is dangerous to overrule the master and the judge on such a theory. I think there was clearly jurisdiction to make the order. When once it is admitted that the condition is fulfilled on which by the terms of the contract the first instalment is payable in cash, it can be no answer to say that an action to recover that amount is not an action for a liquidated demand in money within the meaning of Order III., r. 6, but that the plaintiff might have some remedy in damages. As regards the 25,000*l.* I think the judge was right in the exercise of his discretion in saying that that amount should remain *in medio*, and I am of opinion that this appeal should be dismissed.

Farwell, L.J.—I am of the same opinion. The first question is as to the true construction of the contract so far as regards payment of the price of the steamer. In my opinion it is a contract to pay five separate sums on the happening of five distinct events. Even Mr. Lush could not contend for the defendants that it made any difference whether these sums were contained in one document or in five. But even if it be a contract to pay the whole price of the steamer, followed by a specific contract to pay by instalments, the first sum is to become payable when the keel of the steamer is laid, and the other sums on the happening of other events. That being so, it seems to me that an action for any instalment is an action for a "liquidated demand in money" within the meaning of Order III., r. 6. It is said by counsel for the defendants that such a demand would be recoverable only by way of damages. I am unable to follow that reasoning, which is, no doubt, ingenious, but does not seem to have any substantial merits. I fail to see why damages only should be recoverable. If there was any difficulty why it should not be recoverable as a liquidated demand in money under the law as it existed in the time of Lord Lyndhurst, it seems to me that has now been disposed of by sect. 49, sub-sect. 2, of the Sale of Goods Act 1893, which provides for the recovery of the price of goods sold according to the terms of the contract, whether or not the property in the goods has passed to the buyer, and whether or not delivery has taken place. I do not see why it should not apply to the case of a sale where the price is to be paid by instalments as well as to a sale for one entire sum; but any doubt as to this seems to be cleared up by sect. 31, which contemplates the case of a contract for the sale of goods to be delivered by instalments which are to be separately paid for. It provides that if in such a case "the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract, or whether it is a recoverable breach giving rise to a claim for compensation, but not a right to treat the whole contract as repudiated." It is to be observed that the technical term "compensation" is used in the section, and I think the Legislature intended the section to apply to cases other than those in which damages were usually recoverable, namely, to cases in which an action was brought to recover the price. Mr. Lush thought it would be hard that if his clients repudiated the contract

after the first instalment had been paid they might be out of money if the ship were sold or the vendors might sell it to other purchasers at a profit. This is not the law as was laid down by James and Mellish, L.JJ. in *Ex parte Barrell; Re Parnell* (33 L. T. Rep. 115; L. Rep. 10 Ch. 512). In that case by a contract for the sale of land part of the purchase money was to be paid immediately, and the residue on completion; but the purchaser, after paying the first instalment, became bankrupt, and was unable to complete, and his trustee in bankruptcy afterwards brought an action to recover the instalment of the purchase money. James, L.J. there said: "The trustee in this case has no legal or equitable right to recover the deposit. The money was paid to the vendor as a guarantee that the contract should be performed. The trustee refuses to perform the contract, and then says, 'Give me back the deposit.' There is no ground for such a claim." Mellish, L.J. said: "It appears to me clear that, even where there is no clause in the contract as to the forfeiture of the deposit, if the purchaser repudiates the contract he cannot have back the money, as the contract has gone off through his default." Although I sympathise with Mr. Lush, I agree with the Lord Chief Justice in thinking that this appeal should be dismissed.

KENNEDY, L.J.—Although I think the matter is not quite so clear as it appears to the Lord Chief Justice and to my brother Farwell, I agree that this appeal should be dismissed. The question, which has received grave argument on the part of Mr. Lush, seems to be whether this is the kind of action which can be enforced under the provisions of Order XIV., r. 1, not because of the nature of the claim itself, but because the words "liquidated demand" are said to cover this. A case only falls within Order XIV., r. 1, where the writ is specially indorsed under Order III., r. 6, and the writ can only be specially indorsed under the latter rule in an action to recover a "debt or liquidated demand in money" arising (*inter alia*) upon a contract. Had it been a claim for payment of the whole contract price of the steamer, and not for an instalment, there can be no doubt that it would have come within these words. It is not easy to unravel the reasoning in the older cases and to distinguish it from mere technicality, but there is good reason for saying that for the recovery of certain classes of money demands you could not technically sue for the recovery of an instalment by itself, although it was stipulated to be paid on a certain day, where it formed only part of a promise by the defendant to pay a larger sum in which it was included. Here we have not to deal with a question depending on the form of the pleading whether in actions of debt or *indebitatus assumpsit*. We have to deal with pleading as it now is; and I find nothing to show me that in applying Order XIV. I may not apply it to a claim for an instalment of a larger sum merely because the law laid down in the old cases goes to show that in an action of debt, strictly so called, you cannot sue in debt as distinct from an action of *indebitatus assumpsit* for an instalment. Had the matter here rested on the construction of the contract I should have held that Order XIV. did not apply; but I think it is fairly open to argument that this contract does fall within the principle stated and illustrated in Bacon's Abridgment, this being a contract for one entire sum split up into several instalments. But assuming that where the whole sum is payable in instalments an action may be brought for any instalment, one must look at the words of the rule to see whether the claim would be for a "liquidated demand in money," and thus fall within Order III., r. 6. In my opinion it does in substance fall within that rule, and I do not find any rule of pleading which lays down that I am to apply reasoning depending on form and not on substance. One would have expected to find in sect. 49, sub-sect. 2, of the Sale of Goods Act 1893 some limitation to the effect that it was to apply only where the price was payable in one entire sum, but not where it was payable in instalments. On the whole I am of opinion that the words of Order XIV., r. 1, which refer back to Order III., r. 6, are to be construed as extending to the claim in this action. With all deference to the editors of the Annual Practice, it seems to me that they are not quite accurate in stating, as they do in the note to the latter rule, that the words "debt or liquidated demand" only apply to an action of debt in its most technical form.

Appeal dismissed.

Solicitors for the appellants, *Armitage* and *Chapple*.

Solicitors for the respondents, *Blyth, Dutton, Hartley*, and *Blyth*.

Friday, May 29, 1908.

(Before Sir GORELL BARNES, P., MOULTON and FARWELL, L.JJ.)

BURGIS AND OTHERS v. CONSTANTINE. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Shares in ship—Transfer by beneficial owners to registered owner of ship as trustee—Shares registered in name of trustee—Mortgages of shares by trustee in breach of trust—Form of mortgage signed in blank—Advance by mortgagee without notice — Negligence — Estoppel—Conflicting equities—Merchant Shipping Act 1894 (57 & 58 *Vict. c.* 60), *ss* 24, 26, 31, 56, 57.

The plaintiffs, owners of shares in a ship, transferred them into the name of the senior partner of a firm, which firm managed the ship's business as trustee for the plaintiffs, the object of the transfer being to facilitate the formation of a company which was to purchase the ship. Upon the transfer the senior partner was registered in the register of shipping at the port to which the ship belonged as the owner of the shares. Various attempts were made to form a company, but without success, and the above-mentioned shares were not reconveyed to the plaintiffs. Subsequently a son of the senior partner, who had charge of the financial arrangements of the firm, obtained for the purposes of the firm from the defendant through an agent for the defendant and without the knowledge or authority of the plaintiffs an advance of money which was intended to be secured by a mortgage by the senior partner of (inter alia) *the above-mentioned shares. He obtained the latter's signature to a printed form with blank spaces which was then handed to the defendant's agent by whom the document was subsequently filled*

(*a*) Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.

up as a mortgage of the shares to the defendant. The defendant had no knowledge that the senior partner was merely a trustee of the shares for the plaintiffs. The defendant then registered the document as a mortgage. Upon learning what had been done the plaintiffs claimed as against the defendant a declaration that the mortgage was void and an order that the register should be rectified by expunging from it the entry of the mortgage.

Held, by the Court of Appeal (reversing the decision of Bigham, J.), that although the plaintiffs had allowed the senior partner of the firm to appear on the register as legal owner of their shares the defendant was, under the circumstances of the case, not entitled to an equitable right as against the plaintiffs to a charge upon the shares as security for the money advanced by him.

Rimmer *v.* Webster (86 *L. T. Rep.* 491; (1902) 2 *Ch.* 163) *discussed.*

APPEAL from the judgment of Bigham, J. in an action tried by him without a jury.

The action was brought by the plaintiffs as beneficial owners of twenty-one sixty-fourth shares in a ship called the *Greta Holme*, claiming (1) a declaration that a certain mortgage on twenty-seven sixty-fourth shares in that vessel, which appeared upon the register in favour of the defendant, should be declared to be void, and that the defendant was not entitled to be registered as mortgagee of the shares; (2) an order that the register should be rectified by the entry of the mortgage being expunged; and (3) delivery up of the mortgage to be cancelled. The facts giving rise to the action were as follows: In 1897 there was a firm of Hine Brothers, which consisted at all material times of Wilfrid Hine and his nephew. The business was that of managing, amongst others, a line of steamers called the Holme Line, of which the *Greta Holme* was one, and the head office of the firm was at Maryport; the firm had also an office in London which was under the control of Alfred Ernest Hine, a son of Wilfrid Hine, who was in the employment of the firm, and had authority to sign the firm's name, and to whom, at all material times, the management of the money matters of the firm was left. The ships belonging to the Holme Line were owned by a number of persons in the usual way, in sixty-fourth parts. From time to time the firm rendered accounts to, and distributed dividends among, those owners of the shares. In 1897 Wilfrid Hine, the senior partner, conceived the idea of turning his business, and the business of the Holme Line, into a limited company, for the purpose of taking over the Holme Line. Circulars were accordingly sent out by the firm to the shareholders in the different ships as to the proposed company, but nothing was done by Hine Brothers of any definite character till the end of 1898, when a prospectus was prepared. It was thought necessary or desirable that the shareholders, who were at that time on the register at Maryport, in respect of their holdings, should transfer these shares to Wilfrid Hine as trustee, so that he might be in a position to hand over the title to the ships to the company when formed. Accordingly a circular dated the 30th Nov. 1898, and signed by Wilfrid Hine, was sent out to the various shareholders, amongst others the plaintiffs, inclosing a draft prospectus of the proposed company, and a valuation of the various steamers of the Holme Line. The circular, after stating that it was proposed that the sum representing the value of the shares in the ships belonging to the persons to whom it was sent should be satisfied as to 90 per cent. in fully paid ordinary shares, and as to 10 per cent. in fully paid preference shares in the proposed company, proceeded as follows:

> Will you please sign the memorandum at foot hereof, and also the inclosed bill of sale, in exchange for which I undertake to send you share certificates for the above shares in Hine Brothers Limited when allotted. As time is very important, I shall be glad if you will return the documents to me at your earliest convenience, and I have no hesitation in saying that I consider this arrangement will be to your interest, and that I am making no profit out of your shares, but will merely hold your interest in the ship in trust for you pending the allotment of the shares to which you are entitled.

In response to that circular, the plaintiffs executed bills of sale of their shares in the *Greta Holme*, and signed the inclosed memorandum, which was in the following terms:

> I hereby agree to accept the terms of your letter of 30th Nov. 1898, and send herewith a bill of sale on the understanding that you hold my interest in the ship *Greta Holme* referred to in trust for me as therein set forth, and I hereby authorise you to enter into a contract for sale to the proposed company of my interest in the said ship.

A number of shareholders, including the plaintiffs, having assented to the proposal, their shares were transferred into Wilfrid Hine's name. He was registered in respect of them in the register at the ship's port of registry, and thereby became the legal owner of the shares. He held them in trust to transfer them, in the event of a company being formed, to that company as part of its assets, and, if the company was formed, each shareholder was to receive a specified interest in it.

Difficulties arose in the formation of the company, and nothing was in fact ever done which resulted in its formation.

From time to time letters passed between certain of the shareholders and Hine Brothers about the matter, from which it appeared that the original idea as to what the company should be composed of had been somewhat modified, but towards the end of 1906 Hine Brothers stated that the project for the formation of a company had not been abandoned, and suggested that the shares should be allowed to remain as they were until the matter was finally disposed of. The plaintiffs' shares in the *Greta Holme* were accordingly allowed to remain as they were.

In the early part of 1907 the firm of Hine Brothers got into financial difficulties. Alfred Ernest Hine then gave a mortgage to a Mr. Constant, which mortgage included twenty-seven shares in the *Greta Holme* (the plaintiffs' twenty-one shares and six others). That mortgage was given to Mr. Constant by Alfred Ernest Hine upon a form which bore the signature of Wilfrid Hine. It was given in order to raise money for the firm, and the money was in fact raised exclusively for the purposes of the firm, and not for the private purposes of Alfred Ernest Hine. It was a mort-

gage that should not have been given, and when Wilfrid Hine was asked about it he said that it was true that the mortgage bore his signature, but that it was not true that he knew anything about it.

Both the father and son said that after the father's illness, which happened in 1905, it had been the practice of the father to sign blank forms of mortgage and leave them in the son's possession, so that the son might, when need required, fill them up. Wilfrid Hine said that one of these forms must have been used by his son unknown to him to create the Constant mortgage.

In 1907 money was again required for the purposes of the firm of Hine Brothers, and on the 9th April Alfred Ernest Hine applied to a firm of John Holman and Sons for an advance of 4000*l.* upon the security of the freight of a vessel called the *Isel Holme*, and said that he was prepared to pledge that freight, and also twenty-seven shares in the *Greta Holme*, which shares included the shares of which the plaintiffs were the beneficial owners, by way of collateral security for the advance. This application having been communicated by John Holman to the defendant, who had no notice of the plaintiffs' interest in the shares, or that there was any irregularity in the transaction, he agreed to make the advance upon the terms mentioned on the 10th April. What took place was this: Alfred Ernest Hine, being anxious to obtain money, gave the charge upon the freight, and also asked John Holman to furnish him with a blank form of mortgage for his father to sign. That form he took away with him, and, having obtained his father's signature to it, he took it back to Mr. Holman's office and left it with Mr. Holman for him to fill up the blank spaces with the particulars relating to the twenty-seven shares in the *Greta Holme*. The amount advanced by the defendant was received the same day. The security for the loan was perfected in Mr. Holman's office and by Mr. Holman himself, and he also drew the assignment of the freight. On the same day the Constant mortgage was discharged. The freight of the *Isel Holme*, which had been pledged to the defendant, was received by Alfred Ernest Hine, instead of being paid to the defendant, as it ought to have been.

Difficulties were raised, with the result that on the 1st July 1907 the defendant caused the mortgage to be registered in the shipping register. It was that registration which the plaintiffs (who had only then become aware of what had been done with their shares) sought to have cancelled.

On these facts Bigham, J. held that Mr. Holman in drawing the assignment of the freight and filling up the blank form of mortgage did so as the agent on behalf of the defendant, and that the defendant must be taken to have had notice through his agent Holman that at the time when Wilfrid Hine's signature was appended to the document, it was a blank form so that there could be no question of estoppel, and that the so-called mortgage not being the deed of Wilfrid Hine was a worthless document. He therefore made an order declaring that the alleged mortgage was bad, and that the entry of it must be expunged from the register. He further held, on the authority of *Rimmer* v. *Webster* (86 L. T. Rep. 491; (1902) 2 Ch. 163), that inasmuch as the plaintiffs had intrusted Wilfrid Hine with authority to deal with the shares, although he had not dealt with them in the way the plaintiffs intended, the defendant had obtained an equitable title to the shares which, although it came into existence long after the equitable title of the plaintiffs, nevertheless took priority, and he made a declaration that the defendant was not entitled to be registered in respect of the shares in the *Greta Holme*, but that he was entitled to an equitable charge upon the shares as against the plaintiffs to the extent of any unpaid balance of the advance made by him. He accordingly gave judgment, declaring the defendant to be entitled to such a charge.

The plaintiffs appealed against the last portion of the judgment.

J. A. Hamilton, K.C. (*Maurice Hill* with him) for the plaintiffs.—The decision of Bigham J. was wrong. If the defendant had obtained a mortgage of the shares by bill of sale under the provisions of the Merchant Shipping Act 1894, he would have obtained a legal title to the shares which would have prevailed against the title of the plaintiffs:

The Horlock, 3 Asp. Mar. Law Cas. 421 (1877); 36 L. T. Rep. 622; 2 P. Div. 243.

But it is clear that in this case the mortgage is void, so that the defendant obtains no legal title at all to the shares. The only question is whether the defendant can establish an equitable title to the shares in question, and, if so, whether it is to prevail against the equitable title of the plaintiffs, who have the beneficial ownership of the shares. The plaintiffs only transferred their shares to Wilfrid Hine with the object of enabling him to transfer them to the company when it should be formed and when it was approved by them. Wilfrid Hine was merely trustee of the shares for the plaintiffs and had no power to deal with them. He held them in trust to transfer them in the event of a company being formed to that company as part of its assets. All that the defendant got was a personal promise to give a mortgage, coupled with a cause of action for deceit, against Alfred Ernest Hine. The case of *Rimmer* v. *Webster* (86 L. T. Rep. 491; (1902) 2 Ch. 163), upon which Bigham, J. proceeded, is really not in point. In that case a security had been delivered to an agent for sale, and transfers of the same had been duly executed. In this case no indicia of title were handed to the defendant; all he got was a deed which said nothing. The fact that Wilfrid Hine was allowed by the plaintiffs to remain the registered owner of the shares cannot possibly give rise to the equity claimed by the defendant. It appears from the cases in the Courts of Equity, in which a subsequent equitable mortgagee has been held to override the rights of a prior equitable mortgagee, that there must have been some misconduct or negligence so gross as to render it just to deprive the prior mortgagee of his security. It need not be negligence amounting to fraud. He also cited

Lewin on Trusts, 11th edit., p. 901;
Briggs v. *Jones*, 23 L. T. Rep. 212; L. Rep. 10 Eq. 92;
Northern Counties of England Fire Insurance Company v. *Whipp*, 51 L. T. Rep. 806; 26 Ch. Div. 482;

Re Castell and Brown Limited; Ex parte Union Bank of London, 78 L. T. Rep. 109; (1898) 1 Ch. 315;

Re Valletort Sanitary Steam Laundry Company Limited; Ward v. *Valletort Sanitary Steam Laundry Company Limited*, 89 L. T. Rep. 60; (1903) 2 Ch. 654.

Scrutton, K.C. (*Bailhache*, K.C. with him).—The decision of Bigham, J. was right. The shares were invested in Wilfrid Hine, with authority to dispose of them to a company which was to be formed, and his name appeared on the register in respect of the shares. This would give him power absolutely to dispose of them under sect. 56 of the Merchant Shipping Act 1894 to a purchaser for value without notice. The plaintiffs were themselves in default in allowing Wilfrid Hine to be put on the register. This case must be decided on the principles applicable to cases of agency as laid down by Farwell, J. in *Rimmer* v. *Webster* (*sup.*). The present case falls within the principles there laid down. The indicia of title were handed to Hine for the purpose that he should sell them to a company which was to be formed. As soon as he was put on the register he became the absolute owner of the shares for the purpose of dealing with them, though in a limited way. There was no limitation of his authority entered on the register. There is nothing to show that his power to transfer the shares is limited, and the defendant had no notice of any trust at all affecting the shares. He also cited

Bradley v. *Riches*, 39 L. T. Rep. 78; 9 Ch. Div. 189, 192;

Brocklesby v. *Temperance Permanent Building Society and others*, 72 L. T. Rep. 477; (1895) A. C. 173;

Taylor v. *Russell*, 66 L. T. Rep. 565; (1892) A. C. 244;

Northern Counties of England Fire Insurance Company v. *Whipp* (*sup.*);

Re Castell and Brown Limited; Ex parte Union Bank of London (*sup.*).

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

Sir GORELL BARNES, P.—The question in this case which has been argued before us is of some importance, though, as far as I can make out, it was not the point upon which the case was fought, and it was not a point which was raised in the pleadings at all. In order to make clear the observations which I propose to put forward very shortly, it is necessary to see what this action was for, and what are the facts as far as they are necessary to be considered. [His Lordship stated the facts, and continued:] Now, the action arose in consequence of a transaction with regard to those particular shares which may be very shortly stated. Mr. Wilfrid Hine had registered these shares in his own name, and in 1907, I think it was, a mortgage of these shares was executed to Mr. Constantine, and that mortgage was afterwards paid off out of the proceeds which were raised on the mortgage which has given rise to the present suit. The document which gave rise to this suit was duly registered, and it purported to be a mortgage by Wilfrid Hine to the defendant in this suit of twenty-seven sixty-fourth shares, which included the twenty-one sixty-fourth shares of which the plaintiffs were beneficial owners, and the defendant claimed to be the mortgagee of those shares. Now, the claim made by the plaintiffs in their statement of claim was that the mortgage and the registration thereof were wholly void, and that the defendant was not entitled to the mortgage or to register his mortgage on the shares; and they also assert that the document was never executed or delivered by Mr. Wilfrid Hine with the authority of any of the plaintiffs or at all, and that he had not authority to mortgage. Now, this is what they allege. I read this because upon this the main point in the case originally fought turned. It is as follows: "In or about the month of April 1907 one A. E. Hine, without the authority of the said W. Hine or any of the plaintiffs, gave to the defendant a blank form of mortgage which bore the signature of the said W. Hine, but was not otherwise filled in, and the defendant, by himself or his agent, subsequently filled in the said form as a mortgage to be registered." Then they claim a declaration that the sale is void, and that the defendant is not entitled to be registered as mortgagee, and the delivery up and cancelment of the document, which purported to be a mortgage and a declaration, that the alleged mortgage is not entitled to be registered as a mortgage, and asking for an order that the entry be expunged from the register. Now, it is important to see what the defence was. First of all I think I am correct in saying that pars. 1, 2, 3, and 4 are practically traverses (with some admissions) of unimportant facts. Now par. 5 is this: "The defendant is a *bonâ fide* purchaser for value by way of mortgage of the shares in question from the said W. Hine without notice of any interest of the plaintiffs therein and has been and is duly registered as a mortgagee thereof and has an indefeasible title to the said shares as such mortgagee." For the purpose of my judgment I take the facts as stated and found by Bigham, J. in his judgment which very clearly and very fully states the facts; and in the argument before us I do not think any quarrel has been raised as to the way in which these facts are stated. I only propose (in order to make the point plain) to refer to the finding as to the mortgage question. He says in his judgment: "Mr. Constantine (the defendant) agreed to make the advances proposed, and on the 10th April this in my opinion took place. Mr. Alfred Ernest Hine who was anxious to get the money, gave the charge on the freight and he also asked Mr. Holman to furnish him with a blank form of mortgage for his father to sign. He took it away from Holman's office and obtained his father's signature to the blank form, and then took it back to Mr. Holman and left Mr. Holman to fill it up with the particulars relating to the twenty-seven sixty-fourth shares. The loan was then made on the same day—I think, the 10th April; 4000*l.* was advanced by Mr. Constantine. The security for that loan was perfected in Mr. Holman's office, and by Mr. Holman himself. Mr. Holman drew out the assignment of the freight and Mr. Holman filled up the blank form of mortgage which had been obtained in the way described by us. Mr. Holman did that, in my opinion, as the agent and on behalf of Mr Constantine, the present defendant, and I think in this case it must be taken that Mr. Constantine through his agent in that behalf had notice that at the time that Mr. Wilfrid Hine's signature was appended to that

document, it was a mere blank form; and if such notice is to be imputed to him, there can be no estoppel in favour of a man who himself knows the truth of the circumstances." Now, although the parties at that time do not appear to have known the fact, Mr. Holman, it was not suggested, had the slightest idea that this way of carrying out the mortgage would lead to any difficulty, notwithstanding there was want of knowledge that the document which was registered as a mortgage in fact was a worthless document. It was signed in blank originally by Mr. Wilfrid Hine. When I say "in blank," of course there was the printed form used under the Merchant Shipping Act, but I take it there was nothing about the name of the ship, the number of shares, and so forth, which are required to be filled in before the document is executed in order to make it a good document. The result was that this mortgage, as Bigham, J. says, in his opinion (and in my opinion too), was a wholly worthless document.

Now, that was the case which was to be fought, whether that was a good mortgage or not, and Bigham, J. having found that it was a bad mortgage in the sense that it was not executed under such circumstances as to make it a valid document, thought that the party receiving it and the party executing it might have well thought they were carrying out a perfectly legal transaction. Now, that being the case which was fought, the point was afterwards taken by counsel for Mr. Constantine that although that document gave him no title whatever, notwithstanding the fact that he had been placed on the register under it and although he had advanced his money under it, although that document was a worthless document, he was still entitled to maintain that he had such an equity as would defeat the beneficial interest of the plaintiffs' in the shares in question. Now, I have not expressly gone into all the circumstances about Hine executing this document. So far as those are necessary to be stated at all they are to be found in Bigham, J.'s judgment. But he decided that, the document being a worthless document, the register must be rectified by expunging the entry from the register, that Constantine must be left in the position in which he was when that registration had been expunged and when the document had been determined to be a worthless document; but Bigham, J. went on to deal with the point which was raised by counsel for Mr. Constantine though not raised in the defence as I have said, that notwithstanding that the mortgage must be expunged from the register Mr. Constantine had an equity which would prevail over the rights of the plaintiffs, and, that being so, the plaintiffs could not obtain the benefit of their property without discharging the claim upon them. That is the substance of it.

Now, in order to see whether that position can be made out I think it is necessary to refer to a few sections of the Merchant Shipping Act 1894. I start with this: That the plaintiffs had handed their bill of sale over to Mr. Hine in the circumstances which I have shortly stated, that Mr. Hine had been placed on the register of the ship at Maryport as the sole registered owner of these shares. Now, on the register, of course, there is no notice of any trust or anything of that kind, that Mr. Hine had made this arrangement or someone had made it for him with Mr. Constantine, and that Mr. Constantine had advanced money on a document which turned out to be practically worthless; and let me now see what the position is which Mr. Constantine is left in under the Merchant Shipping Act. According to the Merchant Shipping Act, there is a general provision for the mode of registering ships and shares in them and the mode which is transfer by sale or by mortgage of shares in ships which have been registered. Sect. 24, sub-sect. 1, provides that, "A registered ship or share therein (when disposed of to a person qualified to own a British ship) shall be transferred by bill of sale"; and sub-sect. 2, "The bill of sale shall contain such description of the ship as is contained in the surveyor's certificate, or some other description sufficient to identify the ship to the satisfaction of the registrar, and shall be in the form marked A in the first part of the first schedule to this Act, or as near thereto as circumstances permit, and shall be executed by the transferor in the presence of and be attested by a witness or witnesses." By sect. 26, sub-sect. 1, it is provided: "Every bill of sale for the transfer of a registered ship or of a share therein, when duly executed, shall be produced to the registrar of her port of registry, with the declaration of transfer, and the registrar shall thereupon enter in the register book the name of the transferee as owner of the ship or share, and shall indorse on the bill of sale the fact of that entry having been made, with the day and hour thereof." By sub-sect. 2: "Mortgages shall be recorded by the registrar in the order in time in which they are produced to him for that purpose, and the registrar shall by memorandum under his hand notify on each mortgage that it has been recorded by him, stating the day and hour of that record." Then with regard to mortgages, sect. 31, sub-sect. 1, says: "A registered ship or a share therein may be made a security for a loan or other valuable consideration, and the instrument creating the security (in the Act called a mortgage) shall be in the form marked B in the first part of the first schedule to this Act, or as near thereto as circumstances permit, and on the production of such instrument the registrar of the ship's port of registry shall record it in the register book." I do not intend to read through all the sections of the Act which relate to bills of sale of ships or mortgage deeds; the effect of the sections is that machinery is provided by the Act for the transfer of the complete ownership or the transfer of mortgageable interest or interests which are to be treated in the same way as a mortgage of a ship or shares therein by the various sections, two of which I have already read. Then sect. 56 provides: "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 the 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." Then sect. 57, which is also material, is: "The expression 'beneficial interest' where used in this part of the Act includes interest 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 powers 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." "Beneficial interests" are mentioned in several places in the Act, and more particularly in sect. 58, which deals expressly with the liability of the beneficial owner, if the beneficial ownership is not to appear on the register. Now, the point raised at present is that Mr. Constantine (notwithstanding the fact that this so-called mortgage is a worthless document) has an equity which is to prevail over the equity of the beneficial owners, the plaintiffs. Now, I confess, when I attempt to touch the question of one equity prevailing against the other, I feel some difficulty in doing so when I do so in the presence of a very distinguished Chancery judge. But the point, to my mind, in this case is one of a simple character. It seems to me when the Act of Parliament has provided with regard to ships that they shall be registered in the name of persons who appear on the register, and that therefore those persons are to be held out to the world as persons who are entitled to deal with them, and provides machinery by which they may transfer and mortgage and so forth in the forms provided in the Act, that it requires at least a very strong case, a very strong proposition indeed to show that any person who does not comply with these provisions is to get a title as against the original owners who are beneficially interested so as to defeat their rights when he could, if he had chosen and had acted properly, have obtained a good title in the manner provided by the Merchant Shipping Act. Therefore at the outset it seems to me that where there is only here in this case a claim based upon a personal contract with the man who is the registered owner, and no charge given by way of following out the provisions of the Merchant Shipping Act, and no charge given, in fact, by any document, that he, the lender of the money, has not placed himself in the position in which he could have been if he had wished for adequate protection by following the provisions of the Act; and I think it is important that this matter should be dealt with upon the lines which are indicated in the statute. But it is said the plaintiffs in the case have acted in such a way as to hold out Hine—because that is what it comes to—as being a person in possession entitling him to create (without following the form prescribed in the Act at all) a charge on the plaintiffs' shares by merely promising to give a charge upon them in favour of the lender, Mr. Constantine, which will defeat the plaintiffs' title, unless, of course, they pay off Mr. Constantine. Now, certain cases have been referred to which I do not intend to go through or examine because the broad view which I take of this case is this: that if persons beneficially interested leave another person on the register, as legal owner, all that they have done by merely doing that is to place him in a position in which he can defeat their right as against the outside world by transferring or selling the shares which legally belong to him and which stand in the name of the registered owner, and that unless that course is followed they cannot have their rights infringed. I am not going to say there is no case in which something more may not be done, either by way of some direct communication between the beneficial owners and the mortgagee which will entitle him to rely upon something more than the mere registration or otherwise; but in this case he relies on the fact alone that Hine was allowed by the plaintiffs to remain on the register as the owner of the shares; there is nothing else relied upon than that. Where there is nothing more than the registry, it seems to me to be introducing a very startling proposition to allow people to defeat the rights of persons who had *bonâ fide* placed their shares in the circumstances in which they were so placed in this case for a purpose which they were perfectly rightly entitled to do; in other words, I cannot myself help thinking—it may be that I am going too far in saying so, and it may be it is beyond what is necessary to say in this case—I cannot myself help thinking that the true object of the legislation was that beneficial owners who leave their shares registered in the name of a particular person will be bound by anything he does in the manner provided by the Act, but not otherwise, unless they themselves have by some other means contributed to his act in such a way as every person is entitled to rely upon it. If that is the correct view, it seems to me that this case is disposed of in a different way to what Bigham, J. has done, and therefore I think that his judgment must be extended. He has ordered the expunging of the registration of the mortgage; but the real relief in substance seems to me to be that which the plaintiffs claim to be entitled to. Therefore my decision will be generally in favour of the plaintiffs' claim, so that they will get the beneficial rights that they have in those shares.

MOULTON, L.J.—I am of the same opinion. The nature of this action is an action by the beneficial owners of certain shares in a ship, the *Greta Holme*, to have those shares transferred from the name of W. Hine, in which they were standing in the register, to their own names. The register at that time appeared to be incumbered by a transfer by way of mortgage in favour of the defendant to secure a sum of 4000*l.*, and they set out in their points of claim that that transfer was a nullity, that it was a form originally signed by W. Hine, and delivered blank to the defendant, the agent, who himself had filled it up with the name of the ship and the number of the shares, and that therefore, being a nullity, it ought to have been struck off the register, and they ought to have a clean transfer of these shares. Now, that was a completely undefended action. To the knowledge of the defendant all the statements in it were true. However, he chose to traverse them, and went to trial, and when the evidence was called it was perfectly clear that this so-called mortgage was a nullity, and it ought not to be on the register, and judgment was given that it should be struck off. But the learned judge, I suppose

in a desire to settle as far as possible all the points in controversy between the parties seems to have permitted the defendant to set up something which is rather in the nature of a counter-claim—namely, a claim that he had an equity to a charge upon these shares by way of security for the amount of money which he had advanced to Mr. Hine, and not, of course, to the plaintiffs. Now, that is the only point that has been contested before us, and I confess it appears to me to be a point of no particular difficulty when once you disentangle the various legal considerations which bear upon it. The case in my eyes is this: At the time when the transactions took place which gave rise to this action Hine was a bare trustee for the plaintiffs. He had no beneficial interest in those shares, and in my opinion he was nothing but a bare trustee. But that is a point I shall return to later. He undoubtedly put himself on the register in respect of them as legal owner, and was entitled to do so. He also borrowed money from the defendant, and promised the defendant to give him a mortgage upon those shares of which he was the registered owner. By the concurrence both of the defendant and of Hine that security was never given, for the document that was drawn up was a complete nullity, and all the circumstances that rendered it a nullity were perfectly well known to Holman as well as to Hine. There is no question of concealment or fraud about it. The consequence is that we must take it that the parties never carried out the promise to give a security on these particular shares. The situation therefore is this: The *cestuis que trust* call upon their trustee to reconvey to them, and they are entitled to. The only thing is, however, that he has promised to give a security on trust property to somebody else, and has not carried out that promise. In order to get a charge he would have to come to the court and ask for specific performance of this promise, and, as specific performance of this promise would *ex concessis* involve a breach of trust on his part, the court would not grant him specific performance, and therefore he remains a bare trustee of these shares, though the legal owner. As such legal owner for the plaintiffs he must retransfer the shares to them. That, in my opinion, decides this case. But the defendants here, in Mr. Scrutton's very resolute and able argument, have tried to bring this case within certain equitable doctrines which on proper occasions will put an equity subsequent in time in a position of priority to a prior equity, and even in special cases to the legal title itself; but they are always based upon some negligence in the owner of the prior equity. Now here, in my opinion, there is no possible ground for suggesting that the *cestuis que trust* were guilty of any negligence. A person is entitled to leave his property, whatever be its nature, in the name of a trustee. A vast amount of property in this realm must be in the names of trustees; the legal interest is from the devolution of the property vested in the trustees, and the fact that shares in a ship stand in a man's name on the register does not negative in any way his being a trustee for other people with regard to those shares. But the great importance of titles to shares in a ship being indefeasible has led the Legislature to enact this: that a trustee or owner, whether he is interested or not interested in the shares that stand in his name, shall have an absolute power to give a good title by way of charge, or by way of sale to any other person not having notice of any defect in his title, though it may be a breach of trust provided he does it "in manner in this Act provided," so that a man who allows his property to stand in the name of a trustee runs one risk, and one only, and that is that in breach of his trust the trustee may avail himself of the statutory means of effectually transferring, either by way of charge or sale, the part or whole of the property in those shares. Now to that risk the plaintiffs in this case exposed themselves, but that risk did not come off. W. Hine did not do that, and the consequence is they are, in my opinion, not affected in any way by the fact that for a time their interests were imperilled to the extent that, had Hine followed the mode prescribed by the Act, he could have alienated this property from them. Now, Mr. Scrutton feels the difficulty of that, and he tries to raise a question that this has to be dealt with under what he calls "the principles of agency." Of course that phrase is a very vague one, and we have to examine carefully what he means. Does Mr. Scrutton mean that there was an actual agency in Hine to act on behalf of the plaintiffs, or does he mean that there was such conduct on the part of the plaintiffs as made Hine their ostensible agent to perform acts such as he actually did perform when he promised to give security in a way which would make those acts binding on a principal? Now, in the first place I am of opinion that Hine was in no sense an agent for the plaintiffs—he was a bare trustee. It is true that when the transfer of these shares to him was made in trust for the plaintiffs there was an authority given to him to dispose of those shares in a particular way. At that time it was intended to form a company to hold all these shares. The transfer to him was for the purpose of enabling them to be transferred to that company, and there was unquestionably an actual agency for that purpose given to him. But long before any of the events happened in which the defendant was concerned that purpose had wholly and for ever failed, and the consequence was that that agency had gone for ever. Nothing could possibly have been done by Mr. Hine as agent for the plaintiffs, excepting by a fresh authority given, so that in my opinion there was no actual agency of any kind whatever, excepting at the material time when he was, as I have said, a bare trustee. Then Mr. Scrutton says: "Oh, but he was an ostensible agent." Now, as soon as you come to the question of an ostensible agency, you may disregard all matters which have not come to the knowledge of the person dealing with him, because an ostensible agent means that a man has been held out to the person who has been treating him as an agent, as being an agent by some acts done or permitted by the real principal. The consequence is we may drop entirely the consideration of the fact of this authority which subsequently became of no effect by reason of the abandonment of the scheme, because it is not suggested that the defendant heard of its existence, and the ostensible agency can then only arise from the fact that the shares stood in the name of W. Hine. Now, I am not going to repeat what I have said,

because it has been said very much better on this point by the authoritative language of Lord Cairns in the case of *Shropshire Union Railways and Canal Company v. The Queen* (32 L. T. Rep. 283; L. Rep. 7 H. L. 496). The passage I refer to is the one which is quoted by Farwell, J. in *Rimmer* v. *Webster* (*sup.*). You do not hold out anything by transferring your shares to a man so that they should be held in his name—you do not hold him out as your agent at all. It may be that he is a bare trustee. There is no negligence and no implied holding out in that beyond the fact that you invest him for the time with the legal ownership for your own purposes. He has power to deal under the Act. If he deals under the Act you are bound by it, but otherwise no implication of agency whatever can be based upon the mere fact that the shares are in his own name, and, as I pointed out on the question of ostensible agency, no other fact whatever can be relied upon by the defendant in this case as he knows none other. For these reasons I entirely agree in the judgment that the President has just given.

FARWELL, L.J.—I am of the same opinion. In my view this is a mere question of conflicting equities. The legal estate in the plaintiffs' shares is outstanding in Mr. Hine. The blank transfer executed by him was a mere nullity, according to *Hibblewhite* v. *McMorine* (6 M. & W. 200) which was approved of in the House of Lords in the case of the *Société Générale de Paris* v. *Walker* (54 L. T. Rep. 389, 11 App. Cas. 20), and therefore had no operation in point of law, although on the true basis of the circumstances, I apprehend that as between Hine and the mortgagee there is a contract on which Hine would be liable in damages, and which if Hine were the beneficial owner, he would be compelled specifically to perform. But when you come to the question of conflicting equities, you start with the maxim that *primâ facie* an equity prior in time is better in law. Now the equity prior in time can only be displaced by some act or default of the owner by which the person claiming the subsequent equity has been induced to act to his own detriment. I pause for a moment to say that in this particular instance I think that the actual transfer and direction to Hine to convey to the company when formed may be disregarded entirely. It adds nothing to the statutory power, it is simply a direction by the beneficial owner to the trustee (who has the statutory power) of the mode in which he is to execute it in the particular event of that company being formed. It fell through long ago, and to my mind the case rests solely and simply on the position of the registered owner under the Merchant Shipping Act 1894, and is therefore of very general importance under that Act. Now, as has been pointed out by Lord Cairns in the case of the *Shropshire Union Railways and Canal Company* v. *The Queen* (*sup.*), the mere fact that a man transfers land or shares to a trustee, and gives him the title deeds or the securities or other indicia of title does not justify anyone in assuming that that person is the beneficial owner. Even where a trustee does in fact deal with the property, and conveys the legal estate to a *bonâ fide* purchaser for value without notice, then the *cestui que trust* has to bear the loss of trusting to a rogue. If, therefore, the subsequent purchaser or mortgagee does not get the legal estate, then he has not taken those steps which the law allows him in order to protect himself against all risks, and he cannot set up any misconduct or neglect or negligence in the true owner, because it is in accordance with the usages of mankind so to deposit your deeds and so to convey your legal estate. Therefore, to use a phrase used in another case before, no other member of the community is entitled to allege that such a course of action contains any invitation to him from which a duty to him can be inferred. Now, to my mind the present case is *à fortiori*, because it is perfectly consistent with Hine being trustee that he is on the register. The Act has enabled a person dealing with the registered owner to protect himself fully by following the provisions of the Act and taking a transfer in the manner provided by the Act and getting it registered; but the defendant has, unfortunately for himself, failed to do it. Then he has recourse to equity, but the person owning a prior equity says: "I have done no wrong, I have been guilty of no negligence, I have done what 50 per cent. of the owners of shares in a ship do—put it in the name of a trustee; the Act gives him power to sell in a certain event—namely, by deed only, and I trusted to his not doing anything in contravention of that; if he had sold by deed, I should have had no case against the subsequent *bonâ fide* purchaser for value, but inasmuch as you have chosen to neglect that safeguard which the Act gives you, you have no reason to complain of me for having misled you." This is unanswerable, it seems to me. But I am bound to say I feel called upon to try and rectify a misunderstanding of my own decision in the case of *Rimmer* v. *Webster* (*sup.*), because looked at in the light of subsequent argument, when certain passages are picked out from a particular page it does look as though I had said that which certainly I never intended to say. It is very difficult to express oneself for more than a sentence, at any rate, without giving some possibility of ambiguity, and one cannot keep on repeating "this refers to the facts of this particular case." The gist of that decision was twofold. First of all I dealt with the case as a case of agency, holding that the fact that the principal had transferred a legal estate to his agent for the purpose of more effectually enabling him to carry out the agency did not affect the transaction as a question of agency, and in dealing with the point of agency I said what I did on pp. 172-3 of the report of 1902 2 Ch. Then it was also dealt with as a question of trusteeship, and that was dealt with on the footing of the well-known case of *Rice* v. *Rice* (2 Drew 73, 83). The observations which have been picked out by Mr. Scrutton (not at all unfairly, because he read the whole paragraph) would, apparently, according to him, refer to a case of this sort to which I certainly did not intend them to refer, and which I desire to exclude, namely, to the ordinary case of a transfer of railway stock or shares or debentures by trustees of a marriage settlement on trust for sale. In a case like that, if the trustees, who are only trustees and not agents at all, choose to deposit the certificate or to give an equitable charge to a banker or other person for their own purposes, and that banker or other person does not take the precaution to get a legal

transfer, there is nothing I have said in *Rimmer* v. *Webster* (*sup.*) that I intended to apply to such a case, and I think when *Rimmer* v. *Webster* (*sup.*) is read as a whole it will be seen that is so, because when you transfer shares into the names of trustees on trust for sale you do that which is in accordance with the usages of mankind every day. So long as the person dealing with the shares deals with them in accordance with the trust committed to him, well and good, but I have no doubt myself that the equity of the *cestui que trust* would prevail over that of the banker in the case I have put, and that any *cestui que trust* could get an injunction to restrain the transfer of the legal estate to such banker if they could interfere before the banker had got them. Therefore I desire to that extent to try and elucidate that which I feel my command of the English language has not sufficiently clearly stated in *Rimmer* v. *Webster* (*sup.*), which is divided into two chapters, one dealing with principal and agent, the other with a trustee. I agree in the conclusion that the court has arrived at, that this appeal should be allowed to the extent which has been pointed out by the President.

Appeal allowed.

Solicitors for the plaintiffs, *Downing, Handcock, Middleton,* and *Lewis,* agents for *Lightfoot* and *Lightfoot,* Maryport.

Solicitors for the defendant, *Holman, Birdwood,* and *Co.*

Friday, May 29, 1908.

(Before Sir Gorell Barnes, P., Moulton and Farwell, L.JJ.)

Yangtsze Insurance Association Limited *v.* Indemnity Mutual Marine Assurance Company. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Insurance—"Warranted no contraband of war"—Carriage of belligerent officers on neutral ship—Whether persons contraband of war.

The transport of military officers of a belligerent State as passengers on a neutral ship captured and condemned by a prize court on the ground that the vessel was transporting contraband persons does not amount to a breach of warranty against "contraband of war" in a policy of marine insurance.

Semble: *The term "contraband of war" in its primary and natural meaning applies to goods only and not to persons.*

Judgment of Bigham, J. affirmed.

Commercial list.

Action tried before Bigham, J. sitting without a jury.

Plaintiffs' claim was under a marine policy of reinsurance which contained the warranty "no contraband of war."

The facts as found were as follows:—

The plaintiffs underwrote a policy for 18,000*l.* on the steamer *Nigretia* at and from Shanghai to Vladivostock, while there for not exceeding twelve days whilst discharging the cargo, and thence to one port in China in ballast. The policy contained a warranty not to carry cargo other than kerosene oil and the insurance was to cover the risk of capture. This policy was made in Shanghai.

The plaintiffs were anxious to reinsure part of the risk, and accordingly, on the 28th Oct. 1904, they telegraphed from Shanghai to their London office to reinsure 15,000*l.*, including war risk, warranted no contraband of war.

The London office succeeded in getting a slip initialled by different underwriters, including the defendant company; but as there was an uncertainty as to the meaning of the warranty "no contraband of war," which affected the question of premium, the London office telegraphed to the Shanghai office on the 29th Oct. as follows:

S S. *Nigretia.* Reinsurance has been effected as required. There is some doubt as to the meaning of "warranted no contraband of war." It is understood that cargo oil kerosene only you guaranteeing not contraband. It is of utmost importance; or otherwise 30 guineas per cent.

The meaning of this telegram was that the underwriters were uncertain whether the Japanese courts might not regard kerosene as contraband, and they required the plaintiff company to guarantee that it was not contraband, intimating that in the absence of such a guarantee the premium would be 30 guineas per cent.

This telegram was answered by the Shanghai office on the 31st Oct. as follows:

S.S. *Nigretia.* Cargo oil kerosene only. We will guarantee that Consul for Japan has to-day written British Consul that kerosene not regarded contraband by Japanese Government if shipped anywhere. Cannot give further guarantee. Steamer clears Vladivostock. Are you satisfied?

This telegram was shown by the London office to the different underwriters and was accepted as satisfactory. The slip which up to this point had contained in this connection only the words "warranted no contraband" was then amended by adding to those words the further words, "on basis of cable dated the 31st Oct. 1904," and the signatories to the slip initialled the telegram so as to identify it.

The defendant company underwrote 2000*l.* The premium was agreed at 15 guineas per cent. Subsequently—namely, on the 13th Dec. 1904—the defendants issued their formal policy on which the present action is brought. The policy, following the terms of the slip, contains the following provision: "Warranted no contraband of war on basis of cable dated the 31st Oct. 1904, copy of which attached hereto," and pinned to the policy is a typed copy of the telegram.

The policy further provides as follows:

Being a reinsurance of the Yangtsze Insurance Association Limited, subject to the same clauses and conditions as in the original policy, and to pay as may be paid thereon (but warranted free from particular average) and all clauses as in the original policy including war risk.

At this time a state of war existed between Russia and Japan, and on the 19th Dec. 1904, while on the insured voyage to Vladivostock, the *Nigretia* was captured by a Japanese cruiser and taken to the port of Sasebo in Japan, where she was condemned by the Japanese prize court.

The circumstances under which she was condemned appear from the judgment of the prize

(*a*) Reported by W. Trevor Turton and Edward J. M. Chaplin, Esqrs., Barristers-at-Law.

court. This judgment finds that on the 16th Dec. 1904 two Russian naval officers, who had assumed German names, were received on board the *Nigretia* at Shanghai as passengers to Vladivostock. There was no proof that the captain or owners of the vessel knew that these two persons were Russian officers, but, on the other hand, the court found that there was no proof that they were ignorant of the fact, and the court held that the ship "must be confiscated as the vessel was actually engaged in transporting contraband persons."

The plaintiffs have paid or compounded on the original policy as for a total loss, and they now bring their action on the reinsurance policy to be indemnified by the defendants.

The defendants say they are not liable because there has been a breach of the warranty, "no contraband of war on basis of cable dated the 31st Oct. 1904."

Scrutton, K.C. and *Leck* for the plaintiffs.—The plaintiffs properly paid the assured under the original policy because there was a loss by capture, and the defendants accordingly must indemnify the plaintiffs. There was no breach of the warranty, and the onus of proving such a breach is on the defendants. The cable only warranted that kerosene was not contraband. [BIGHAM, J. —The words in the warranty referring to the cable message do not cut down the words "warranted no contraband." They mean that kerosene should not be considered contraband in any event.] A person does not come within "contraband of war" and cannot be "contraband cargo." "Contraband" applies to materials and goods, but not to persons. There is no English authority which states that persons are included in the term. The warranty therefore "no contraband of war" refers only to contraband goods, and the presence of the Russian officers on board was therefore no breach of the warranty. Writers on International Law when using the term "contraband" are referring to goods. See

Lawrence's War and Neutrality in the Far East, 1904, 2nd edit., chap. 7;
Hall's International Law, 1904, 5th edit., chap. 5;
Grotius, De Jure Belli ac Pacis III., c. 1, sect. 5;
Bynkershoek, cap. x., book 1, 1767; De rebus bellicis
Hannis Taylor's International Public Law, 1902, part 5, chap. 5;
Holland's Naval Prize Law, 1898;
Oppenheim's International Law, 1906, vol. 2, p. 420.

As to the carriage of persons and dispatches, Westlake in his work on International Law, 1907, part 2, p. 262, says: "Men present no real analogy to contraband, although they as well as dispatches are often spoken of as its analogues. Men cannot be forwarded like goods . . . Accordingly, the carriage of men has not been usually coupled in treaties with the carriage of contraband . . ." The judgment of a foreign prize court is conclusive evidence of the fact of condemnation and breach of warranty of neutrality in cases where there is a question of the warranty of neutrality; but that is exceptional, and there is no authority which holds that the judgment of such a court is conclusive as to the grounds of condemnation in other cases:

Ballantyne v. *Mackinnon*, 8 Asp. Mar. Law. Cas. 173 (1896); 75 L. T. Rep. 95; (1896) 2 Q. B. 455;
Castrique v. *Imrie and Tomlinson*, 3 Mar. Law. Cas. O. S. 454 (1870); L. Rep. 4 H. L. 414;
Lothian v. *Henderson*, 3 B. & P. 496, at pp. 524 and 525.

The judgment of the prize court in this case is not conclusive. The plaintiffs are entitled to be reimbursed by the defendants under the policy of reinsurance.

J. A. Hamilton, K.C. and *Maurice Hill* for the defendants. — Contraband persons is a well-recognised term. See

Phillimore's International Law, 1885, 3rd edit., vol. 3, p. 459;
Bluntschli's Le Droit International, 1874, sects. 815 to 817;
Creasy's First Platform of International Law, p. 631;
Calvo's Le Droit International, 1872, 2nd edit., vol. 2, p. 494.

No authority has stated that persons cannot be included in the term "contraband," and, moreover, in the *Trent* case in 1861 (see sect. 669 Hannis Taylor's International Law) it seems that they could in Lord John Russell's view. "Contraband of war" includes persons, officers, messengers with dispatches, spies, &c. A belligerent has power to declare what is to be considered contraband, and that which exposes a neutral ship to capture is contraband. If a neutral vessel carries belligerent officers that amounts to a violation of neutrality and renders the vessel liable to confiscation. That is well known to writers on international law, and that is the reason why, when dealing with contraband, they are generally referring to goods, for about goods only could any question arise. The difference between carrying contraband persons and contraband goods is that the former renders the vessel liable to confiscation, whereas the latter does not render the vessel liable to condemnation merely because the goods carried are contraband. If the warranty applies to goods only, no protection is given to the defendants. The true construction is that the defendants are protected against the liability of the vessel being confiscated. The ground of condemnation by the prize court was the presence of the Russian officers, and, as that is within the jurisdiction of the prize court, that is conclusive. The presence of those officers amounted to contraband of war. As to how far judgments of a prize court are evidence, see

Arnould's Marine Insurance, 7th edit., sect. 678-680.

There has been a breach of the warranty of no "contraband of war" and the defendants are not liable to reimburse the plaintiffs.

BIGHAM, J. read the following judgment:— This is an action brought on a marine policy of reinsurance effected by the plaintiffs with the defendants, which contains a warranty, "no contraband of war." The question left to be determined (other questions having been already disposed of) is whether the defendants have proved a breach of the warranty so as to relieve them from liability. The facts are shortly as follows:— [Having stated the facts set out above, his Lordship continued:] The question resolves itself into this—Are contraband persons contraband of war within the meaning of the warranty? I am of opinion that they are not. Contraband

of war is an expression which, in ordinary language, is used to describe certain classes of material and does not cover human beings. Many text writers on international law have no doubt used the expression "contraband persons," but I think I am right in saying that such words are not to be found in any English case, and certainly not in such connection as to show that they describe a class of contraband of war. The most recent text writers treat persons as outside any accepted definition of contraband. The transport of "contraband persons" may no doubt in some cases involve the same consequences to the ship as the carriage of contraband, but so may other acts on the part of the ship, as for instance, transmitting information to the enemy. It would, in my opinion, be wrong to say that, because the same result may follow in the one case as in the other, therefore the two cases are identical and may be covered by one definition. The Japanese court carefully avoided describing these officers as "contraband of war," and used the somewhat novel, but for their purpose sufficient, expression "contraband persons." The view which I take of this matter is well expressed in the fifth edition of the late Mr. Hall's treatise on International Law, at p. 673, where he says: "With the transport of contraband merchandise is usually classed analogically that of despatches bearing on the conduct of the war, and of persons in the service of a belligerent. It is, however, more correct and not less convenient to place adventures of this kind under a distinct head, the analogy which they possess to the carriage of articles contraband of war being always remote. They differ from it in some cases by involving an intimacy of connection with the belligerent which cannot be inferred from the mere transport of contraband of war, and in others by implying a purely accidental and almost involuntary association with him. They are invariably something distinctly more or something distinctly less than the transport of contraband amounts to. When they are of the former character they may be undertaken for profit alone, but they are not in the way of mere trade. The neutral individual is not only taking his goods for sale to the best market, irrespectively of the effect which their sale to a particular customer may have on the issue of the war, but he makes a specific bargain to carry despatches or persons in the service of the belligerent for belligerent purposes; he thus personally enters the service of the belligerent, he contracts as a servant to perform acts intended to affect the issue of the war, and he makes himself in effect the enemy of the other belligerent. In doing so he does not compromise the neutrality of his own Sovereign, because the non-neutral acts are either as a matter of fact done beyond the territorial jurisdiction of the latter, or if initiated within it, as sometimes is the case in carrying despatches, they are of too secret a nature to be, as a general rule, known or prevented. Hence the belligerent is allowed to protect himself by means analogous to those which he uses in the suppression of contraband trade. He stops the trade by force, and inflicts a penalty on the neutral individual. The real analogy between carriage of contraband and acts of the kind in question lies not in the nature of the acts, but in the nature of the remedy applicable in respect of them. When the acts done are of the second kind, the belligerent has no right to look upon them as being otherwise than innocent in intention. . . . When again a neutral in the way of his ordinary business holds himself out as a common carrier, willing to transport everybody who may come to him for a certain sum of money from one specified place to another, he cannot be supposed to identify himself specially with belligerent persons in the service of the State who take passage with him." A little further on, at p. 682, when examining the terms of the despatches which passed between Great Britain and the United States of America in connection with the *Trent* case, Mr. Hall points out that whereas Admiralty Courts have power to try claims to contraband goods they have no power to try claims concerning contraband persons, and he adds: "To say that Admiralty Courts have no means of rendering a judgment in favour of or against persons alleged to be contraband, or of determining what disposition is to be made of them, is to say that persons have not been treated as contraband. If they are contraband the courts must have power to deal with them." I agree that my interpretation makes it difficult to say to what the warranty would apply, having regard to the fact that the policy already contained a warranty that the cargo should consist of kerosene only; but this difficulty ought not, in my opinion, to induce me to depart from what I am satisfied is the plain meaning of the words, and the sense in which they are always understood among underwriters and merchants. There must be judgment for the plaintiffs.

The defendants appealed.

J. A. Hamilton, K.C. and *Maurice Hill*, for the defendants, used similar arguments to those in the court below.

Scrutton, K.C. and *Leck*, for the plaintiffs, were not called upon to argue.

Sir Gorell Barnes, P.—The facts which give rise to this case are very fully stated in the judgment of Bigham, J., and therefore I should only waste time by recapitulating them. I understand that they are substantially accepted on both sides, although there was some indication on the part of Mr. Hamilton that there was a doubt that something said was to be treated as properly admitted. For the purpose of this judgment, I take the facts as stated by Bigham, J. Now, that leaves only one question to be determined—namely, whether the policy which was effected by the plaintiffs as reinsurers with the defendants is one on which the defendants are not liable, because there has been a breach of warranty. The plaintiffs had underwritten a policy for 18,000*l.* on the steamer *Nigretia* at and from Shanghai to Vladivostock, while there for not exceeding twelve days whilst discharging the cargo, and thence to one port in China. The policy which is the subject of this appeal is the reinsurance policy, and I will read two or three clauses that bear on this matter in the two policies. In the original policy effected with the plaintiffs there is this warranty: "Warranted to proceed *viâ* Korean Straits. Warranted not to carry cargo other than kerosene oil. Warranted to sail on or before the 12th Dec. 1904. Warranted that the vessel will clear for Vladivostock and not carry false papers." In the policy

sued upon it is described "to be upon hull and machinery, &c., valued as per original policy or policies, being a reinsurance of the Yangtsze Insurance Association Limited, subject to the same clauses and conditions as in the original policy or policies, and to pay as may be paid thereon, but warranted free from particular average and all clauses as in the original policy or policies including war risk." War risk had been taken in the original policy, and then it proceeds to describe the voyage from Shanghai to Vladivostock. The insurance is on the ship *Nigretia* "at and from Shanghai to Vladivostock and while there, and thence back to one port in China, including Hong Kong, and for thirty days after arrival. Warranted no contraband of war on basis of cable dated 31st Oct. 1904, copy of which attached hereto." The copy of the telegram is as follows: "Cargo oil kerosene only. We will guarantee that consul for Japan has to-day written British Consul that kerosene not regarded contraband by Japanese Government if shipped anywhere. Cannot give further guarantee. Steamer clears Vladiovstock." Now, it appears the steamer did clear for Vladivostock, and was afterwards captured by a Japanese cruiser and taken to the port of Sasebo, in Japan, and was there condemned by a Japanese prize court by a judgment which found that on the 16th Dec. 1904 two Russian naval officers who had assumed German names were received on board the *Nigretia* at Shanghai, and carried as passengers to Vladiovstock. I read this part to show there is no fault on the part of the shipowners. "There was no proof that the captain or owners of the vessel knew that these two persons were Russian officers; but, on the other hand, the court found that there was no proof that they were ignorant of the fact, and the court held that the ship must be confiscated, as the vessel was actually engaged in transporting contraband persons." Now, the plaintiffs paid on the original policy as for a total loss, and then claimed on the reinsurance policy. Now, to my mind, this case does not raise the more general and broad question on which Mr. Hamilton launched his argument as to the general meaning of "contraband of war," because my view is that this particular warranty was introduced into this reinsurance policy with the knowledge on the part of both parties that they were dealing with a cargo of kerosene oil, the original policy having warranted that no other cargo should be carried except kerosene oil, and the copy telegram was introduced for the purpose, making it plain what the undertaking was with regard to a warranty against contraband which the defendants undertook, and then I think myself they undertook the reinsurance with a warranty which only protected them to the extent indicated by the telegram. If that is the true view to take in this case, there is an end of the point, because the warranty was not broken in the sense in which I read it. It may be that that is not the strict and correct view to take, and I will say only a few words about the broader point that Mr. Hamilton has gone into and dealt with. I may be doing what I say at the risk of uttering *obiter dicta*, but I shall state shortly how I regard it. He has cited a certain number of text-writers who have dealt with the broad questions that arise in cases where there have been breaches of neutrality of carrying either goods or persons which neutrals ought not, in a state of war, to carry, and whose carriage has rendered the ship liable to seizure and condemnation. But it is remarkable to find that no case whatever has been cited to us in this country in which persons have ever been called "contraband of war." When one goes back to rather older days, one of the leading cases on the subject of contraband, using that term for the moment quite openly, is the old case of the *Jonge Margaretha* (1 Ch. Rob., p. 189), which is one of Lord Stowell's decisions, and which will be found in Tudor's Leading Cases on Mercantile Law (3rd edit., on p. 981); in discussing the questions in that case of what was and what was not contraband, the learned editor, in stating the notes to that case, commenced thus at p. 986: "One of the most important exceptions to the rule allowing neutrals to carry on commercial intercourse with the belligerents on both sides is that which forbids them to supply any of them with what is called contraband of war; under which term are comprehended all such articles as may serve a belligerent in the direct prosecution of his hostile purposes," and I think it will be found that there are numerous cases in which the contests have arisen in the older days of prize courts before Lord Stowell and other learned judges as to what was and what was not contraband of war, and that they all dealt with articles and not with persons. When we come to deal here with a commercial contract, used in the course of an insurance transaction between commercial men, my view is certainly that the parties were using these terms contraband of war in the primary sense in which it is understood among all people, certainly in commerce, and indeed in a general way—viz., as applicable to goods. If we turn to an ordinary definition of it, as found in any well-known dictionary—for instance, in Murray's Dictionary under the head of "contraband"—we find various meanings given to it. One is as follows: "Illegal or prohibited traffic; smuggling. Anything prohibited to be imported or exported; goods imported or exported contrary to law or proclamation; smuggled goods (also humorously for anything stolen). (In full contraband of war) anything (especially arms, stores, or other things available for hostile purposes) forbidden to be supplied by neutrals to belligerents in time of war, and liable by the Law of Nations to be captured and confiscated." Then there is a reference I need not read, to a negro slave, and another heading which states: "Prohibited by law, proclamation, or treaty, to be imported or exported: as contraband goods, &c. So contraband trade, or a trader, in contraband goods," and then, lastly, "forbidden, illegitimate, unauthorised." Now, when one regards this matter from the point of view which I have already indicated — namely, that no case has been decided in England in which this term has been used as applicable to persons; when one finds it used in a well-known dictionary, to include only that which relates to things; and when one also finds in certain writers on international law—notably, Mr. Hall—that primarily contraband of war is dealt with under the heading of matters, and relating to matters which are things, articles, and so forth, and the term "analogues of contraband" is used as applicable to those matters which deal with the prohibi-

tion of carriage of persons or despatches, and so forth, I have no hesitation whatever in saying that in this case, if this matter depended upon the broader questions it ought to be decided in favour of the view which has been expressed by Bigham, J.

It is not without interest to notice that in the declarations which were made at the commencement of the Russo-Japanese war, the Japanese declaration as regards contraband, quoting from Smith and Sibley on "International Law, as interpreted during the Russo-Japanese War," p. 207, was as follows: "First class: Military weapons, ammunition, explosives, and materials. . . . The above-mentioned articles will be regarded as contraband of war when passing through or destined for enemy's army, navy, or territory." Then comes the second-class, where a large number of other articles are referred to and it is stated: "The above-mentioned articles will be regarded as contraband of war when destined for enemy's army or navy, or in such cases where, being goods arriving at enemy's territory, there is reason to believe they are intended for use of enemy's army or navy. Exception has been made as regards articles manifestly intended for use of vessels carrying them. Prize courts at Sasebo, Tokio." Now, the Russian regulations read thus: "The following are the Russian regulations declaring contraband which recently acquired prominence in connection with seizure of British ships: Declared contraband of war: Arms, munitions, explosives. . . ." Then follows a long list of articles, and then this declaration: "Assimilated to contraband are the following acts: Transport of enemy's troops, despatches and correspondence, and furnishing transports and ships of war to the enemy." I should also like to refer to one other matter which I mentioned in the course of the argument, and that is the declaration appended to the Treaty of Paris in 1856, respecting maritime law in time of war. This shows that the word "contraband" was used to refer to goods only. Perhaps I may be going somewhat beyond what is necessary for the decision of this case in making these general observations, but I feel no hesitation in saying that on this particular contract, the warranty has not been broken, and on the general ground I think Bigham, J.'s judgment must be upheld.

MOULTON, L.J. — I am of the same opinion, and will only add a few words on the second point. To my mind primarily and naturally the phrase "contraband of war" is applicable to goods, and not to soldiers or despatches on a neutral vessel in time of war. But I should be prepared to consider whether that might not be used in a wider sense if I could find that such a user was common in commercial circles, or in commercial documents, or had been recognised in the courts of law. But when it is admitted that, although this country is particularly rich in decisions by eminent judges on matters such as these, there is not a single case or instance in any reported case in the English courts where the phrase "contraband of war" has been applied otherwise than to goods, and where the only instances in which it can be shown to have applied to persons are one or two cases taken from text books, where by reason of the context it is quite clear no mistake could possibly arise, I think there is nothing to displace the primary and natural meaning of the phrase, and that therefore Bigham, J.'s judgment was right.

FARWELL, L.J.—I agree. My own opinion is that "contraband of war" has a primary meaning applicable to goods only, and I do not think Mr. Hamilton meant to contest that when he said that the phrase might have acquired what I should have called a secondary meaning. Assuming that it is the primary meaning, then the ordinary rules of construction apply. There has been no evidence given here, nor is there anything that I can find in the context of the instrument which helps Mr. Hamilton; on the contrary, it is rather against him, because it is obvious that this is a trading vessel carrying cargo, and there is not a suggestion to show that the parties were contracting with any idea that passengers would be carried. There being nothing found in the context to qualify the meaning, and the primary meaning being what I have said, I agree on both grounds that the judgment of Bigham, J. is correct.

Appeal dismissed.

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

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

Wednesday, June 17, 1908.

(Before VAUGHAN WILLIAMS, MOULTON, and BUCKLEY, LL.J.)

LEONIS STEAMSHIP COMPANY LIMITED *v.* JOSEPH RANK LIMITED. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Charter-party—Demurrage — Lay days — Strike clause—Strike on railway—Military insurrection—Cargo delayed by strike—Congestion of shipping—"Obstructions."

Clause 39 *of a charter-party provided as follows: "If the cargo cannot be loaded by reason of riots or any dispute between masters and men, occasioning a strike of . . . 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. . . ."*

The plaintiffs' ship arrived at the port of loading on the 24*th Feb.* 1905, *and notice of readiness to load was given on that day. At that time the port was crowded with shipping, the congestion having arisen from a strike among the railway* employés, *which had occurred in the previous month, and a military insurrection, during which the insurgents seized the railway. The strike and the insurrection had caused the accumulation of vessels by delaying the arrival of cargo by railway, but both the strike and the insurrection were over before the arrival of the plaintiffs' ship.*

The ship did not obtain a berth and begin to load until the 30*th March* 1905.

(*a*) Reported by W. TREVOR TURTON and EDWARD J. M. CHAPLIN, Esqrs., Barristers-at-Law.

In an action against the charterers for demurrage :

Held, that, as the cargo was delayed by reason of the strike and so prevented from being loaded, the charterers were entitled to the protection of the clause.

Held, by Vaughan Williams and Buckley, L.JJ. (Moulton, L.J. expressing no opinion), that the fact that other ships were at the loading berth in their turn before the plaintiffs' ship prevented the cargo from being loaded, and constituted an "obstruction . . . beyond the control of charterers" within the meaning of the clause.

Decision of Bigham, J. affirmed.

COMMERCIAL LIST.

Action tried before Bigham, J. sitting without a jury.

The plaintiffs were the owners of the steamship *Leonis* and the defendants were the charterers of the vessel.

The plaintiffs' claim was for demurrage incurred on the said vessel whilst at Bahia Blanca, in the Argentine.

The material parts of the charter-party were as follows :

Buenos Ayres . . . Dec. 30, 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, stanch, 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. . . .

On the 21st Feb. 1905 the vessel arrived at Montevideo and received orders on the 22nd Feb. to go to Bahia Blanca.

Bigham, J. found as a fact that there was no unreasonable delay on the charterers' part in giving those orders.

The vessel arrived at Bahia Blanca on the 24th Feb. 1905, and notice of readiness was given by the captain at 5.30 p.m. on the 24th Feb. That notice expired at 5.30 a.m. on the 25th Feb. The vessel was an "arrived" ship on the 24th Feb. (see *Leonis Steamship Company Limited* v. *Joseph Rank Limited* (1908) 1 K. B. 499, overruling 10 Asp. Mar. Law. Cas. 398 (1906) ; 96 L. T. Rep. 458 ; (1907) 1 K. B. 344), and was lying about three lengths from the railway pier.

On arrival the port of Bahia Blanca was crowded, there being forty-six vessels waiting to load. That congestion was due partly to a strike amongst the railway *employés* during Jan. 1905 and partly from a military insurrection which broke out in Feb. 1905 and which only lasted for eight days, during which time the insurgents seized the railway serving Bahia Blanca.

The strike and the insurrection had caused the accumulation of vessels by delaying the arrival of cargo by railway, but both the strike and the insurrection were over before the arrival of the steamship *Leonis*. The vessel obtained a berth and began to load a cargo of wheat on the 30th March 1905, and completed loading on the 5th April.

J. A. Hamilton, K.C. and *Bailhache* for the plaintiffs.—The vessel arrived at Bahia Blanca on the 24th Feb., and at 5 30 p.m. notice of readiness was given. At the expiry of twelve hours from that time—namely, at 5.30 a.m. on the 25th Feb.—the lay days commence, subject to the exceptions in the charter-party. At the charter-party rate the vessel had twenty-one days in which to load. Allowing for Sundays and holidays the twenty-first lay day was the 23rd March, therefore the lay days run out at the end of 23rd March, and, as the loading was completed on the 5th April, thirteen days' demurrage had been incurred. Clause 23 in the charter-party is distinguishable from that in *The Katy* (7 Asp. Mar. Law. Cas. 510, 527 (1894) ; 71 L. T. Rep. 709 ; (1895)

P. 56). The rate to be applied here is 200 tons per running day, commencing at 5.30 a.m. the 25th Feb. If a running day here means from midnight to midnight, how can the time begin to run after twelve hours from 5.30 p.m. the 24th Feb.? The clause contains a precise stipulation that the time for loading is to count twelve hours after written notice is given which could be given as late as 6 p.m. As to clause 39, that excludes things interfering directly with the loading of the cargo and not to things the results of which only interfere with the loading. It is the immediate cause which is excepted. The delay was caused by the slow overtaking of the arrears of business which had accumulated at an earlier date. Obstruction on railways and docks does not apply to congestion of port. Smith, L.J. in *Re Richardson* v. *Samuel and Co.* (8 Asp. Mar. Law Cas. 330 (1897); 77 L. T. Rep. 479; (1898) 1 Q. B. 261, at p. 267) says: "The contention that because the delay arose from the loading of the ships in the port in order of their arrival the charterer is exempt cannot prevail, for it is impossible to treat delay arising from such a cause as due to accident on the railway, or as coming within the term "other causes beyond charterers' control." An obstruction in the dock does not apply to a case where a vessel which is not in berth has to wait her turn. An obstruction in docks would be the fouling of the channel by a dredger which had foundered. An obstruction on railways would include, for example, wash out, broken bridges, or collision, but delay in delivery owing to heavy traffic would not be an obstruction. There is no word here which can cover the result of insurrection unless it is riot, but riot and insurrection are different things. The exceptions, therefore, in clause 39 do not apply.

Scrutton, K.C. and *Ashton*, K.C. for the defendants.—On the 25th Feb. no work was done, and that day cannot count as a lay day at all, for a running day means a calendar day from midnight to midnight, and the charterers are entitled to a whole lay day—not part of a day:

The Katy (*ubi sup.*).

That case and *Houlder* v. *Weir* (10 Asp. Mar. Law Cas. 81 (1905); 92 L. T. Rep. 861; (1905) 2 K. B. 267) govern the present case on this point. The vessel did not get into berth until the 30th March. Under the charter-party twenty-one days are allowed, which commence from that time. (1) The vessel, in fact, was hindered by the berths being all full with other ships in front of her either in berth or in turn. All available berths were filled until the 30th March by vessels which had arrived before the *Leonis*. Nothing that the ship or the charterers could do could have obtained a berth earlier than the 30th March. That is a sufficient excuse, as it comes within the words of the charter-party "obstruction in docks or other loading places beyond the control of the charterers." (2) If it is necessary to search for the cause of the obstruction, then it was caused by military riot and strike which had delayed the arrival of cargo at the port, and so caused the ships to accumulate, resulting in the vessels, including both the *Leonis* and those prior in arrival to her, being delayed. [BIGHAM, J.—The immediate cause of delay was the crowded state of the port which prevented berthing: the effective cause was the antecedent military revolt. The words in clause 39, "by reason of" and "through," are, I think, identical. Do those words refer to the existing state of affairs or to consequences of past events?] The charter-party contemplates things happening before the vessel's arrival, for cargo on railway is referred to and that would be prior to the vessel's arrival. The presence of other vessels was an "obstruction in the loading places beyond the charterers' control." Other ships in a crowded port preventing berthing for a considerable time are within the words "other hindrance beyond charterers' control":

Sailing Ship Milverton Company Limited v. *Cape Town and District Gaslight and Coke Company Limited*, 1897, 2 Com. Cas 281.

Here there was an actual physical obstruction (*i.e.*, a vessel) in the berth. In *Shamrock Steamship Company Limited* v. *Storey and Co.* (reported on appeal, 8 Asp. Mar. Law Cas. 590 (1899); 81 L. T. Rep. 413; 1898, 4 Com. Cas. 80) the charter party excepted "Commotions by keelmen, pitmen, or any hands striking work . . . or other acts or causes beyond the freighter's control which may prevent or delay" the loading of the ship. By reason of the Welsh coal strike there was an accumulation of vessels at Grimsby when the plaintiffs' vessel arrived there, and the vessel was delayed, and it was held that the charterers were not protected by the exceptions in the charter-party from liability for demurrage. Bigham, J., at p. 82, says: "It was admitted that there was no strike or interference with work at the collieries from which the defendants' coal was being procured, and the fact that the Welsh coal strike may have caused an unusual number of ships to seek cargoes at Grimsby has, in any view, no more to do with the case than if the same result had followed from a strike in German, or Australian, or Japanese collieries. The glut in shipping cannot, I think, be brought within the fair meaning of either of the particular or the general words of the exception, the general words having to be read as confined to matters *ejusdem generis* with the particular matters mentioned in front of them." That case, which turned on a colliery guarantee, was affirmed by the Court of Appeal (1899, 5 Com. Cas. 21), but Lord Russell, C.J., at p. 23, and at p. 591 of the report in Asp. Mar. Law Cas. above referred to said: "Bigham, J. stated that . . . apart from the colliery guarantee altogether, he would have arrived at the same conclusion in favour of the defendants if this colliery guarantee clause had not been in the charter-party. . . . If it were necessary to consider that view of the case, I should certainly require to have it further discussed before I should be prepared to accept the view of the learned judge." In *Crawford and Rowat* v. *Wilson, Sons, and Co.* (1896, 1 Com. Cas. 154; affirmed by Court of Appeal at p. 277) a charter-party contained the following exception: "All unavoidable accidents or hindrances in . . . loading and for discharging the cargo. . . ." When the vessel arrived at her discharging port a rebellion was in progress, and it was held that the rebellion constituted an "unavoidable accident or hindrance in discharging the cargo." The exceptions in clause 39 apply, and therefore no demurrage is due.

J. A. Hamilton, K.C. in reply.—Obstruction is a very different thing to hindrance. Obstruction is not the natural result of business operations. Hindrance has a much wider meaning than obstruction. Obstruction in loading places is not prior occupation of berths in the ordinary course, but something that arises not in ordinary course. Obstruction on railways would not include the shunting of a train into a loop on a single line railway to let an up train pass. As to the case of *Shamrock Steamship Company* (*sup.*) Russell, C.J. in 5 Com. Cas. 21, at p. 23, must be either wrongly reported or he was not referring to the exception clause. The words in the charter-party, "if the cargo cannot be loaded," govern the clause, and that is a very different thing from "if the cargo cannot be brought to the port." Clause 39 is intended to excuse the immediate cause of the delay. The strike might not have caused any of the delay; had the number of vessels been less, the strike would not have effected the position. On the other hand, a glut of vessels might have occurred without a strike. The clause does not cover delay caused by remote circumstances. A military insurrection is not within the word "riot." A riot suggests disorder on the spot, and there is no evidence of that. Further, an insurrection need not be riotous. As to the words in clause 39, "Delivery of the cargo proved to be intended for the steamer," there is not sufficient evidence that the cargo which was delayed was cargo intended for the steamship *Leonis*.

BIGHAM, J.—The charter-party provides by clause 23 that: "Cargo to be loaded at the rate of 200 tons per running day, Sundays and holidays excepted. . . ." If the clause stopped there I think that running days would mean calendar days made up from midnight to midnight. The clause, however, continues, "time for loading shall commence to count twelve hours after written notice has been given by the master." That alters, I think, the construction that the day commences at midnight. It makes the loading commence at an hour during the twenty-four hours in reference to which time twelve hours notice has to be given. The running days contemplated in this charter-party begin twelve hours after serving the notice of readiness, and therefore mean periods of twenty-four hours commencing at 5.30 a.m. Subject to the question of the strike clause the lay days begin at 5.30 a.m. on the 25th Feb. The remaining question, therefore, that I have to decide is whether the defendants, the charterers, have brought themselves within the protection of the strike clause. I think that they have done so. The words are: "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." The evidence satisfies me that the working, loading, or delivery of the cargo intended for the steamship was interfered with by riots or disputes between masters and men within the meaning of that clause. The evidence satisfies me that the cargo for this vessel was coming by railway. The carriage along the railway and the dealing with the cargo were delayed by causes coming within the words of the clause, and in that way the cargo was prevented from being loaded. Clause 39 continues: "If the cargo cannot be loaded by reason of riots or any disputes . . . or through obstructions on the railways or in the docks or other loading places beyond the control of charterers, the time so lost not to be counted as part of the lay days. . . ." Why should I not give to those words their plain meaning? The only place where loading could take place was obstructed. I give the word "obstructed" its real meaning, and not the narrow meaning suggested by Mr. Hamilton. There were other vessels in the berths, or awaiting their turn to go into the berths, over which the parties had no control. Those vessels, in my opinion, did obstruct the *Leonis*. It was by reason of the obstruction which the other vessels caused that the *Leonis* could not get alongside, and the defendants could not put their cargo on board. The charterers, I think, have brought themselves within both provisions of the strike clause. There must be judgment for the defendants.

The plaintiffs appealed.

J. A. Hamilton, K.C. and *Bailhache*, K.C. for the plaintiffs.—Bigham, J. was wrong in holding that the defendants came within both provisions of clause 39. He did not hold that the direct cause of the failure to load was the strike. He said that the congestion on the railway was the cause, but that is too remote. He relied on the word "obstructions" in the clause, where it says, "obstructions on the railways or in the docks or other loading places beyond the control of charterers," and held wrongly that the loading of the vessel was delayed thereby. "Obstruction" implies something which ought to be removed, and does not refer to a number of ships which are in the dock waiting in turn to be loaded. The case of *Larsen* v. *Sylvester and Co.* (11 Asp. Mar. Law Cas. 78 (1908); 99 L. T. Rep. 94) does not apply. There the House of Lords held that delay caused by a large number of ships waiting in turn to load before the ship in question was an unavoidable "hindrance" which delayed the loading. Hindrance is not the same thing as "obstruction." A ship is "hindered" if it has to wait its turn to load, but it is not "obstructed."

Scrutton, K.C. and *Ashton*, K.C., for the defendants, were not called upon to argue.

VAUGHAN WILLIAMS, L.J.—I think the judgment of Bigham, J. was quite right. When he concluded his judgment he used these words: "The charterers, I think, have brought themselves within both provisions of the strike clause." I think that disposes of this case. I am not prepared to differ from that final conclusion of Bigham, J., but, speaking for myself, I think the stronger of the two points in favour of the charterers is the first limb of the clause. It is not contested that in fact there was a dispute between masters and men occasioning a strike of railway *employés*, nor that there was proved to be a cargo intended for the vessel. Under those circumstances it seems to have been a question of fact which Bigham, J. had got to decide, and it was this: Is it true to say that by reason of the strike, as is mentioned in clause 39 of the charter-party, the cargo proved to be intended for the vessel could not be loaded within the lay days?

It seems to me that upon the facts it is true to say that, by reason of the strike the cargo intended to be loaded on the vessel could not be loaded within the time fixed as lay days. Mr. Hamilton said that this conclusion was wrong in fact. He says that, although it may be true that the strike remotely affected the delivery of the cargo and hindered it in that way, it did not prevent it. I use the word "prevent" as a convenient term for expressing the fact that the cargo could not be loaded. I think that Bigham, J. intended to find that by reason of the strike of the railway *employés* this cargo could not be loaded. Mr. Hamilton says that if Bigham, J. had meant that, he would not have said "interfered with." To my mind, his judgment, and especially his final words, make it perfectly clear that when he used the word "interfered" he intended it to mean the same thing as if he had said "could not be loaded." Under these circumstances the appeal fails, and I agree that it fails on both grounds, although I have only dwelt on the first point because I prefer not to attempt to lay down a rule as to the meaning of "obstruction" in such a clause as this.

MOULTON, L.J.—I am of the same opinion. The events which happened make it clear that the case falls within the first limb of clause 39, so that I need not trouble about the second limb. In my opinion the cargo could not be loaded by reason of a "dispute between masters and men occasioning a strike . . . of . . . railway *employés* or other labour connected with the working, loading, or delivery of the cargo proved to be intended for the steamer." Bigham, J found rightly that that was the fact, and therefore the case comes within the exception. We have had a very able argument from Mr. Hamilton as to the use of the several words mentioned in this clause, but this is a business document drawn up by business men to be used in business, and it is not a case to look for very refined distinctions. We have to look at the question from a business and common-sense point of view, and ask ourselves was it the strike which stopped the loading of the vessel? I have no doubt that any business man would say that it was, and I think that the reasons given by the House of Lords in *Larsen* v. *Sylvester and Co.* (*sup.*) give the views of that tribunal as to the manner of regarding documents of this nature. For these reasons I think the appeal fails.

BUCKLEY, L.J.—I agree. I think the judgment of Bigham, J was quite right.

Appeal dismissed.

Solicitors for the plaintiffs, *Downing, Handcock, Middleton*, and *Lewis*, agents for *Bolam, Middleton*, and *Co.*, Sunderland.

Solicitors for the defendants, *Pritchard* and *Sons*, agents for *Hearfield* and *Lambert*, Hull.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Thursday, June 25, 1908.

(Before SWINFEN EADY, J.)

Re CUNARD STEAMSHIP COMPANY. (*a*)

Company — Debenture — Substituted security— Registration—Companies Act 1900 (63 *&* 64 *Vict. c.* 48), *ss.* 14, 15—*Practice.*

It is not a convenient way of deciding whether a mortgage requires registration under the Companies Act 1900, *s.* 14, *to make a motion under sect.* 15 *of the Companies Act* 1900 *for leave to extend the time for registration. Even if such an order is made on such a motion, it does not decide that registration of the mortgage is in fact necessary. Such a point ought to be decided in an action properly constituted.*

Re Harrogate Estates Limited (88 *L. T. Rep.* 82; (1903) 1 *Ch.* 498) *not followed.*

MOTION.

Application for the extension of time for the registration of a mortgage of a ship as substituted security for debentures. The application was made on the part of the debenture-holders. The company took the view that registration was unnecessary.

Kirby for the applicants.—[SWINFEN EADY, J. If I take the view that registration is unnecessary, nobody is bound. The proper way is to raise such a point by summons.] In *Re Harrogate Estates Limited* (88 L. T. Rep. 82; (1903) 1 Ch. 498) Buckley, J. held it was unnecessary to register certain debentures, and accordingly refused to extend the time for registration. This application is precisely similar. The substituted security requires registration:

Cornbrook Brewery Company Limited v. *Law Debenture Corporation Limited*, 89 L. T. Rep. 680; (1904) 1 Ch. 103.

[SWINFEN EADY, J.—That decision was given in a properly constituted action. See report (88 L. T. Rep. 722; (1903) 2 Ch. 527).]

Maugham for the company.

SWINFEN EADY, J.—I do not see my way on motion to do more than extend the time for registration. It is not convenient to decide whether registration is necessary or not upon such a motion. There would be no difficulty about deciding the point in a properly constituted action.

Maugham.—May some words be introduced showing that the order is without prejudice to the contention of the company that registration is unnecessary? Else it may be said that your Lordship has decided that registration is necessary, or you would not have made the order.

SWINFEN EADY, J.—No such contention would be substantiated if it was ever made. No such limitation of the order is necessary.

Solicitors: *Norton, Rose*, and *Co.*; *Rawle, Johnstone*, and *Co.*, for *Hill, Dickinson*, and *Co.*, Liverpool.

(*a*) Reported by G. B. HAMILTON, Esq., Barrister-at-Law

July 8 *and* 18, 1908.

(Before SWINFEN EADY, J.)

CUNARD STEAMSHIP COMPANY LIMITED *v.* HEPWOOD. (*a*)

Company — Debenture stock — Covering deed — Ancillary mortgage — Substituted security — Registration — Companies Act 1900 (63 *&* 64 *Vict. c.* 48), *s.* 14.

In sect. 14, *sub-sect.* 4, *of the Companies Act* 1900 *the words "debentures containing any charge" are equivalent to debentures which have the benefit of a charge.*

Where debenture stockholders are entitled to the benefit of a covering deed containing a charge under which they are entitled pari passu, *the issue of debenture stock amounts to a series of debentures within the Companies Act* 1900, *s.* 14, *sub-s.* 4.

Where part of the property specifically mortgaged is withdrawn and other property substituted for it in pursuance of a provision to that effect contained in a trust deed to secure debentures, registration under sect. 14, *sub-sect.* 4, *protects the substituted property as fully as the original property, and without any further registration under the Act.*

SPECIAL CASE.

The Companies Act 1900 (63 & 64 Vict. c. 48) provides:

Sect. 14 (1). Every mortgage or charge created by a company after the commencement of this Act and being either (*a*) a mortgage or charge for the purpose of securing any issue of debentures; or (*b*) a mortgage or charge on uncalled capital of the company; or (*c*) a mortgage or charge created or evidenced by an instrument which, if executed by an individual, would require registration as a bill of sale; or (*d*) a floating charge on the undertaking or property of the company shall, so far as any security on the company's property or undertaking is thereby conferred, be void against the liquidator and any creditor of the company unless filed with the registrar for registration in manner required by this Act within twenty-one days after its creation, but without prejudice to any contract or obligation for the repayment of the money thereby secured. . . .

(4.) Provided that where a series of debentures containing any charge to the benefit of which the debenture-holders of that series are entitled *pari passu* is created by the company it shall be sufficient to enter on the register (*a*) the total amount secured by the whole series; and (*b*) the dates of the resolutions creating the series and of the covering deed, if any, by which the security is created or defined; and (*c*) a general description of the property charged; and (*d*) the names of the trustees (if any) for the debenture-holders.

The plaintiff company was registered on the 23rd May 1878 with a capital of 2,000,000*l.*, divided into 100,000 shares of 20*l.* each. On the 3rd Dec. 1903 a resolution was passed for the issue of 2,600,000*l.* debenture stock, and a trust deed was executed to secure such debenture stock.

Clause 7 provided that the company should forthwith mortgage certain existing ships to the trustees, and two new ships of large size and high speed, to be built, as and when they were completed, the mortgage in each case to be a first mortgage effected and registered under the Merchant Shipping Act 1894 (57 & 58 Vict. c. 60).

Clause 8 contained a specific equitable charge on the above ships, clause 9 a floating charge on the rest of the undertaking, clause 15 gave the stockholders the benefit of the security *pari passu*, and clause 19 empowered the trustees, with the company's consent, to withdraw a ship from the specific charge on substituting another of equal value.

The company registered particulars of the charge under sect. 14, sub-sect. 4, of the Companies Act 1900 on the 22nd Dec. 1903, but omitted the date of the resolution creating the stock. The registrar on the same day issued a certificate of registration, a copy of which was indorsed on every debenture stock certificate issued.

On the 16th Dec. 1904 the company executed nine mortgages of nine of the original ships to the trustees in accordance with the Merchant Shipping Act 1894, and on the 17th Dec. 1904 the mortgages were registered at the Custom House, Liverpool. The company on the 17th Feb. 1905 executed a mortgage of the *Brescia*, which had been substituted under clause 19 for the tenth original ship, the *Aurania*. This mortgage was registered at Liverpool on the 18th Feb. 1905.

On the 18th Oct. 1907 the company executed a mortgage of the *Lusitania*, one of the two new ships, and this was registered at Liverpool on the 19th Oct. 1907.

None of the mortgages were registered under the Companies Act 1900, s. 14. Swinfen Eady, J. having declined to determine whether they needed to be so registered upon motion (*a*), this special case raised the point.

Maugham for the company.—These mortgages do not require registration. Sect. 14, sub-sect. 4, of the Companies Act applies to debenture stock as well as debentures:

Re Harrogate Estates Limited, 88 L. T. Rep. 82; (1903) 1 Ch. 498.

There is a specific charge upon the *Lusitania*, which is one of the two ships. The certificate of the registrar is conclusive, and, as it has been granted, the court will refuse to go into the question whether the requirements of sect. 14 have been complied with:

Re Yolland, Husson, and Birkett Limited, (1908) 1 Ch. 152.

Kirby for the trustees.—If this is a registration under sect. 14, sub-sect. 4, the Act has not been complied with. Sub-sect. 3 shows that "file" means registration. There is an equitable charge under the trust deed. The only exemption given is to a "series of debentures." But here we have debenture stock. "A series of debentures" does not mean a certain amount of debenture stock. You cannot read "debentures" as meaning debenture stock certificates. Under sub-sect. 1, whatever instrument is not registered is void. There is no benefit from any legal charge until registration. The stock certificates do not contain any admission of indebtedness or import any obligation or covenant to pay.

Maugham replied.

Cur. adv. vult.

July 18.—SWINFEN EADY, J.—The first question which arises upon this special case is whether the debenture stock secured by the trust deed of

(*a*) Reported by G. B. HAMILTON, Esq., Barrister-at-Law.

(*a*) See *Re Cunard Steamship Company* (*ante*).

the 3rd Dec. 1903 is within sect. 14, sub-sect. 4, of the Companies Act 1900. This sub-section relates to "a series of debentures containing any charge to the benefit of which the debenture-holders of that series are entitled *pari passu*." It was contended that in the present case there was not any creation of a series of debentures; that the holder of debenture stock was only entitled under the trust deed to a certificate under the seal of the company stating the amount of the stock held by him and referring to the trust deed; and that although by sect. 30 of the Act the expression "debenture" includes debenture stock, unless the context otherwise requires, yet the expression does not include a debenture stock certificate which does not contain any admission of indebtedness or import any obligation or covenant to pay. Previous to the decision of Buckley, J. in *Re Harrogate Estates Limited* (*ubi sup.*) it might have been contended that sub-sect. 4 was limited to a series of debentures containing a charge, and each of which debentures would but for that subsection have required to have been registered under sect. 14, sub-sect. 1, and that it did not apply to debentures which did not contain any charge, and therefore did not require registration, although entitled to the benefit of a charge contained in some other duly registered instrument; and moreover, that if the debenture did not contain a charge, but were only secured by a charge in some other instrument, that instrument could readily be registered like any other mortgage or charge under sect. 14, sub-sect. 1, and the question of the trouble and expense of separately registering each of a number of documents issued in a series would not arise. In the case, however, to which I have just referred, Buckley, J. considered sect. 14 of the Act, and, with regard to sub-sect. 6, expressed himself as follows (1903) 1 Ch. 503): "In this sub-section, the words 'debentures containing any charge' are, I think, equivalent to debentures which have the benefit of a charge. The case in which the charge is contained in the covering deed only and not repeated or extended by the debentures themselves is, I think, within the sub-section." And this construction of the Act is adopted and given effect to by sect. 10 of the Companies Act 1907, which has now replaced sect. 14 of the Companies Act 1900.

I must therefore treat it as settled that debentures which do not themselves contain any charge, but which are entitled to the benefit of a charge in some other instrument, are within sub-sect. 4. Again, the debenture stockholders in the present case are entitled *pari passu* to the benefit of the security contained in the trust deed. Clause 15 of the deed provides for the trustees applying the moneys received by them under the trust for conversion. "First, in paying to the stockholders *pari passu* in proportion to the amount due to them respectively and without any preference or priority all arrears of interest remaining unpaid on the stock held by them respectively; and, secondly, in paying to the stockholders *pari passu* in proportion to the stock held by them respectively and without any preference or priority on account of priority of issue or otherwise howsoever all principal moneys due in respect of the stock held by them respectively, and that whether the same principal moneys shall or shall not then be payable." So that, in the present case, there is the creation and issue of debenture stock, the holders of which are entitled *pari passu* to the benefit of the charge created by the company. Under these circumstances it would, in my opinion, unduly narrow the construction of the statute if I were to accede to the argument of the defendants. By sect. 30 the expression "debenture" includes "debenture stock" unless the context otherwise requires. What context is there in sub-sect. 4 which excludes debenture stock? Debenture stockholders may be entitled to the benefit of a covering deed containing a charge, in the same manner as holders of debentures not containing any charge may be so entitled; such debenture stockholders and debenture-holders may also equally be entitled *pari passu*; when once the notion is got rid of that to bring a case within sub-sect. 4 the debenture must itself contain a charge, I see no reason for holding that sub-sect. 4 has any context which requires the word "debentures" to be read as excluding debenture stock. The issue of the debenture stock in question amounts, in my opinion, to "a series of debentures" within the meaning of sect. 14, sub-sect. 4, of the Act. This construction is assisted by sub-sect. 6, which requires the company to indorse a copy of the registrar's certificate of registration on every "debenture" or "certificate of debenture stock" issued by the company, and the payment of which is secured by the mortgage or charge so registered. The question remains whether the registration is insufficient because the date of the resolution creating the series of debentures was by inadvertence not inserted in the third column of the particulars. No doubt the entry on the register under sub-sect. 4 ought to specify the date of the resolution creating the series. That is one of the requirements of the enactment. But, notwithstanding the omission to insert the date, the registrar issued his certificate that the statutory particulars had been duly registered. The certificate under sub-sect. 6 of sect. 14 is conclusive: (*Re Yolland, Husson, and Birkett Limited, ubi sup.*). It follows from what I have said that the registration already made is sufficient to protect the ships named in the trust deed and also the two ships of large size and high speed referred to in the trust deed, one of which is now known as the *Lusitania*, and that the ship mortgages of these ships do not also require to be registered under the Companies Act. There remains the case of the *Brescia*. The trust deed contains a clause (19) entitling the company, with the permission of the trustees, to withdraw any of the specifically mortgaged premises, upon substituting other property of a value equal to or greater than the value of the property proposed to be withdrawn, and under this power the company, with the permission of the trustees, have withdrawn the *Aurania* and substituted the *Brescia*, and a ship mortgage of the *Brescia* has been duly executed and registered at the Custom House. This mortgage is required to be registered by sect. 14, sub sect. 1, of the Companies Act 1900 unless the registration already made under sub-sect. 4 is sufficient to protect it. The question whether registration under that sub-section is sufficient to protect a substituted security was raised before the Court of Appeal in *Cornbrook Brewery Company Limited* v. *Law*

Debenture Corporation (89 L. T. Rep. 680; (1904) 1 Ch. 103), but was not dealt with by the court, as there had not been any registration in that case, the covering deed having been executed before the passing of the Companies Act 1900, Stirling, L.J. saying: "Sub-sect. 4 of sect. 14 of the Companies Act 1900 was referred to on behalf of the appellants; but, inasmuch as the requirements of that clause have not been complied with, it does not seem to assist them." Now, sect. 14 (4) requires only (*c*) a "general description of the property charged" to be entered on the register. A particular description, sufficient to identify each item or particular of property charged, is not required by the statute. Where part of the property specifically mortgaged is withdrawn, and other property substituted for it, in pursuance of a provision to that effect contained in the trust deed, I am of opinion that registration under sect. 14, sub-sect. 4, protects the substituted property as fully as the original property, and without any further registration under the Act. This seems to me to follow necessarily from *Re Yolland, Husson, and Birkett Limited* (*ubi sup.*). The Master of the Rolls there explained the meaning and operation of sect. 14, and added: "I cannot bring myself to doubt that it would be almost shocking if we held in this case that the certificate of the registrar, which is actually indorsed on each of these debentures, did not justify the debenture-holders in saying that they had as against the unsecured creditors as represented by the liquidator a perfectly good charge upon the assets of the company." Unless the registration under sect. 14 (4) protects the substituted security, a burden would be placed upon the debenture-holders (who have already advanced their money and hold certificates from the registrar as to registration) to see that the mortgages or charges of the substituted security are duly registered, under the penalty of losing their security in default of proper registration. The observations of the Master of the Rolls (1908) 1 Ch., p. 158) as to the difficulty, if not impossibility, of debenture-holders proving that all the requirements of sect. 14 have been complied with, apply as regards substituted charges with even greater force than to the original charges. The debenture-holders have not any notice of the substitution; it takes place without their assent or knowledge by arrangement between the company and the debenture trustees; so that if in the present case all the ships were changed, as in course of time they well might be, the debenture-holders might lose the whole of their security for want of the registration of deeds executed after their title to their debentures was obtained, and notwithstanding the certificate of registration. In my opinion this proposition is quite untenable. I therefore answer the questions in the special case by saying that none of the ship mortgages require registration under the Companies Act 1900.

Solicitors: *Rawle, Johnstone*, and *Co.*, for *Hill, Dickinson*, and *Co.*, Liverpool; *Norton, Rose*, and *Co.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

DIVISIONAL COURT.

May 6 and June 2, 1908.

(Before BUCKNILL and BARGRAVE DEANE, JJ.)

THE SUEVIC; CORNWALL COUNTY COUNCIL *v.* OCEANIC STEAM NAVIGATION COMPANY LIMITED. (*a*)

Stranded vessel—Frozen carcases washed ashore—Burial by Receiver of Wreck—Payment of expenses by local authority — Recovery of expenses from owner of vessel — Diseases of Animals Act 1894 (57 *&* 58 *Vict. c.* 57), *ss.* 46, 59.

A vessel carrying a cargo of frozen meat ran ashore. Some of the carcases were washed ashore and by direction of the Board of Trade were buried by the Receiver of Wreck. The carcases were free from disease and frozen when shipped.

Held (affirming the decision of the County Court judge), that the expenses of burial were recoverable from the owners of the vessel under sect. 46 *of the Diseases of Animals Act* 1894.

APPEAL from the decision of His Honour Judge Granger, sitting in Admiralty in the County Court of Cornwall held at Truro, by which he held the owners of the steamship *Suevic* liable for expenses incurred by the county council of Cornwall under sect. 46 of the Diseases of Animals Act 1894.

The plaintiffs were the county council of Cornwall; the defendants were the Oceanic Steam Navigation Company Limited.

The summons in the County Court was issued on the 23rd Nov. 1907, and by it the plaintiffs claimed (1) the sum of 52*l.* 8*s.* 9*d.* expenses incurred by the said council under sect. 46 of the Diseases of Animals Act 1894 on account of the burial or destruction in the month of May 1907 of a number of carcases of sheep thrown or washed from the defendant company's steamship *Suevic* at or near the Lizard Point; (2) an order for payment of the said sum and costs.

The facts which gave rise to the claim were admitted, and were as follows: The *Suevic* was wrecked on or about the 17th March 1907 at Polbream Cove, near the Lizard. The cargo of the *Suevic* consisted in part of frozen carcases of sheep; such carcases were dead and frozen when shipped and were free from disease. A large number of the carcases were thrown or washed from the *Suevic* on to the shore at or near Polbream Cove, near the Lizard, where the said carcases were found or recovered shortly after the *Suevic* was wrecked. The carcases, or the greater part of them, having been recovered by or under the direction of the Receiver of Wreck at Falmouth, were in the month of May 1907, at or near Polbream Cove, buried or destroyed under the direction of the said Receiver of Wreck, acting with the authority of the Board of Trade. The Receiver of Wreck did demand from and was paid by the Cornwall County Council as the local authority the sum of 52*l.* 8*s.* 9*d.*, being the expenses incurred in connection with the burial or destruction of such carcases.

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

The defendants delivered a defence on the 13th Jan. 1908 by which they admitted they were the owners of the *Suevic*; they denied the plaintiffs were under any liability to pay the sum of 52*l.* 8*s.* 9*d.*, or any part of it, to the Receiver of Wreck; they did not admit that the cargo was rightly described on the summons, and denied that sect. 46 of the Diseases of Animals Act 1894 had any application to mutton free from disease and frozen when shipped; and, further, denied that the plaintiffs were entitled to recover the sum of 52*l.* 8*s.* 9*d.* or any sum from the defendants.

The plaintiffs on the 13th Jan. 1908 delivered a reply joining issue.

The action was tried at Truro on the 18th Jan. 1908.

W. T. Lawrence for the plaintiffs.

J. B. Aspinall for the defendants.

The following are the sections of the Diseases of Animals Act 1894 under which the claim was made:

46 (1). Where a carcase washed ashore is buried or destroyed under the direction of a Receiver of Wreck with authority from the Board of Trade, the expenses thereof shall be expenses of the local authority, and shall be paid by the local authority to the receiver on demand, and in default of payment shall be recoverable with costs by the receiver from the local authority.

(2) Where a local authority has incurred any expenses under this section on account of the burial or destruction of the carcase of any animal which, or the carcase of which, was thrown or washed from any vessel, the owner of the vessel shall be liable to repay such expenses to the local authority; and the local authority may recover such expenses with costs in the same manner as salvage is recoverable.

59 (1). . . . The expression "carcase" means the carcase of an animal, and includes part of a carcase, and the meat, bones, hide, skin, hoofs, horns, offal, or other part of an animal, separately or otherwise, or any portion thereof.

His Honour Judge Granger gave judgment for the plaintiffs in the following terms:—

HIS HONOUR.—In this case, which has been very well fought, I have had the greatest assistance from learned counsel. It is really a short point, and, in saying that, I do not at all wish to say for one moment it has taken longer than the importance of the case deserves. This case is important because it is the first case that has been taken under this section, and it has been pointed out it is important both to the plaintiffs as the local authority and also most important to the shipowners because of the burdens which may be cast on them in cases of wrecks happening with frozen meat in the future. I need scarcely state that neither of those considerations have any effect upon me, and all I can do is to interpret this section of the Act of Parliament, and I do so with greater ease because I am quite sure whichever way I decide this case will be taken to a higher court, because it is an important one. Counsel or the defendants, in his extremely able argument, has taken me through the Acts of Parliament, beginning at the Act of 1869, and he has shown, by reference to many sections, that the purview of the whole of those Acts undoubtedly is for the purpose of preventing and arresting diseases in animals. There cannot be the smallest doubt about that, and it is also admitted that it was in 1875 that the first trade in frozen carcases began to take place—a trade which has increased from very small beginnings indeed to the enormous amount which takes place now between America, Australia, and this country. The first of these sections under which this case is brought is first found in the Act of 1878, and counsel for the plaintiffs has very properly said it is curious that that section should be put in shortly after the trade in frozen meat has commenced. And then I find that sub-sect. 2 was included in the Act of 1886, sect. 11, and that, when the Acts were finally codified by the Act of 1894, both those sections are put under this section 46, sub-sects. 1 and 2. I think there cannot be the slightest doubt I must find as a fact these things were carcases. I cannot see, taking the English language, how I can come to any other conclusion. When you say the vessel has come with so many thousand carcases of frozen meat, you do not say anything else. It is a common form. In the shipping lists you see "So and so, a ship has arrived with 50,000 or 60,000 carcases of sheep." The question I have really to decide in this case is: Does frozen meat put on board and free from disease come within the definition of "carcases" under sect. 46, taking into consideration the interpretation? Now, counsel for the defendants has argued it does not, and he quoted *Nissler* v. *Corporation of Hull* (42 L. T. Rep. 894; 5 Q. B. Div. 325) for the purposes of this case. This section, he says, is put in to meet the case of where a local authority, under power given, orders the carcases of cattle to be destroyed when they reach the port, and taken out to sea outside the three miles limit mentioned in the Act, and in case the carcases come ashore then the Receiver of Wreck is entitled under this section to take steps to get the money paid from the local authority, and the local authority can then recover from the persons who are responsible. But, as I pointed out in the course of the argument, it seems to my mind that, if that section is to be limited in that way, the Receiver of Wreck certainly may recover from the local authority, but I do not see how the local authority can ear-mark carcases in order to recover from the shipowner who brought the carcases over. It is perfectly clear, as counsel for the plaintiffs has contended, that the preamble of an Act does not altogether take away from the effect of the absolute section. You can find sections which go beyond the Act, and in this particular Act of 1894 it is said, "for certain purposes and for other purposes." Taking into consideration the fact of the large increase of this frozen meat trade, I have come to the conclusion that the Legislature must have had it in their minds when they enacted this section. It seems to me, upon the whole of the authorities, it would have such an effect on that section as to do away with it altogether. I quite agree it is by no means a case free from doubt, but from the whole of the case I have come to the conclusion that the plaintiffs are entitled to recover this amount from the defendants, and therefore I give judgment for the plaintiffs for 52*l.* 8*s.* 9*d.*, with costs, and I stay execution for a fortnight.

On the 27th Jan. 1908 the defendants delivered a notice of appeal praying that the judgment might be reversed and set aside.

The appeal was argued before the Admiralty Divisional Court on the 6th May 1908.

Bailhache, K.C. and *J. B. Aspinall* for the appellants, defendants in the court below.—The question here is whether the owners of the *Suevic* are under any liability to defray the expenses of burying a number of carcases of frozen meat which were washed ashore from the wreck of that vessel. It has been assumed throughout that the Receiver of Wreck was acting under the authority of the Board of Trade. It is said that the liability of the owners of the *Suevic* is created by the Diseases of Animals Act 1894 (57 & 58 Vict. c. 57), s. 46, coupled with sect. 59, which defines the

word "carcase." It is submitted that this section was never intended to apply and has no application to the facts of this case. It is clear that the Act does not in terms apply to the case of a wrecked vessel, and, if it is made to apply, it imposes a liability on the owners of the vessel altogether unknown to the common law. The public and the owners suffer by the washing ashore in the same way, except that the owners also sustain a private loss as well:

The Crystal, 71 L. T. Rep. 346; 7 Asp. Mar. Law Cas. 513; (1894) A. C. 508, at p. 528;
Brown v. *Mallett*, 5 C. B. 599.

The Diseases of Animals Act 1894 was passed for the purpose of preventing disease by stopping the importation of diseased animals; it does not deal with carcases which were carcases when shipped, but with animals which were alive when shipped and which became carcases afterwards. The only exception to this is sect. 32, sub-sect. 1; sect. 46 is only intended to refer to dead bodies thrown overboard when the ship is near the coast and which get washed ashore by the tide:

Nissler v. *Corporation of Hull*, 42 L. T. Rep. 894 (1880); 5 Q. B. Div. 325.

A reference to the index at p. 683 of the Law Reports statutes 1894 shows how the sections are grouped. The Act deals throughout with disease and infected areas; there are no sections dealing with public health, and it is noteworthy that there is no reference to a wreck in the Act, only to the Receiver of Wreck. To arrive at the real meaning of a statute it is always necessary to get an exact conception of the aim, scope, and object of the whole Act; every clause of a statute should be construed with reference to the context and the other clauses of the Act, so as to make as far as possible a consistent enactment of the whole statute or series of statutes relating to the subject-matter:

Maxwell on the Interpretation of Statutes, 4th edit., p. 30.

To support this judgment, sect. 46 of the Act must be read apart from the whole context of the Act. The first part of the section is taken from the Diseases of Animals Act 1878 (41 & 42 Vict. c. 74) and the latter part from the Diseases of Animals Act 1886 (49 & 50 Vict. c. 32), so the Act of 1894 contains no new law. The Receiver of Wreck has no powers under this Act; he gets his orders from the Board of Trade, and is only empowered to recover his expenses from the local authority.

Foote, K.C. and *W. T. Lawrance* for the respondents, plaintiffs in the court below.—The Diseases of Animals Act 1894 did more than consolidate the existing Acts relating to such matters; a reference to the preamble shows it was passed for that and other purposes. The preamble of an Act of Parliament may be looked at if the meaning of the Act is not clear; but if the Act is clear, the preamble cannot be used to cut down the Act:

Hughes v. *Chester Railway Company*, 7 L. T. Rep. 197;
Hemmant v. *Foulger*, 8 Best & Smith, 426;
Copland v. *Davies*, 5 L. Rep. H. L. 358;
Bentley v. *Rotherham and Kimberworth Local Board*, 4 Ch. Div. 588.

The ratepayers of the county of Cornwall do not want to pay for the burial of the *Suevic's* derelict carcases. This Act applies to carcases other than diseased carcases; when it deals with disease alone it says so (sect. 52, sub-sect. 7). If the contention of the appellants is correct, the Receiver of Wreck, when carcases are washed ashore must determine whether they are diseased before he can bury them. Further, he is to determine whether the carcases were shipped alive or dead. The meaning of the word "carcase" is every carcase; the section is of general application.

Bailhache, K.C. in reply.—A reference to the sections, which are conveniently grouped in the index, shows the object of the Act was to deal with disease in cattle. The *Suevic* is not now a vessel; a third of the vessel which carried these carcases remains on the rocks. The carcases were washed out of a wreck, and, if the respondents are to succeed, the court will have to say that the words "carcases washed from a vessel" cover carcases washed out of a wreck.

The court reserved judgment.

The judgment of the court was delivered by Bucknill, J. on the 2nd June 1908.

BUCKNILL, J., after stating the facts, continued:—The question is whether this claim comes within sect. 46 of the Diseases of Animals Act 1894, which is in these terms. It is in two parts. [His Lordship read them.] It will be seen that the first part of this section is in the same words as sect. 53 of the Act of 1878, and the second part of the section is in the same words as sect. 11 of the Act of 1886, which was an amendment to the Act of 1878, and in that connection an amendment of sect. 53 of it. Historically, the first important statute relating to the contagious and infectious diseases of animals or other cattle was an Act of 1869 (32 & 33 Vict. c. 70). That Act deals for the first time with the burials of diseased animals by local authorities (sect. 60), and it also required railway companies to provide water and food for any animals carried by them (see sect. 64). Therefore there was something else introduced into that Act than that which merely referred to the prevention of contagious diseases of animals. Then came the Act of 1878 (41 & 42 Vict. c. 74), which is entitled "An Act for the making better provision respecting contagious and infectious diseases of cattle and other animals, and for other purposes." I have been able to get the original Bill which was introduced into the Legislature, and the heading of this Bill is in these words: "An Act for making better provision respecting contagious and infectious diseases of cattle, and other animals." So that it was when the Bill was passing through Parliament that the words "and for other purposes" were added, and very properly so, if one may say so, seeing that the Act of 1878 did deal with other matters, and therefore was a Bill for other purposes than merely for the prevention of contagious diseases in animals. For example, sect. 32. The Privy Council may make orders for preventing or checking of disease, and other purposes. Then sect. 33 provides for the provision of water and food at railway stations, and so on. And then sect. 34 gives power for the Privy Council to make orders relative to dairies, cowsheds, and milkshops, and again sect. 51 is almost in the same connection.

Then we come to sect. 53, which deals, as I have already said—and I have read the first part of the section in question—with the burial of a carcase washed ashore. It is to be noted the word is "carcase," not "diseased carcase," but merely "carcase." "Carcase" is defined by sect. 5, subsect. 6, as meaning "the carcase of any animal, and includes part of a carcase and the meat, bones, hide, skin, hoofs, horns, offal, or other part of an animal, separately or otherwise, or any portion thereof." Now, one asks oneself this question at once: How could it be possible for the Receiver of Wreck to say whether a carcase to be washed ashore was diseased or not, or whether it was affected by some contagion? Therefore it may well be that in this section the word "carcase" is used in the manner in which it is without saying "diseased carcase" or "suspected carcase," or using language of that sort. Then comes the Act of 1886, and by sect. 11, as I have pointed out, powers were given which added to the powers given by sect. 53 in the Act of 1878, and lastly the consolidating and amending Act of 1894.

Now, then, what strikes one is this, it was said by the learned County Court judge, and urged apparently strenuously before him, that the Legislature had in its mind the increased traffic in frozen meat, and the importation of live animals. In our opinion, it may be, or it may not be, that that was so, but it is not for us to judge whether it was so or whether it was not so. The Legislature may have had no such exact case as this in its contemplation, but whether it had or whether it had not, if the words of the section are so clear as to create no doubt in the mind of a person applying the ordinary rules of construction of the English language, it matters not whether the Legislature contemplated or whether it did not contemplate such an exact case as this. At all events, it gives no expression, and there is nothing to be observed in the language of the Act as to whether it did or did not. Now, with regard to the rules of construction, just let me draw attention to one or two cases. In *Grey and others* v. *Pearson* (6 H. L. C. 61, at p. 106) Lord Wensleydale laid down a rule which has been followed, as he says he was following it, for many years. What he said was this: "I have been long and deeply impressed with the wisdom of the rule—now, I believe, universally adopted, at least in the courts of law in Westminster Hall—that in construing wills, and, indeed, statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity or some repugnance, or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid this absurdity and inconsistency, but no further." And in the case of *Ex parte Board of Trade; Re Parker* (52 L. T. Rep. 670; 15 Q. B. Div. 196) the Master of the Rolls, then (I think) Sir Balliol Brett, said at p. 202: "My judgment will rest upon a much used and ordinary rule of construction, which is this, that you are to take the words of an Act of Parliament in their plain and ordinary sense unless there is something in the context which obliges you to take them in some larger or more limited sense." Now, we find here that the language is plain, and that the meaning of the words used is plain. Counsel for the appellants first of all said in argument that if the County Court judge was right in the construction which he put on this section, then there has been imposed a greater obligation than that which the common law imposed on the owners of ships, or vessels, or wrecks, over which they still exercised control. We know perfectly well—I suppose we may take judicial cognisance of the fact—that in this case, after the *Suevic* was stranded so that she could not be moved, she was cut in half, and one half was left on the main, and the other half was taken away and is now a ship. Then counsel for the appellants also contended that that particular section applied only to carcases of animals shipped alive, and not to dead frozen animals when shipped. The court cannot accept that argument. It seems to us that to do so would be putting too confined a meaning on the word "carcase." Then it was urged that such a case as this refers to a vessel, and not to a wreck. But it must be noted that in the statement of defence the defendants, when pleading their defence, called themselves the owners of the steamship *Suevic* at that time, and, therefore, we think that argument cannot prevail. Finally, we are of opinion that the learned County Court judge was right in the judgment which he pronounced in this case. We think that the language of the section is clear, and raises no doubt on the matter, and therefore the judgment must be affirmed, and with costs. Whether this was a vessel, or whether it was a wreck, is a question of fact. We are not here to decide questions of fact; we are simply a Court of Appeal. That question of fact was not raised apparently before the court below as to whether it was a vessel or a wreck. If it was intended to raise it it should have been raised there, and we are not going to decide that question, as a matter of fact.

Leave to appeal was granted.

Solicitors for the appellants, *Rawle, Johnstone,* and *Co.*, agents for *Hill, Dickinson,* and *Co.*

Solicitors for the respondents, *C. L. Cowlard,* Bodmin.

June 3, 4, *and* 20, 1908.

(Before Sir GORELL BARNES, P. and Elder Brethren.)

THE ST. PAUL AND THE GLADIATOR. (*a*)

Collision—Vessel approaching falling snow—Sound signals for snow—Duty to sound—Speed—Collision Regulations 1897—*Arts.* 15 *and* 16.

Neither arts. 15 *or* 16 *of the Collision Regulations apply to a steamship approaching falling snow, but good seamanship requires her, in such circumstances, to go at such a rate of speed as to enable her to enter the snow at a moderate rate of speed, and to sound fog signals before entering the snow for the purpose of warning vessels within it.*

Query, where a vessel in charge of a compulsory pilot is approaching falling snow, ought the master to see that fog signals are sounded?

ACTIONS OF DAMAGE.

The plaintiffs in the first action were the Commissioners for executing the Office of Lord High Admiral of the United Kingdom and the officers

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

and crew of H.M.S. *Gladiator* (suing for their lost effects) and the defendants were the owners of the steamship *St. Paul*.

The plaintiffs in the second action were the International Mercantile Marine Company of New Jersey the owners of the steamship *St. Paul* and the defendants were Walter Lumsden, captain of H.M.S. *Gladiator*, and Sydney Beckwith Mainguy, lieutenant and navigating officer of H.M.S. *Gladiator*.

The actions were consolidated and tried together.

The case made by the plaintiffs in the first action and the defendants in the second action was that shortly before 2.28 p.m. on the 25th April 1908 H.M.S. *Gladiator*, a second-class protected cruiser of 5700 tons displacement, 320ft. in length and 57ft. beam, fitted with vertical triple-expansion engines of 10,000 indicated horse-power and twin screws, and manned by a crew of about 250 hands, all told, under the command of Captain Walter Lumsden, R.N., was in the Solent Channel, between Hurst Castle and Victoria Fort on a voyage from Portland to Spithead. The wind was north-north-westerly, and it was snowing heavily. The tide was flood setting to the eastward of the force of about two or two and a half knots. H.M.S. *Gladiator* was heading N. 77° E. magnetic, making about nine knots through the water, and was keeping to the southern side of the fairway. She was duly sounding on her siren at proper intervals the regulation signals for steam vessel under way in falling snow, and a good look-out was being kept on board of her.

In these circumstances those on board H.M.S. *Gladiator* saw at a distance of about half a mile, and bearing ahead and a little on the port bow, a vessel which proved to be the *St. Paul*. As she came into sight the *St. Paul* was heard to sound two short blasts, and she was seen to be acting under a starboard helm as if intending to pass starboard side to starboard side. The helm of H.M.S. *Gladiator* was accordingly at once starboarded thirty degrees, but the *St. Paul* came on at great speed, heading for H.M.S. *Gladiator*, and closing in as if under port helm, causing risk of collision, and, as the sole chance of escaping collision, the helm of H.M.S. *Gladiator* was put hard-a-port to throw her quarter clear. The *St. Paul*, however, with her stem struck the starboard side of H.M.S. *Gladiator* about amidships, doing her great damage, and causing her to sink shortly afterwards.

Those on H.M.S. *Gladiator* charged those on the *St. Paul* with not keeping a good look-out; with failing to sound whistle signals for falling snow; with proceeding at an improper and excessive speed; with failing to pass port to port; with improperly starboarding and attempting to pass starboard to starboard; with failing to keep to the starboard hand side of the channel; with failing to slacken her speed or to stop and reverse her engines; and alternatively with failing to keep out of the way of H.M.S. *Gladiator* and improperly attempting to cross ahead of her.

The case made by the owners of the *St. Paul*, the defendants in the first action and the plaintiffs in the second action, was that shortly before 2.29 p.m. the *St. Paul*, a twin-screw steamship of 11,629 tons gross and 5874 tons net register, 554ft. in length, was in the Solent on a voyage from Southampton to New York, *viâ* Cherbourg, with 168 passengers, mails, and a general cargo manned by a crew of about 362 hands. The weather was overcast, with passing snow squalls, the wind was N.N.W., a strong breeze to a moderate gale, with squalls, and the tide was flood of the force of from two to three knots. The *St. Paul*, in charge of a duly licensed Trinity House pilot, was proceeding down the Solent on her starboard side of the Channel on a course of W. ½ S. magnetic, and, with engines working at half speed, was making from nine to ten knots. A good look-out was being kept on board of her.

In these circumstances a cruiser, which proved to be the *Gladiator*, was seen from a quarter to half a mile distant and bearing about half a point on the port bow. Both engines of the *St. Paul* were at once stopped. Almost immediately afterwards, when the *Gladiator* had sounded a short blast and was showing her port side, the helm of the *St. Paul* was put hard-a-port, one short blast was blown, and the starboard engine was put full speed astern. The vessels were in a position to pass safely port side to port side, but the *Gladiator* starboarded, and although the port engine also of the *St. Paul* was put full speed astern, when the *Gladiator* was seen to be acting under a starboard helm, the *Gladiator* came on at high speed across the bows of the *St. Paul*, and with her starboard side a little forward of amidships struck the stem of the *St. Paul*, doing considerable damage.

Those on the *St. Paul* charged those on the *Gladiator* with not keeping a good look-out; with improperly failing to pass port to port; with improperly starboarding; with not navigating in accordance with the port-helm whistle signals exchanged between the vessels; with not indicating by sound signals that they were directing their course to port; with neglecting to sound fog signals; with navigating at an improper speed; with not easing, stopping, or reversing their engines; and with not keeping to the starboard hand side of the channel.

Alternatively the owners of the *St. Paul* alleged in the first place that if the navigation of the *St. Paul* was negligent, which they denied, those on the *Gladiator* could nevertheless and ought by the exercise of reasonable skill and care to have avoided the collision, or were guilty of negligence which caused or contributed to it. In the further alternative, the owners of the *St. Paul* alleged that the *St. Paul* at the time of the collision was in charge, by compulsion of law, of a duly licensed Trinity House pilot, and that if the collision was caused or contributed to by the negligent navigation of the *St. Paul*, which was denied, the negligence was solely that of the pilot.

The charges of negligence were based on the following Collision Regulation 1897:

Art. 15. All signals prescribed by this article for vessels under way shall be given: 1. By "steam vessels" on the whistle or siren. . . . The words "prolonged blast" used in this article shall mean a blast of from four to six seconds' duration. . . . 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.: (*a*) A steam vessel having way upon her shall sound, at intervals of not more than two minutes, a prolonged blast.

Art. 16. Every vessel shall, in a fog, mist, falling snow, or heavy rainstorms, go at a moderate speed, having

careful regard to the existing circumstances and conditions. A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel, the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over.

Art. 18. When two steam vessels are meeting end on, or nearly end on, so as to involve risk of collision, each shall alter her course to starboard, so that each may pass on the port side of the other.

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. 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 lies on the starboard side of such vessel.

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.

Art. 28. 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.: One short blast to mean, "I am directing my course to starboard." Two short blasts to mean, "I am directing my course to port."

Art. 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.

The *Attorney-General* (Sir W. S. Robson, K.C.) *Batten*, K.C., *W. Wills*, and *J. G. Pease* appeared for H.M.S. *Gladiator*.

Aspinall, K.C., *Laing*, K.C., and *Dunlop* appeared for the owners of the *St. Paul*.

The actions were heard on the 3rd and 4th June, and judgment was reserved.

The following cases were referred to during the course of the case:—As to the respective duties of master and pilot in thick weather:

The Oakfield, 54 L. T. Rep. 578; 5 Asp. Mar. Law Cas. 575; 11 P. Div. 34.

As to the assistance which a pilot is entitled to receive from a master:

The Tactician, 97 L. T. Rep. 621; 10 Asp. Mar. Law Cas. 534; (1907) P. 244.

As to whether pilotage was compulsory:

The Assaye, 94 L. T. Rep. 102; 10 Asp. Mar. Law Cas. 183; (1905) P. 289.

As to the duty to stop on hearing whistle signal when approaching fog:

The Bernard Hall, 86 L. T. Rep. 658; 9 Asp. Mar. Law Cas. 300;

The Oravia, 96 L. T. Rep. 869; 10 Asp. Mar. Law Cas. 434, 525.

In the course of the argument the President questioned the Attorney-General's contention that when a vessel in charge of a compulsory pilot is approaching falling snow it is the duty of the master to see that fog signals are sounded.

Further evidence was given on the 19th June as to the whistle signals given by the *St. Paul*, and judgment was delivered on the 20th June.

Sir GORELL BARNES, P.—This is a case which was heard on the 3rd and 4th of this month, and judgment was suspended at the request of the parties—and that has enabled the further evidence to be taken which was taken yesterday—because the court-martial was pending, and it was desired that this case, so far as this court is concerned, should stand over until after the court-martial had been disposed of. I understand from communication by counsel, that it has been arranged that I should give my judgment, at present, in the case of "The Commissioners for executing the Office of Lord High Admiral of the United Kingdom and the Officers and Crew of H.M.S. *Gladiator* (suing for their lost effects) *v.* The Owners of the Steamship *St. Paul*"; that is to say, that my judgment should be given as between ship and ship for the present, and that if it becomes necessary at any time to give a judgment in the other action, which is by the owners of the *St. Paul* against Walter Lumsden, captain of H.M.S. *Gladiator*, and Sydney Beckwith Mainguy, navigating officer of the *Gladiator*, that it should be dealt with when the time comes. The reason for that, as I understand, is that it enables me to deal with this action of the *Gladiator* against the *St. Paul* as between ship and ship, and leave out of consideration for the moment any question of the individual action against persons on board the *Gladiator*. So I will seek to deal with the case as a case in the ordinary way between ship and ship. The two actions, however, were tried together. The case arises out of a very disastrous collision between H.M.S. *Gladiator* and the American liner *St. Paul*, which took place on the 25th April last, a minute or two before 2.30 p.m., in the Solent, off Fort Victoria, speaking generally. The result was that the *Gladiator*, while attempts were being made to get her on the beach, sank on the beach at a spot shown on the chart, where the wreck is marked, and one is very sorry to know of the great loss of life which occurred. The *St. Paul*, on the other hand, was damaged about the bows in the manner which is shown on the photographs put in. Now this collision, as I have said, was a very disastrous one, and I am using a term or expression which I think fell from the Attorney-General when addressing me in this case. He said, "There must have been a bad mistake somewhere." I have to endeavour to solve the problem of what the mistake was and to deal with all the different points made in this case. There is not much conflict on the evidence with regard to the general features of the case, but there are certain contested points which require very careful consideration, and upon which very much depends in the case. As I have said before, I am leaving out of consideration at present any question attaching to individuals. The *Gladiator* was a second-class protected cruiser of 5750 tons displacement, 320ft. in length and 57ft. beam, fitted with vertical triple-expansion engines of 10,000 indicated horse-power and twin screws, and manned

by a crew of about 250 hands all told, under the command of Captain Walter Lumsden, R.N., and was on a voyage from Portland to Spithead. The navigating officer at the time was Lieutenant Mainguy. The *St. Paul*, a twin-screw steamship of 11,629 tons gross and 5874 tons net register, and 554ft. in length, belonging to the International Mercantile Marine Company, of New Jersey, was on a voyage from Southampton to New York, *viâ* Cherbourg, with 168 passengers, mails, and a general cargo, and manned by a crew of about 362 hands. She was in charge of a duly licensed Trinity House pilot. There are two elements outside the action of the two vessels which I propose to consider first. The tide, I may say, was flood, setting up the Solent, force two to two and a-half knots, and the wind was about N.N.W., of force 6 or 7, with squalls, and at times before this collision happened there were snow squalls, or, as some witnesses said, flurries. It seems to me on the evidence that the squalls or flurries, or whatever is the correct expression, were of a thicker character with the *Gladiator*, coming in from the sea, than with the *St. Paul*, coming down the Solent. The weather records which were put in were two. There was one from Calshot light-vessel, which is further up the Solent from the place of collision, at the bend where vessels round, coming down from Southampton, and take a more westerly direction; and that record is: "At 1.50 p.m. sounded fog signals. Thick with snow. 2.40 p.m. clear. Ceased sound fog signals." As far as I can make out from the evidence that fog signal must have started after the *St. Paul* had passed. The other record is the Hurst Castle lighthouse, which records the weather from noon as W.N.W. wind, force 5, and there is an S., which means snow. At 3 p.m. the wind is recorded as N.N.E., force 4. What the weather was at the moment of collision does not appear, because these records are only taken at specified times, and it is quite obvious that the weather and wind changed with great rapidity. Besides those records a good deal of evidence was given by various witnesses as to the state of the weather, and the witnesses to some extent differ. They probably differed because in this kind of weather the state of things differs very much from place to place. Without going through all this evidence, I notice that one witness said you could not see seventy-five yards, while at other places the weather was clear. The conclusion of fact at which I have arrived is that although the *St. Paul* had encountered an occasional snow flurry, she had, until the vessels sighted each other, sufficiently clear weather to enable her to proceed down Channel at the speed she did. The evidence of the witnesses from her is, as perhaps you might not unnaturally expect, strongly in favour of that view, but their view received remarkable confirmation from the witness called yesterday—namely, Lady Montagu of Beaulieu, who was in a bungalow at Durn Point. In the course of her evidence she said that she was in her verandah, and she saw the *St. Paul* passing the Solent Banks buoy, which is very nearly abreast, only a good distance away from the bungalow. She said it had been snowing, but then there was a cessation of the squall, and that it would be two miles from where she was that the *St. Paul* passed. At any rate, it was on the other side of the Solent Banks buoy, and she said she could see the hull, masts, and funnels. Then, I think in answer to a question I put to her, after or during her cross-examination, she said the *St. Paul* was three miles off when she was lost sight of. Now, that witness was an extremely able and intelligent person, and her evidence as to the state of the weather at that time is substantially in accordance with the evidence given by those who were on board the *St. Paul*. The *Gladiator's* case was somewhat different, for she, I think, met with thicker squalls, and had been sounding her fog signals, though her speed had been about nine knots, which was practically as fast as she was then able to go, shortly before the *St. Paul* was made out. It was said by Captain Lumsden that she would not steer satisfactorily under the circumstances with less speed, but, if less speed was necessary, he could have anchored his vessel, and the Elder Brethren advise me that Totland Bay had just been passed and it is good anchorage there, even with the wind as it was. So he can hardly have considered the weather was so thick as to have prevented him proceeding at the speed at which the vessel was proceeding. Now, shortly before the collision it seems that a snow squall swept across from about Hurst Castle towards the Isle of Wight, and the *Gladiator* was seen by those on the *St. Paul* coming through this squall, whilst I find that the *St. Paul* was still in clear weather herself, the squall not yet having reached her. Each vessel was sighted from the other at a distance of about half a mile—both sides agree as to that. So much for the weather and wind and tide. [His Lordship referred to the cases made by the *St. Paul* and H.M.S. *Gladiator* respectively, and continued:]

Those are the two cases, and at the outset of those two cases you have got two ships about half a mile apart, approaching each other port side to port side, and each vessel having the other on her port bow. I only need add, with regard to the defence of the *St. Paul*, that it is pleaded, and is the fact, that she was in charge of a duly licensed Trinity House pilot; and the evidence is that he gave all the orders, and all his orders were obeyed. Now, it is clear from the courses of the vessels and the bearing of each from the other when seen, that there ought not to have been the least difficulty in these two vessels passing each other port side to port side, as, in the ordinary course of navigation, they ought to have done, but they are found in collision in a position in which the stem of the *St. Paul* is in contact with the starboard side of the *Gladiator*, at a two to three points angle leading aft; and such a collision was only possible if the *Gladiator* starboarded. That she did so there is no doubt, but it is said that this was because the *St. Paul* was starboarding and sounding two short blasts of her whistle, and that the *St. Paul* did this because she was about in the place where she would alter her course to proceed down the channel. I shall have to refer a little more closely to the place of collision, but I find that in the ordinary course the *St. Paul* would have proceeded a little further before changing her course, and I do not consider the action attributed to her as probable. Had she starboarded, remembering that the *Gladiator* starboarded to the extent of some three or four points, I do not see myself how any collision could have happened; and if that had been the

true position of things—that is to say, if both vessels had starboarded, and they had got into a position to pass starboard to starboard—it is incredible that the *St. Paul*, seeing the other vessel acting in that way, would have ported back. Moreover, when it is remembered that the *Gladiator* starboarded some three or four points and then ported to throw her quarter off, and that she acts quickly, and that the angle of the blow was two to three points, it almost follows that there was very little change in the heading of the *St. Paul*, in fact, from the time of sighting the *Gladiator* till the moment of the collision. Having seen the witnesses, I am satisfied that the *St. Paul's* helm was not starboarded, and that her manœuvres were substantially as pleaded by her owners in their defence; and that witnesses from the *Gladiator* who say that the *St. Paul* was swinging to port, which means starboarding, were mistaken. The next question is, Was there a two-blast signal sounded by the *St. Paul*? and probably that is the most controverted question of fact in the case. Every witness from the *St. Paul* says that no two-blast signal was sounded. The officer who was actually sounding the signals, the third officer, says he blew a signal, and it was a distinct short blast, and that no two-blast signals were ever given, and there was no starboarding. Of course, it was necessary that one should watch that witness with some care, because he was the person actually giving the signals, and I did so, and I thought him a very clear, intelligent, and reliable witness. As to the witnesses from the *Gladiator*, it is very remarkable that neither Captain Lumsden nor Lieutenant Mainguy, the navigating officer, heard any signal at all from the *St. Paul*. With regard to the other witnesses, of the two who say they heard two blasts, one is not quite sure, and a third says he saw two puffs of steam. The others heard nothing. In addition some witnesses were called from the shore—the Isle of Wight side. I am afraid I cannot pay very much attention to those witnesses, who do not seem to have had any special reason for noticing these whistles at the time, and may have confounded different sounds. With regard to the evidence which Lady Montagu gave yesterday I should like to make this observation. She said that she heard two distinct short, sharp blasts coming from the direction of Yarmouth: "My impression was that it was a siren, but it was difficult—as it was short and sharp—to say. I should say it was sounded by the same instrument. I heard no others at all. They sounded as blasts blown in an emergency." In cross-examination a letter which she had written, and which was the cause of her being called, was put to her, and in that letter she says: "I very distinctly heard two blasts from a siren," and further on: "I am confident a siren was sounded and there were two blasts." It is quite clear that if the sounds she heard were really from that particular direction, and were the sounds of a siren, they were not from the *St. Paul*, because we have had it proved conclusively that the *St. Paul* only had steam whistles; but the distance those vessels then were from Durns Point—three or four miles—makes it very difficult for anybody to be certain that they hear whistles or a siren from a particular vessel, when they cannot see that vessel. Although Lady Montagu was confident she was right, I feel very great difficulty in feeling certain the two blasts came from either of these ships. If they did, we know that immediately before the collision each blew a blast, and one followed the other; and in that locality it is possible there may have been echoes which produced that effect. At any rate, as against the positive evidence which I have from the *St. Paul*—and having regard to what I should like to call, without any offence, the defective evidence from the *Gladiator* herself—I cannot come to any other conclusion than that the two-blast signal alleged to have been given by the *St. Paul* never was in fact given by her. In my opinion those who say they heard two blasts or saw two puffs were mistaken, and I find as a fact that no two short blasts were given by the *St. Paul*, but only one short blast. If the matter rested there, the blame lies solely with the *Gladiator* for starboarding improperly; but having now dealt with what I consider to be the main contest in this case, namely, whether the *St. Paul* starboarded and blew two short blasts—both of which points I find in her favour—I have to deal with other points which are made against her. Before passing to those points, however, I desire to make one observation—namely, that it was pointed out in the course of the arguments in this case that those on the *Gladiator* did not give any starboard-helm signal at the time they starboarded. I do not think it is necessary to consider this point at all. I do not attach any importance to it in the circumstances of the particular case before me. I now proceed to deal with the other points made against the *St Paul*, and I do not think it is going too far to say that they are in reality minor points; but they are important points. The first is that the *St. Paul* was in her wrong water; the second, that she was going at an improper speed; the third, that she improperly neglected to sound fog signals; and the fourth, that she neglected to keep a good look-out. The last point I can dispose of in a word—every man was at his post, and there is really no serious suggestion that a bad look-out was kept on the vessel, and I do not think there was. The look-out was quite satisfactory. With regard to the first of the points, the place of collision, of course, is most important. The two sides do not agree about it. I have a chart before me, and I do not suppose either of the positions is exactly right. It may possibly be somewhere between those two places. The important point is on which side of the channel it was. It is said that the *Gladiator* was to the south side of the channel, but it has to be remembered that Captain Lumsden said she was near the mid-channel and a little to the southward, and, further, that the *Gladiator* starboarded, going at the speed she was going, and ran away a little to the northward. It was also said that the course of the *St. Paul* from the Solent Banks buoy, in the state of the wind, would set her to the southward; and one witness went so far as to say she passed close to a black buoy, which is more inshore than the place where the wreck lies. I can only say about that that if she had been passing in that position she would have been ashore in a moment or two on the course she was on, and she could not possibly have got to the place of collision which is fixed upon by the witnesses for the *Gladiator*. The position of the wreck has to be borne in mind, but that position may be

due, as was probably the case, to the fact that the wind was blowing right on to the shore of the Isle of Wight, and the engines of the *Gladiator* were reversed. On this question of the suggestion of the course of the *St. Paul* being deflected, the Elder Brethren advise me on the course set by her she might with her draught and power easily make that course good, having regard to the local conditions of tide. Also, I consider it of importance that the *St. Paul* must have been to the northward of the *Gladiator* as they were approaching each other, because if the courses are laid down and each vessel has the other on her port bow, what I have just said, I think, follows. Then, also it is to be remembered that the *Gladiator* undoubtedly went across to the north under starboard helm. My finding of fact, therefore, is that the *St. Paul* was not on the wrong side of the channel.

Then the next question is, Was the *St. Paul* going at a moderate speed? She had obeyed the directions for Yarmouth, as I may term them, published in 1902, which I understand are intended to avoid the swell which large vessels passing near Yarmouth at a high speed cause. The directions require that vessels shall proceed at a moderate speed from a mile to the eastward of Yarmouth. I think it is demonstrated from the log-books which were put in that her speed was reduced to half speed eight or nine minutes before this collision—namely, at 2.20, the collision taking place just shortly before 2.30—and during those eight minutes she had been going at half speed, though, in dealing with the calculation of the exact distance run, it must be remembered that she was going at full speed when the change to half speed took place, and it would take some time to run down to half speed. Her whole speed down the Solent, however, had not been her ocean-going full speed—these vessels do not work up to their full speed at once — and I think her witnesses are substantially correct in the account they gave of the speed having got down to somewhere about nine to ten knots at the time when the *Gladiator* was made out. Further, I think, as I have already said, that the witnesses were substantially giving a correct account of the visibility up to that period. I have pointed out that the *St. Paul* was not yet in that snow squall which had to a certain extent enveloped the *Gladiator*, and the rule which has to be considered on this point is art. 16: "Every vessel shall, in a fog, mist, falling snow, or heavy rainstorms, go at a moderate speed, having careful regard to the existing circumstances and conditions." That rule is not in the strict terms applicable to the *St. Paul*, however, during the period of passing down towards the spot where she sighted the *Gladiator*, because she was not then in falling snow; but the question of good seamanship comes into consideration, although the exact terms of the rule are not applicable. Over and over again we have had cases in this court where a vessel not herself in a fog has been blamed because, seeing a fog ahead, she has not taken precautions, so that her speed shall be off when she enters the fog. There is a difference in snow, but the same kind of considerations apply. If there is a thick snowstorm ahead, so that nothing can be seen in it, good seamanship requires there should be a moderate rate of speed, so as to approach that place under proper control. I have found all the facts which bear upon this point, and upon those facts I have put a question to the Elder Brethren with regard to this point of good seamanship, and the Elder Brethren advise me that on the facts I have found, having regard to the slowing of the *St. Paul* to half speed above Yarmouth, she was not, at the time when the *Gladiator* was seen, going too fast. I see, myself, no reason to find that she was going faster than her witnesses say—namely, nine to ten knots—when the *Gladiator* was seen, or to hold that her speed was excessive; and I may add that the Elder Brethren consider that half a mile in such a place, especially when vessels must be generally going in opposite directions, is a sufficient distance for them to avoid each other when going at the speed the *St. Paul* was.

That brings me to the question of the fog signals. With regard to the absence of fog signals—because it is admitted that none were given on the *St. Paul*—the pilot of the *St. Paul* said that if the *Gladiator* had not been reported he would have slowed down and have sounded his whistle just at that particular time. The captain of the *St. Paul*, Captain Passow, who is a very experienced master, said: "I thought it was a passing shower, and I did not consider it necessary to use fog signals. I do not think it would have made any difference. We were just going to slow down when I saw the cruiser." That in substance amounts to this—that they had slowed down to half speed some eight minutes before; that they had observed that there was this squall ahead; and that they were about to sound and slow for it, but at that moment the cruiser appeared. Of course, it may be said that that is a very useful coincidence, but I have seen the witnesses, and I do not think they were merely inventing the idea. That, however, does not dispose of what they might have done before the *Gladiator* was seen at a distance of half a mile. Again, the terms of the article do not in strictness apply. The article which it is necessary to refer to is art. 15, which provides that: "In fog, mist, falling snow, or heavy rainstorms, whether by day or night . . . a steam vessel having way upon her shall sound, at intervals of not more than two minutes, a prolonged blast." As I have already said, the finding of fact which guides me is that the vessel herself was not yet in falling snow, and so the terms of the article strictly do not apply; but it would be again a question of good seamanship whether, in view of the squalls seen coming as the witnesses described, she ought to have sounded fog signals. This being a question of good seamanship, I have consulted the Elder Brethren upon the point, and their statement to me is as follows: They tell me that as a matter of good seamanship it would have been advisable for the *St. Paul* to sound fog signals before the time when the *Gladiator* was sighted, having regard to the nature of the squalls ahead. They are, however, of opinion that the omission to do so made no difference in this case, and in this opinion I concur. To some extent the reasons upon which that opinion is based depend upon questions of fact. I have found the facts, but I may say that their view of the facts is the same as my own. There is no doubt that the *St. Paul* gave a short blast after the *Gladiator* was seen half a mile distant, but very few of those on the *Gladiator* heard

any sound signal at all. Even those who say they heard signals are mistaken. Any signal made before this would have been when the vessels were still further apart, and there is no probability that if the *St. Paul* had sounded a fog signal it would have been heard on the *Gladiator*; but, further, if heard it would only have indicated that there was a steamer approaching down channel, and her position would not have been ascertained with certainty; and at the time when the *Gladiator* was sighted, as I have already said, there was not the least difficulty in the vessels keeping clear of each other and avoiding collision. But for the starboarding of the *Gladiator* there would have been no collision, and I am unable to see any ground upon which it can be said that the absence of fog signals had any effect upon the collision. The view which I take of this case renders it unnecessary to consider any question of pilotage, and the result is that the plaintiffs fail to establish that any of those on the *St. Paul* were guilty of fault which led to the collision, and in my opinion the *Gladiator* was alone to blame.

Solicitor for the plaintiffs, *Treasury Solicitor.*

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

June 29 *and* 30, 1908.

(Before BARGRAVE DEANE, J. and Elder Brethren.)

THE FORFARSHIRE. (*a*)

Contract to repair and transport to loading berth — "All transporting to be at owner's risk"— Liability of repairers for negligence.

Ship repairers contracted with the owners of a ship "to transport vessel from berth to dry dock, finding all tugs, pilots, watermen, and boats, sufficient hands for managing vessel . . . and all items of transportation to loading berth in South-West India Dock." Along the edge of the contract was printed, "All transporting to be at owner's risk." After the repairs in the dry dock were finished the repairers proceeded to transport the vessel to a loading berth in the South-West India Dock, and for that purpose engaged a tug to tow her. The ship supplied the ropes. Before the towage began the repairers neither inspected the vessel's ropes nor her anchor. The towage took place at night, and, owing to the negligence of the tug, the tow ropes parted, and before the vessel's anchor could be let go or further ropes could be made fast to the tug the vessel collided with a wharf.

Held, that the repairers were liable, and that the clause, "all transporting to be at owner's risk," did not exempt them from liability.

ACTION for breach of contract alternatively for negligence.

The plaintiffs were the owners of the ship *Forfarshire*; the defendants were the London Graving Dock Company Limited.

The defendants gave an estimate on the 3rd Jan. 1908 for carrying out the following work on the *Forfarshire* owned by the plaintiffs:—

We estimate to carry out the following work to above vessel: Transport vessel from berth to dry dock, finding all tugs, pilots, watermen, and boats, sufficient hands for managing vessel, hauling up shore ropes, dock, shore, scrape and clean bottom for examination, including dock dues for two clear days in dock, and all items of transportation to loading berth in South-West India Dock. For the sum of 40*l.*

Along the edge of the paper on which the estimate was made the following words were printed: "All transporting to be at owner's risk."

The defendants finished repairing the vessel in dry dock, and proceeded to have her towed to the South-West India Dock to a loading berth.

The plaintiffs alleged that about 4 a.m. on the 6th Feb. the *Forfarshire*, an iron barque of 1354 tons gross and 1300 tons net register, 239ft. in length, having been warped out to the entrance of the Orchard Dry Dock, where she had been repaired by the defendants, was taken in tow by the steam tug *Champion* for the purpose of being transported to her loading berth in the South-West India Dock.

The wind at the time was S.W. light, the tide was about the top of high water slack.

The *Champion* made fast astern with two good 5in. manila ropes, one from each quarter of the *Forfarshire*, and towed her out into the river and then stern up stream.

The *Forfarshire's* stern when she was getting near the South-West India Dock took a slight cant to the southward, and the pilot who was in charge of her ordered the tug on to the port quarter to straighten her up, but the tug, contrary to the pilot's orders, went on to the starboard quarter, thereby giving the vessel more stern way and slewing her stern more towards the south shore. Being again ordered by the pilot on to the port quarter, the tug proceeded there at too great a speed and parted the starboard quarter rope, whereupon, without any orders, she slipped the port quarter rope. This starboard quarter rope was supplied by the *Forfarshire*. As the *Forfarshire* by this time had got athwart the river and was drifting towards the Greenwich Linoleum Jetty, the pilot ordered the tug to proceed quickly forward and take hold of the vessel with the head towing line. Thereupon the tug went on to the port bow, and by means of a boat and throw line secured the *Forfarshire's* towing hawser, but by reason of the slow manner in which those on the tug got the hawser on to their hook the hawser was hanging down, and in consequence of the failure of those on the tug to exercise reasonable care it fouled her propeller, rendering her helpless. The *Forfarshire's* anchor was at once ordered to be let go, but before the order could be carried out the vessel with her stern crashed into the Greenwich Linoleum Jetty, severely damaging both herself and the jetty. Subsequently the services of the steam tug *Lion* had to be employed by the *Forfarshire* to extricate her and take her to the South-West India Dock.

The plaintiffs alleged that the above facts constituted a breach of contract in that the defendants failed to employ a proper and sufficient number of tugs to assist in the navigation of the vessel, and employed only one tug, the *Champion*, which was unable to hold the *Forfarshire*; alternatively, they alleged the defendants were guilty of negligence and breach of duty in not employing a proper and sufficient number of tugs, and in the further alternative they alleged

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

that the damage was caused by the negligence of the defendants or their agents.

The defendants denied that they were guilty of any breach of contract, negligence, or breach of duty. They admitted that the *Champion* was the only tug employed to take the *Forfarshire* from the dry dock to her loading berth, but alleged that she was a proper and efficient tug for the purpose, and that her sole employment was acquiesced in by the master. They further alleged that there was no obligation on them to employ more than one tug, and that they were not liable for the damage, as it was done during the transportation, and by the terms of the contract "all transporting was to be at owner's risk." They further alleged that the damage was caused by the neglect or default of the plaintiffs in supplying a starboard quarter rope which parted when the *Champion* was towing the *Forfarshire*, owing to its being old and perished; and also in passing a towing-wire to the *Champion*, after the starboard quarter rope had parted, the thimble eye of which was too small for the *Champion's* towing-hook, which caused delay in fastening it, so that it got round the tug's propeller.

Alternatively, the defendants alleged that if they were guilty of negligence the plaintiffs were guilty of contributory negligence, in that they caused a defective rope to be used. In the further alternative, the defendants alleged that if those on the *Champion* were guilty of negligence the defendants were not liable for it.

J. A. Hamilton, K.C. and *Raeburn* for the plaintiffs.—Under the terms of the estimate of the 3rd Jan. 1908 the defendants undertook to carry out the work of transportation; they therefore undertook to find all the tugs that might be necessary to carry out the transportation efficiently. The whole business was left to them. The master, mate, and some apprentices in the employ of the plaintiffs were on board, but they took no part in the transportation, and the *Forfarshire* was in the exclusive possession and control of the defendants. They were free to do the transportation as they liked, and a duty was cast on them of exercising care in carrying out the contract. Possibly if proper care had been taken in preparing for the towage one tug might have been sufficient, but, in fact, no preparation was made at all. The defendants used the *Forfarshire's* ropes, and trusted to them, but the plaintiffs incurred no liability on that account, even assuming them to have been defective. The only duty on the part of a gratuitous lender is to warn the borrower of any defect which he may be aware of in the article:

Coughlin v. *Gillison*, 79 L. T. Rep. 627; (1899) 1 Q. B. 145.

It is said that the eye of the wire rope belonging to the *Forfarshire* did not fit the tug's hook, but it is the defendants' duty to ascertain that all the "items of transportation," whether belonging to the ship or not, are efficient for the purpose. The defendants contend that the words in the contract "all transporting to be at owner's risk" mean that they are not to be held liable even for negligence. First it is submitted that these words printed in the margin of the paper form no part of the contract any more than the telephone number printed on the paper does. If, however, they are to be read as forming part of the contract the plaintiffs say that they do not relieve the defendants from the express obligation to find "all items of transportation," and, further, no effect should be given to them, for they are too ambiguous. There is no difference in principle between a contract of carriage and a contract of transportation. An exemption in general words, not expressly relating to negligence, even though the words are wide enough to include loss by the negligence or default of the carrier's servants, does not relieve him from the duty of exercising reasonable skill and care. If the carrier desires to relieve himself from the duty of using by himself and his servants reasonable skill and care in the carriage of goods, he must do so in plain language and explicitly, and not by general words:

Price v. *Union Lighterage Company*, 88 L. T. Rep. 428; 9 Asp. Mar. Law Cas. 398, at p. 400; (1903) 1 K. B. 750, at p. 754.

It is legitimate for the man undertaking to do work to stipulate that he shall not be liable for his own negligence, but he is not relieved unless there is a clear statement to that effect in words that the other party to the contract understands:

Elderslie Steamship Company v. *Borthwick* 92 L. T. Rep. 274; 10 Asp. Mar. Law Cas. 24; (1905) A. C. 93.

General words such as "at owner's risk" will not exempt him from negligence if they are applicable to something else. "At owner's risk" may be a term of exemption or relief from every liability, or it may be only a warning that the defendants are not to be liable for accidents, but if these words form part of the contract they may be intended to relieve the defendants from the negligence of navigators, such as the captain of the tug, though they would not relieve the defendants from providing all the necessary appliances for the transportation. It would be an odd contract for the shipowner to make, to leave his ship entirely in the hands of the defendants, and to pay them for the work done, even though they neglected to provide the necessary tugs and ropes.

Aspinall, K.C. and *D. Stephens* for the defendants.—This contract is not a contract of carriage, but of transportation. The defendants are only liable for negligence. If so, the words "owner's risk" would be useless unless they cover negligence:

McCawley v. *Furness Railway Company*, 27 L. T. Rep. 485; L. R. 8 Q. B. 57, at p. 59.

The railway company in that case were not common carriers of the passenger, nor are the defendants common carriers. Any mistake the defendants may have made is not a risk they have undertaken to be liable for. As regards the alleged breach of duty in not supplying a sufficient number of tugs, that is a matter for the Elder Brethren; some witnesses thought that there should have been two, others thought one was sufficient. That must depend on the state of the weather. It is agreed it is always more safe to have two tugs, but, though it was a dark night, it was fine and clear, with a light wind; there was nothing exceptional in the weather. Once the defendants had got the ship on her way it cannot be said that a second tug was wanted, for the plaintiff's witnesses suggest that it was only at the beginning

of the transportation that the second tug was essential, and they insisted on the size of the *Forfarshire*, as showing it was dangerous for the tug to be loose from her during the few moments occupied by changing the tow rope from the stern to forward. Looked at from a nautical point of view, can it be said that the contract has been broken because a second tug was not provided when it is admitted that the *Champion* is a powerful and efficient tug? Even assuming that the contract was broken, and that it was a risky manœuvre to move the ship with one tug, that course was acquiesced in by the master of the *Forfarshire*, and there was therefore contributory negligence on the part of the plaintiffs:

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

The real cause of the trouble was the defective rope which was supplied by the *Forfarshire*. [*Hamilton*, K.C.—The rope was lent gratuitously; under the contract all items of transportation, of which the rope was one, were to be provided by the defendants.] The *Forfarshire*, in fact, provided the rope, and cannot now say the defendants are liable because it was a bad one.

Hamilton, K.C. in reply.

BARGRAVE DEANE, J.—This is an action for damages for breach of contract. The contract is contained in a specification and a letter of acceptance. The material facts are these: The *Forfarshire*, an iron barque of 1300 tons, had been damaged in collision. She was brought to the Thames, and she was docked, and eventually she was taken to a dry dock by the defendant company to be repaired, and having been repaired, or partly repaired—I believe the repairs were not altogether finished, but they were finished so far as the dry dock was concerned—she was to be transported from there to the South-West India Dock. This contract included that transporting. It is true the master and the mate and the apprentices were on board, but so far as they were concerned they were mere dummies in the matter. The ship and her appurtenances were in the hands and under the control of the defendants' pilot and a crew of runners. It is obvious from the contract that the defendants had to supply "all items of transportation." That means that they must see before they start that they have everything in readiness for the safe conduct of that transportation. The Elder Brethren impress upon me that there were many matters which ought to have been seen to. First of all, the vessel was to be moved on a dark night, when the defendants could not see readily anything which might have to be attended to. Therefore, it is important that they should beforehand have taken every precaution to be prepared for an emergency. The vessel had to be towed, whether by one or two tugs is a question aside for the moment. She required sufficient and proper ropes. In addition, they had to see in case of accident that her anchor was ready to be let go. In addition to that, if they had got only one tug, they ought to have seen that the forward ropes were in good condition and ready to be attached. All these things should be provided for, and provided for before the actual transportation takes place, and at a time when anything that is wrong can be remedied. That being so, this vessel was towed out in the dark morning by one tug stern first, with two ropes, one from her starboard quarter and one from her port quarter attached to the stern of a powerful tug, a tug we all know in this court, called the *Champion*. After being towed a certain distance the pilot noticed that the vessel's stern was canted too much to the south shore. He sang out to the tug to tow off the port quarter to check that cant. By negligence on behalf of the tug, instead of towing off the ship's port quarter she towed off her own port quarter, which was the ship's starboard quarter, with the result that the cant which ought to be corrected was increased. The pilot at once tried to correct that, and it was manifest from what happened that the tug thereupon—not as I expect the pilot put it, progressed to the other quarter—went as fast as she could to correct the mistake, with the result that an undue strain was put upon this starboard quarter rope and it parted then and there, and by reason of that rope parting, or by inattention, the port rope got off the hook and the ship was adrift. The ship, being adrift, was in a position of considerable difficulty. It is true it was slack tide, the top of high water, but she had speed and it is quite clear she had been towed too fast, which is another matter the Elder Brethren have impressed upon me. She was being towed at such a rate that when these ropes parted she went bodily on to this wharf, which is on the south side of the river. Therefore, there was, by the conduct of those who were employed by the defendants, a considerable difficulty raised.

If there had been a second tug, there would have been no risk, but I wish carefully to guard myself against saying that these transportations should be undertaken by two tugs. I do not wish to hold anything of the sort; but I say in this particular instance that with the neglect to make the previous investigation as to the condition of the ropes and the condition of the anchor, and the condition of the bow chain or hawser, the wire hawser forward, a second tug was on this occasion necessary. The pilot gave orders to let go the anchor. That had not been provided for and it could not be let go. They tried to get the wire hawser fast to the tug which went forward on to the bows, but they could not get it fast. All this shows that there was considerable negligence on behalf of those who were employed by the defendants to transport this vessel from the graving dock to the South-West India Dock. That being so, I am of opinion that there was a breach of this contract, and that the defendants did not do that which they contracted to do—namely, to use the words of the contract, "Find all items of transportation" of this vessel to the South-West India Dock.

That being so, a point of law is raised. It is said that if you look at the side of this contract, the contract being in type, you will find it is printed along the side of the contract this: "All transporting to be at owner's risk." On the one side it is said that that saves the situation for the defendants, and, whatever negligence the defendants were guilty of, still the object was that all the risk should be still the risk of the owner of the ship. On the other side it is said, "No. It is true that it meant to protect the defendants against certain accidents which might happen, but it was never intended to protect them against their own negligence." Cases have been

cited on one side and the other about it. I am clearly of opinion that this particular printed indorsement in this particular case does not protect the defendants. It would be monstrous to suppose that it was in the contemplation of these two parties that, whatever neglect there might be on the part of the defendants to perform their part of the contract, still the plaintiffs would be responsible if any accident happened to the ship. In my opinion, that which happened is outside the purview of this particular indorsement on this agreement. I think it may very well be that what was in view was, that the defendants performing all their duties in respect of this contract, if anything happened then the plaintiffs should suffer any expense which might be incurred; but I do not think it was intended to protect the defendants against the neglect on their part to carry out their part of the contract. Otherwise it would be absolutely unintelligible to anybody who had to construe the contract. I do not go so far as putting the case on a par with the case of *Elderslie* v. *Borthwick* (*ubi sup.*), which was cited by counsel for the plaintiffs, because I do not think there is any ambiguity in this particular contract. I think it is perfectly plain that there was on each side an undertaking—the defendants undertaking to do certain things and the plaintiffs undertaking to bear the risk if those things were done. The defendants have failed to do that which they undertook to do, therefore they cannot look to the plaintiffs in their part of the contract to carry out the contract on their part. Therefore, I find in this case the plaintiffs have succeeded in establishing their claim against the defendants for damages in respect of this breach of contract, the measure of damages being the expense to which they were put in having the damage repaired, occasioned by the neglect on the part of the defendants. There will be judgment for the plaintiffs with costs, and a reference to the registrar to assess the damages.

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

Solicitors for the defendants, *E. F. Turner* and *Sons.*

Friday, Nov. 13, 1908.

(Before Sir GORELL BARNES, President.)

THE CAIRO; WATSON AND PARKER *v.* GREGORY. (*a*)

Short Cause Rules 1908—*Practice—Necessaries—Master's lien—Evidence by affidavit.*

A master drew bills on his owners in favour of coal merchants who had supplied coals to the ship he commanded. The bills were accepted, but were dishonoured on presentation.

The coal merchants issued a writ in personam *in the Admiralty Division against the master, and on a summons for directions it was ordered that the cause should be set down for trial as a short cause, and that evidence might be given by affidavit.*

Held, that the master was liable, but that he had a lien against the ship for his disbursements.

ACTION to recover the sum of 2549*l.* 3*s.* 6*d.* for principal and interest due under two bills of exchange dated the 4th June 1908 for 1375*l.* and the 19th June for 1135*l.* 11*s.* 6*d.*, and for charges for noting and protesting the said bills.

The plaintiffs, Messrs. Watson and Parker, were coal merchants and steamship agents at Marseilles; the defendant, George Gregory, was master of the steamship *Cairo*.

In June 1908 the plaintiffs supplied 1100 tons of coal at 25*s.* a ton to the steamship *Cairo* at Marseilles, the invoice price being 1375*l.* To settle this the master drew a bill dated the 4th June on his owners, the Egyptian Mail Steamship Company Limited, for 1375*l.*, payable thirty days after sight. The bill was accepted by the owners on the 9th June payable at the London Joint Stock Bank Limited, Lothbury.

Later in June the plaintiffs supplied the steamship *Cairo* with a further 927 tons of coal at 24*s.* 6*d.* per ton, the invoice price being 1135*l.* 11*s.* 6*d.* To settle this the master drew a bill dated the 19th June on his owners for 1135*l.* 11*s.* 6*d.*, payable at thirty days' sight. The bill was accepted by the owners on the 22nd June payable at the London Joint Stock Bank Limited, Lothbury.

The bill dated the 4th June fell due on the 12th July, and was dishonoured. On the 13th July the plaintiffs were advised of the dishonour, and on the same day gave notice of dishonour to the master, Gregory, who acknowledged the receipt of the notice of dishonour on the 15th July.

The bill dated the 19th June fell due on the 25th July, and was dishonoured. The plaintiffs were informed by telegram on the 25th July of the dishonour, and on the same day gave notice of dishonour to the master, Gregory, who acknowledged the receipt of it on the 27th July.

The company who owned the steamship being in voluntary liquidation, the coal merchants were anxious that the master should exercise his lien against the *Cairo* in respect of his liability for the coals, but the master wished to have a release from his liability with regard to the bills before he proceeded against the ship. The coal merchants would not agree to this, and on the 3rd Nov. issued a writ against the master, as drawer of the bills, claiming the amounts of the bills and further sums of 36*l.* 14*s.* as interest and 1*l.* 18*s.* for noting and protesting charges.

On the 4th Nov. the plaintiffs' solicitors issued a summons for directions as to the trial under the Short Cause Rules 1908.

The summons was heard by the President on the 9th Nov., when the case was ordered to be put in the short cause list, and leave was given for evidence to be given by affidavit.

The action was tried on the 13th Nov.

A. D. Bateson, for the plaintiffs, read two affidavits in support of the claim sworn by the master of the *Cairo* and a partner in the firm of Watson and Parker.

H. C. S. Dumas for the defendant.—The ship is at present under arrest at Marseilles, and the master wishes to take action against her in the courts there. His position will be strengthened by this claim being formally proved, and will also be strengthened if he can show that under English law he would have a lien against the ship in respect of this liability. [The PRESIDENT.—He would have a lien against the ship under English law in priority

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

to most other people.] The bills were drawn on the owners by the defendant as master of the *Cairo*, the coal being supplied to the vessel at Marseilles.

The Short Cause Rules for the Admiralty side of the Probate, Divorce, and Admiralty Division are set out in 125 L. T. Jour. 365, also in the Annual Practice 1909, p. 1070, and the Yearly Practice 1909, p. 1559.

The PRESIDENT.—In this case there must be judgment for the amount of the claim and interest at 5 per cent. from the date of the writ to judgment and costs. The defendant would have under the Merchant Shipping Act 1894 a lien in respect of this sum against the ship which would have priority over most claims except those for collision and salvage.

This is the first case dealt with under the new Short Cause Rules which have been drawn up for the purpose of dealing with cases which might be thus easily disposed of. There is no doubt that these rules afford a means of disposing of cases which are suitable for their application most speedily and most economically. This case is an illustration of how that may be done, and I hope it will be found that they are useful and will be frequently applied. They are only an extension of efforts made in this division in the year 1893, and I may refer to the observation which I made, I think, in the case of *The Alps* (68 L. T. Rep. 624; 7 Asp. Mar. Law Cas. 337; (1893) P. 109) as to the simple and easy process that might be adopted. The observations I made on the utility of the course then suggested are to be found fully set out in the *Shipping Gazette*, in a report of the case which appeared a day or two after *The Alps* case was tried: (*Shipping Gazette*, Feb. 16, 1893). I think it would have been advantageous if they had been fully set out in the Law Reports. The observations are only briefly condensed there, and I am not sure whether it was at that time fully realised by the reporters what those observations might really result in. The consequence was that a very large number of cases were brought in this division immediately afterwards which were cases of a kind not ordinarily coming within the work allotted to this division. For a time a large number of cases of that character—of a character not ordinarily brought in this division—were taken here. Of course, since 1895 they have been dealt with in the Commercial Court, and I am very glad that this set of rules, which I published a few months back, have been put in process. As I have already said, I hope they will be extensively used, and I am sure they can, if parties will only use them, be the means of disposing of cases much more promptly and more economically.

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

Solicitors for the defendants, *Darley, Cumberland*, and *Co.*

House of Lords.

March 3, 5, *and July* 23, 1908.

(Before the LORD CHANCELLOR (Loreburn), Lords ASHBOURNE, MACNAGHTEN, ROBERTSON, ATKINSON, and COLLINS.)

LONDON AND INDIA DOCKS COMPANY *v.* THAMES STEAM TUG AND LIGHTERAGE COMPANY; SAME *v.* MCDOUGALL AND BONTHRON LIMITED; SAME *v.* PAGE, SON, AND EAST LIMITED. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Dock dues — Exemption — Lighters bonâ fide *engaged in discharging or receiving goods — West India Dock Act* 1831, *s.* 83—*St. Katharine's Dock Act* 1864, *s.* 136.

The West India Dock Act 1831, *which empowers the dock company to levy dues on lighters entering the dock, by sect.* 83, *provides an exemption from dock dues in the case of lighters entering the dock to discharge or receive goods to or from any ship or vessel lying therein so long as such vessel shall be* bonâ fide *engaged in discharging or receiving.*

Sect. 136 *of the London and St. Katharine's Dock Act* 1864 *contains a similar exemption "so long as the lighter is* bonâ fide *engaged in so discharging or receiving goods."*

(1) *Two lighters went into the dock intending to discharge goods into a ship then lying in the dock. Through no fault of the lighters the ship being fully loaded was unable to receive the goods, and the lighters left the dock without discharging their cargo.*

(2) *A lighter went into the dock to discharge goods into a ship lying in the dock. The discharge was completed on a Saturday afternoon, and the lighter might have left the dock on the Saturday evening or early on the Sunday morning. She remained in fact in the dock till the Monday morning.*

(3) *A lighter went into the dock to discharge goods into a ship lying in the dock. Through no fault of the lighter the ship being fully loaded was unable to receive the goods. The lighter remained in the dock, and afterwards discharged the goods into another ship which was not in the dock when she first entered it, but came in later.*

Held, that in every case the lighters were not exempt from liability to pay dock dues, Lords Ashbourne and Atkinson dissenting as to the first case.

Judgment of the Court of Appeal reversed.

THREE APPEALS from judgments of the Court of Appeal involving practically the same point were heard together.

The actions were brought by the appellants to recover dock dues from the respondents under circumstances which appear in the headnote above, and in the judgments of their Lordships. The first appeal was from an order of the Court of Appeal (Vaughan Williams, Buckley, and Moulton, L.JJ.), reported 10 Asp. Mar. Law. Cas. 512 (1907); 97 L. T. Rep. 357, affirming a judgment of the King's Bench Division (Kennedy and A. T. Lawrence, JJ.), reported 10 Asp. Mar.

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

Law Cas. 33; 95 L. T. Rep. 506, and holding that the lighters in question were exempt from the ordinary dock dues by reason of sect. 83 of the West India Dock Act 1831, which runs thus:

> 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 second and third appeals were from decisions of the Court of Appeal (10 Asp. Mar. Law Cas. 557 (1907), being judgments by Vaughan Williams and Buckley, L.JJ. (Moulton, L.J. dissenting), affirming decisions of Walton, J. (10 Asp. Mar. Law Cas. 334 (1906).

In those cases the question turned upon a similar clause in the St. Katharine's Dock Act 1864.

Both the docks had passed into the hands of the appellant company.

Sir *R. Finlay*, K.C., *J. A. Hamilton*, K.C., and *G. Wallace* appeared for the appellants.

Scrutton, K.C. and *Cranstoun* for the respondents.

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

Stourbridge Canal Company v. *Wheeley*, 2 B. & Ad. 792;

Stockton Railway Company v. *Barrett*, 11 Cl. & F. 590;

Pryce v. *Monmouth Railway and Canal Company*, 40 L. T. Rep. 630; 4 App. Cas. 197.

Sir *R. Finlay*, K.C. was heard in reply.

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

July 23.—Their Lordships gave judgment as follows:—

First Appeal.

The Lord Chancellor (Loreburn). — My Lords: In this case the respondents' two lighters, the *Clarence* and the *Pike*, entered the East India Dock with goods intended to be discharged into the steamship *Umfuli*, which was then lying in dock. By no fault of the lighters the *Umfuli* was unable to receive the goods, and so, after waiting some time, the lighters left the dock with their cargo quite untouched. Thereupon the dock company claimed payment of dock dues or rates, and the answer, which has prevailed, is that under the circumstances both lighters were exempt from rates, by virtue of sect. 83 of the West India Dock Act 1831. This appeal depends upon the true construction of that section. The other appeals in the cases of McDougall and Bonthron and of Page, Son, and East in part turn upon the construction of another section in very much the same words. I think that the better course is to begin by stating what, in my opinion, is the true construction of sect. 83. It occurs in one of a series of Acts providing for the building or management of docks on the Thames. When these docks were built they were, of course, authorised to charge tolls or rates on vessels using them. But as the business of the river had largely been carried on in the stream by ships discharging into or receiving from lighters which used the stream free, some provision was made to prevent these lighters from being charged for rendering a like service in the docks. That is the origin of sect. 83. When this privilege of exemption was granted it became necessary to guard it against abuse, and there were two obvious sources of abuse. Lighters having no actual business in the docks might enter for convenience or in the expectation of getting business, and so crowd up its limited water space; or lighters having entered and done their business might loiter for convenience or in the expectation of getting further business. To prevent these things, while giving the exemption, was, in my opinion, the object of sect. 83. That section lays down, to begin with, a condition. In order to claim any exemption whatever the lighter must enter the dock to discharge, or receive, to or from "any ship or vessel lying therein." I think that means "lying therein" at the time of the lighter's entry. Otherwise the words are redundant; for every ship loaded or discharged in the dock must be lying therein at the time of receipt or discharge, and it was not necessary to say so if nothing more than that was intended, and I can see the motive of requiring that the ship should be in dock when the lighter entered. It was designed to prevent a lighter from enjoying any exemption at all if she entered too soon. Further, I think that the words "any ship or vessel" denote the plural. The lighter may enter to serve two or more vessels. The section does not say that there must be a contract made with any of them before entry. It is enough if she enters to serve them or any of them specifically. The latter part of the section, to which I now proceed, gives further security against abuse. When once it is established that a lighter in entering the dock complied with the condition already discussed, she "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." She is to be exempt from any rates (that is to say, from all rates)—namely, for "entering," "lying therein," or "departing therefrom" (see sect. 76), but only during the time specified. I agree with the Court of Appeal in thinking that the words "so long as such lighter or craft shall be *bonâ fide* engaged in discharging or receiving" do not mean only while the physical act of discharge or receipt is continuing. No strain upon the language is needed to warrant this conclusion. If a lighter goes into a dock to discharge so many tons of goods, discharges them, and goes out of dock, all the time that she spends in this, and any time reasonably spent in waiting her turn, or coming alongside, or such like, is spent upon the business of discharging to a ship lying in dock. It is, in every particle of it, time necessarily spent upon that which is one operation in several stages. The section does not discriminate as to whether the lighter discharges all that she entered to discharge or only part of it. The exemption continues while she is discharging, in the sense already expressed, any part of it. For the words are "engaged in discharging such goods," and that includes a part as well as the whole. But, on the other hand, I am unable to see how the lighter is "engaged in discharging such goods" when from misadventure or mistake or

from any cause she does not in fact part with an ounce of goods, and leaves the dock as she entered it. It may be very hard on her, and she may have a remedy against the ship for non-acceptance. Or it may be careless of her to have entered without sufficient certainty of being emptied. I really do not know. But in such a case, whatever the cause, no time has in fact been spent in "discharging." If only one ton had been taken out of the lighter, all the time used in going and coming, and so forth, would have been, in fact, time during which she was engaged in discharging one ton. When nothing was taken out she was engaged in discharging nothing. I cannot bring myself to say that when nothing was taken out she was engaged in discharging goods, either "such goods" or any other; for whatever else goods may be, they are at all events something. Yet the exemption does not cover any space of time, according to the section, except such time as the lighter is so engaged. The same is, of course, true of receiving, but I deal only with the case in hand. In this case, therefore, of the two barges *Clarence* and *Pike* I am unable to say that they were engaged in discharging. They were engaged in trying to discharge, which is a different thing. With the greatest respect, I think that it is making laws, not interpreting them, to hold these lighters exempt. I think that the appeal should prevail.

Lord ASHBOURNE.—My Lords: With great deference I am unable to concur in the judgment of the Lord Chancellor. In this case the plaintiffs seek to recover from the defendants certain charges claimed by reason of certain lighters having used the East India Docks under the circumstances mentioned in the case. These lighters entered the docks with goods for the admitted definite purpose of discharging them into the ship *Umfuli*, then "lying therein." That ship was unable to take the goods on board, whereupon the lighters proceeded to depart from the dock without any unreasonable delay. Owing to no fault of their own the lighters were not allowed to leave until the next day. Throughout, the action of the lighters was *bonâ fide* and correct. The facts were not in dispute, and the only question for decision by your Lordships is whether the respondents' lighters were exempt from rates under sect. 83 of the West India Dock Act (1 & 2 Will. 4, c. 52), and involves the true interpretation of the words "so long as such lighters or craft shall be *bonâ fide* engaged in discharging or receiving such ballast or goods as aforesaid." The appellants urge that they had nothing to do with causing the lighters to enter when they did, or with the loading up of the *Umfuli*, or with her inability to receive any of the goods, and had no knowledge or means of knowledge on the subject, and that consequently the respondents are not within the exemption, and should be regarded as unexempt *ab initio*. This, I think, would be a very narrow and unreasonable construction to place upon the section, which was intended to exempt lighters entering the dock for the definite purpose of discharging into a particular ship lying therein, and not staying there any longer than was reasonably necessary. The right of exemption acquired by the lighters on entering was not, in my opinion, lost by the refusal of the *Umfuli* to take their goods and the right of free departure remained. The refusal of the *Umfuli* was unexpected, and there is nothing to show that it could have been reasonably anticipated. I therefore think that the appeal should be dismissed with costs.

Lords MACNAGHTEN and ROBERTSON concurred in the judgment of the Lord Chancellor.

Lord ATKINSON.—My Lords: In this case I have the misfortune to differ from three of the noble Lords who have preceded me, and, as I understand, from the one who is about to follow me, in the conclusion at which they have arrived. That fact necessarily shakes—if, indeed, it does not completely shatter—any confidence which I might have had in the correctness of the opinions which I have formed. Yet, as I do dissent, though I have striven to concur, it is right, I think, that I should state shortly the reasons why I dissent. The facts have already been fully stated, and the section read on which the question for decision turns. It is quite unnecessary to repeat the facts or to re-read the section. I agree that the words "lying therein" apply to a ship lying in the docks at the time of the entry of the lighter. I would point out, however, that the sum sought to be recovered in this action—6*d.* per ton on the tonnage of each of the lighters the *Clarence* and the *Pike*—is the maximum which could be charged for the three operations of entering into the docks, lying in them, and departing from them, if these vessels never enjoyed any privilege of exemption from rates or dues at all. They are treated as if the exemption had never existed, or had been absolutely forfeited. Again, it is not, and cannot be, contended that sect. 83 of the statute is to be strictly construed. The exemption only applies in terms to the operations of discharging or receiving cargo or ballast. The words are "shall be exempt from the payment of rates so long as such lighter or craft shall be *bonâ fide* engaged in discharging or receiving such ballast or goods as aforesaid." So that a lighter, if sense is to be made of the section, must be held to be *bonâ fide* engaged in discharging not only while her crew are making all reasonable and proper preparations for the physical transfer of her cargo to the ship, but during all reasonable delays and intermission in that operation, and also while she is entering the docks to discharge, and departing from them after her physical discharge has been completed. It is only by a stretch of language that a ship can be said to be engaged "in discharging her cargo" while she is leaving a dock without any cargo after the cargo which she carried has been in fact transferred to another vessel; yet it is not disputed by the appellants that the language of this section must in order that it may not receive an interpretation which would defeat its obvious purpose, be so stretched. But while the appellants admit that violence must thus far be done to the language of the section in this direction, they insist that its language cannot be stretched in another direction to effect a similar purpose, and that it is not to be read as if its words were "*bonâ fide* engaged in discharging or endeavouring to discharge" instead of "*bonâ fide* engaged in discharging." The reason given for this contention is, as I understand it, this, that the physical discharge of the cargo is the main and central thing to be accomplished; that all the

other operations are merely auxiliary to this, the main one, or consequent upon it, and that, however earnest the desire or vigorous and sustained the efforts of the crews of these lighters to accomplish this physical discharge, the character and quality of all the preliminary and subsequent operations is changed the moment that they fail to effect this purpose in whole or in part; that the acts which, when done before the failure, were acts done while the lighter was "engaged in discharging" cease altogether, by reason of that failure, to be acts done in the operation of discharging the vessel. With all respect, that appears to me to amount to interpreting this enactment in a sense which tends rather to defeat than to further the object and intention of the Legislature in passing it—a sense which, to use the words of Lord Coke, neither tends to suppress the mischief nor advance the remedy. For it was stated in argument, and not, as I understood, disputed by the appellants, that lighters were, before these docks were built, privileged, without paying any dues or tolls, to approach ships lying in the river, get alongside them, discharge cargoes into them or take cargoes from them, and depart on their proper business, and that no such dues were demanded or could be demanded from them if, without default on their part, the discharge of the cargoes was, from any cause beyond their control, entirely prevented. This privilege was absolute, not conditional. It was not to be exercised at the peril of the owners being mulcted in dues if the operations it covered were rendered abortive. The failure to accomplish the main work did not operate by relation back; somewhat on the trespasser *ab initio* principle, to strip the earlier preparatory proceedings of the privilege which *primâ facie* attached to them at the time when they took place, as it is contended that it works in this case. It was also stated in argument by the respondents, as I understood also, not contested, that sections similar to the 83rd have for many years been introduced into all the statutes dealing with docks on the river Thames. They are styled "the free water clauses," and are designed to secure to the owners of lighters as regards ships lying in those docks privileges similar and co-extensive to those which they enjoyed in the case of ships lying in the river, so far as the altered physical condition and the due and reasonable conduct by the docks company of the business which they were incorporated to carry on would permit. The abuses which the statute of 1831 was meant to guard against are, I think, the entry, without payment of dues of lighters into the docks, (1) to tout for business; (2) to await the arrival of vessels from or into which cargo was to be discharged by them; (3) to lie in the docks for shelter or convenience, or (4) to loiter there after they had done the work for which the entry had been effected. By no stretch of language can the movements or operations of the *Clarence* and the *Pike* on this occasion be, in my view, reckoned amongst abuses such as these. The entry of the lighters into the docks and the arrangements made *bonâ fide* for the purpose for which it is conceded that they were made were *primâ facie* within the privilege. No tolls or dues could at the time when they took place have been demanded from these vessels in respect of them. It is no doubt true that when a certain act is authorised to be done, or is covered by a privilege, every step reasonably necessary to effect it or necessarily consequent upon it is impliedly authorised or privileged as the case may be; but I think in holding that the privilege conferred upon the owners of lighters under this statute is altogether forfeited in the manner contended for, that the nature and extent of the privileges designed to be preserved, and the abuses sought to be corrected, must to a great extent be put out of view. In the case of *Direct United States Cable Company* v. *Anglo-American Telegraph Company* (36 L. T. Rep. 265; 2 App. Cas. 394), Lord Blackburn thus expresses himself: "The tribunal that has to construe an Act of a Legislature, or, indeed, any other document, has to determine the intention as expressed by the words used. And in order to understand those words it is material to inquire what is the subject-matter with respect to which they are used and the object in view."

It is, in my view, plain that the subject-matter of this section was the right or privilege theretofore enjoyed by lighters to discharge cargo or ballast to or from ships lying in the river without payment of tolls and without the risk of forfeiture of that privilege, if guilty of no default themselves, if they were interrupted in any part of their operations. I think it equally clear that the object of this statute was to preserve and protect this privilege as far as the altered circumstances would permit, and that it was never designed to attach to it a condition or import into its exercise a risk theretofore unheard of and unknown. The intention of the Legislature, however obvious it may be, must, no doubt, in the construction of statutes be defeated where the language which it has chosen to use compels to that result, but only where the language compels to it. In the present case every abuse meant to be corrected can be corrected without conferring on the docks company the right which they claim. It is a right which trenches upon what was an ancient privilege, and it certainly appears to me to be unreasonable in its nature and oppressive in its exercise, and unnecessary for the legitimate conduct of the appellants' business. It leaves to the lighter owners but the sorry remnant of the rights which they formerly enjoyed, and causes the so-called free water clauses to fail of their purpose to a large extent. For these reasons I have come to the conclusion that, having regard to what the 83rd section was designed to preserve, and what to prevent, it is permissible to construe its loose and unscientific language as if the words "*bonâ fide* engaged in discharging or in preparing or endeavouring to discharge" were used in it instead of the words "*bonâ fide* engaged in discharging." I am therefore of opinion that the decision of the Court of Appeal was right, and that the appeal should be dismissed with costs.

Lord COLLINS.—My Lords: I agree with the Lord Chancellor.

SECOND APPEAL.

The LORD CHANCELLOR (Loreburn).—My Lords: In this case the lighter *St. Thomas* entered the St. Katharine's Dock on Friday, the 24th Nov., in order to discharge hemp into the steamship *Pladda*, then lying in the dock. The discharge was completed by 5 p.m. on the 25th. The

lighter might have gone out of dock at any time after 9.30 p.m. that night until 1.30 a.m. on the Sunday morning. She preferred to remain till the Monday morning, and was not then allowed to leave the dock until she had paid 1*l.* 10*s.* 6*d.*, being the dock tonnage rate appointed for lying in and departing from the dock. I think it clear, and Walton, J. so found, that this lighter remained in the dock longer than was necessary for the duty which she owed to the *Pladda*. I will not cite the various sections. They have been subjected to a very penetrating scrutiny by the learned judges in the Court of Appeal, and repetition tends to confuse. The charge of 1*l.* 10*s.* 6*d.* was imposed by virtue of rule 3 of the third class; power to impose it is given by sect. 132 of the London and St. Katharine's Docks Act 1864, which allows of a "reasonable rate," and that this rate is reasonable if it be lawful best appears from the fact that no judge has hinted the contrary. But it is said that the rate is not lawfully claimed. First it was argued that sect. 136 of the Act of 1864 exempted the *St. Thomas* from any rate at all. I do not think so. That section exempts a lighter only "so long as the lighter or craft is *bonâ fide* engaged in so discharging or receiving the ballast or goods." "So discharging" covers discharging into any vessel lying in the dock at the time when the lighter entered, and to discharge into which she entered the dock, and the lighter in the present case did enter in order to discharge into the steamship *Pladda*, which was then lying in the dock. But did she spend all her time in the dock "*bonâ fide* engaged in so discharging"? Not so in my opinion. I agree that a lighter is engaged in discharging not merely while the goods are being removed, but also during her entrance to the dock, her departure from it, and any other operation reasonably required in order that she may discharge. It is one single piece of business in several stages. So long as the *St. Thomas* kept to that piece of business she was exempt from the payment of any rates. When she stayed on in the dock instead of leaving it in the night of the 25th-26th Nov. she ceased to be "*bonâ fide* engaged in discharging," and I think that her exemption ceased also. She became and continued from that moment liable for rates both for lying in and departing from the dock. I think that you can treat the departure as part of the business of discharging only when it is in fact part of that business, and it is not so if it is separated from the actual work of discharge by an unnecessary interval. It can be so only when it is a stage in the operation. Next it was argued that the rate was bad because, according to sect. 57 of the Working Union Act of 1888 (51 & 52 Vict. c. 143), the rate must not exceed the rates specified in Part 1 of the schedule to the East and West India Dock Company's Extension Act 1882, and it is said that this rate does so exceed. The incriminated rate is a combined rate for lying in the dock and for departing therefrom. One charge of 6*d.* per ton is made for both, if the lying therein does not exceed a week. If this rate were for lying in the dock alone it would exceed the schedule rate. But it is for departure also. There is no schedule rate for departure. In these circumstances I cannot see that the schedule rate has been exceeded. Comparing the one with the other it cannot, in my opinion, be said that more is exacted by the company for either one or two services than is prescribed by the schedule for the same one or two services. The company may charge for departing as well as for "lying therein." I see no reason why the company may not make a combined charge for both. The rate made is not impugned for not being "reasonable." It is impugned for being in excess of a schedule rate, and I find no schedule rate with which to compare it, though I do find a schedule rate to compare with one of the two charges which go to make it up. I cannot in these circumstances say that the rate is in excess of the schedule. Accordingly I think that the appellant company were within their rights in claiming the money in question, and that, therefore, this appeal must be allowed.

Lord Ashbourne.—My Lords: The question in this case is whether the appellants under their statutory powers were entitled to payment of their ordinary tonnage rate on the defendants' barge *St. Thomas* for using the appellants' St. Katharine's Dock. The facts are very short and few. The steamship *Pladda* was, on the 24th Nov. 1905, in St. Katharine's Dock, from which she was to sail on the 25th Nov. The respondents' barge *St. Thomas*, laden with hemp for the *Pladda*, entered the dock on Friday, the 24th, and her cargo was in due course discharged into the *Pladda* before five o'clock on Saturday, the 25th Nov. The next high tide after the discharge of the *St. Thomas* was half an hour after midnight, and the *Pladda* went out of the dock by that tide; the *St. Thomas* remained in the dock until Monday morning. The 132nd, 133rd, and 136th sections of the London and St. Katharine's Docks Act 1864 regulate the fixing of charges and rates by the appellants, and the question really is whether the respondents can under the circumstances claim the benefit of the exemption founded by sect. 136, so often read during the argument. Under the new schedule of rules, dated the 17th Oct. 1905, vessels are bound to leave the dock on the next available tide after discharge. I cannot think that the *St. Thomas* did leave on the first available tide, putting the most reasonable construction on all the circumstances of the case. I cannot hold on the evidence that she was more than a loiterer on the Sunday, particularly when it is admitted that other barges readily departed. In my opinion the privilege gained by the entry ceased with undue delay. I concur with Moulton, L.J. as to the legality and amount of the rate, which, under the circumstances, I regard as reasonable. In my opinion the appeal should be allowed, with costs.

Lords Macnaghten, Robertson, Atkinson, and Collins concurred.

Third Appeal.

The Lord Chancellor (Loreburn). — My Lords: The facts of this appeal are quite short. On the 23rd Nov. the lighter *Jew* entered the Albert Dock to discharge into the steamer *Matiana*, then lying in the dock. No part of this discharge was effected, through no fault of the lighter. Had she pleased, the *Jew* might then have quitted the dock, on, at latest, the evening of Saturday, the 25th Nov. In fact, she remained

on till the morning of Monday, the 27th Nov., and then received orders to discharge into the *Somali*, which arrived in the dock about midday on that day, the 27th Nov. She discharged into the *Somali*, finishing on the 5th Dec. After that she still remained in dock, receiving cargo from two other ships, and only quitted the dock on the 20th Dec., but nothing seems to turn on that. In these circumstances the dock company demanded a rate of 6*d.* per ton, which they explained to be a charge "for entering the Royal Albert Dock, and for lying therein earlier than one tide before the arrival of the *Somali*, into which vessel her freight was discharged." The lighter claimed exemption under sect. 136 of the London and St. Katharine's Docks Act 1864. It is unnecessary to say more in regard to that section, the construction of which was involved in *Macdougall and Bonthron's* case (*sup.*). If the view which I ventured to express in that case was well founded, it follows that the rate upon the *Jew* was properly demanded. When she entered on the 23rd Nov. she did so with the purpose of discharging into the *Matiana*, and so complied with the conditions without which she could have no exemption. But she did not discharge into the *Matiana*, and accordingly there was no point or space of time during which she was exempt from any rate. Several reasons go to show that her business dealing with the *Somali* did not exempt her. She did not enter in order to discharge into the *Somali*. The *Somali* was not in dock when the *Jew* entered it, and, quite apart from those reasons, the rate claimed was due before the *Somali* entered the dock at all. At that time the *Jew* had already been four days in dock without any protection from the rate. Accordingly I think that this appeal should be allowed.

Lord ASHBOURNE.—My Lords: The matter to be decided in this appeal is the right of the appellants under their statutory powers to demand a certain dock rate from the respondents' barge the *Jew* in the circumstances of its use of the appellants' Royal Albert Dock. The facts and dates in the case are undisputed and can be shortly stated. On the 24th Nov. 1905 the *Jew*, laden with machinery intended for the *Matiana*, entered the dock. None of the *Jew's* cargo was discharged into the *Matiana*, which had no room for it, and sailed on the 25th. The *Jew* did not leave the dock, but remained with its cargo waiting for orders. On the morning of Monday, the 27th Nov., it was ordered by the respondents to deliver its cargo to the steamship *Somali*, which was to arrive that day, and did arrive at noon accordingly. The *Jew's* cargo was discharged into the *Somali*, being finished on the 5th Dec., when she was employed to unload and fill from two ships laden with timber, finishing on the 19th Dec. The appellants' powers of charging rates are contained in sects. 132, 133, and 136 of the London and St. Katharine's Docks Act 1864, with the limits presented by sect. 57 of the Act of 1888 and the schedule therein referred to. I need not repeat these sections or schedule, which were so often mentioned in the arguments. The case turns on the construction of sect. 136, and the meaning to be given to "ship or vessel lying therein." The words are not, I believe, to be found in the earlier Acts, and they must have been intended to have some operative meaning. If they are regarded as descriptive they do not add anything to the meaning or construction of the clause, and would be simply redundant. I think it a sounder view to hold that they were intended to convey in themselves a limitation, requiring the presence of the ship at the time of entering, and that they would not be satisfied by attaching them to any later period. The *Matiana* period is not in controversy, but it is manifest that the *Jew* could readily have departed on the 25th. In dealing with rights one cannot speculate upon the convenience or inconvenience of the *Jew* departing after the *Matiana* and then making a fresh entry for the *Somali*. The *Jew* was exempted from entry for the *Matiana*, a vessel "lying therein" on the 24th, but was not legally justified in remaining therein after the 25th, until the *Somali* arrived on the 27th. She remained at the peril of being charged for rates, which I think are legally recoverable, and the appellants may consider are rightly claimed to maintain the control and avoid the crowding of their docks. I see nothing to make the rate invalid. In my opinion the appeal should be allowed. I concur with the Lord Chancellor.

Lords MACNAGHTEN, ROBERTSON, ATKINSON, and COLLINS concurred.

Judgments appealed from reversed. Respondents to pay to the appellants their costs in this House and below.

Solicitors: for the appellants, *E. F. Turner* and *Sons*; for the respondents, *Keene, Marsland, Bryden*, and *Besant*.

July 9 and 31, 1908.

(Before the Earl of HALSBURY, Lords ASHBOURNE, MACNAGHTEN, JAMES OF HEREFORD, and COLLINS.)

GREENSHIELDS, COWIE, AND CO. *v.* THOMAS STEPHENS AND SONS. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

General average—Cargo damaged by water in extinguishing fire—Spontaneous combustion of cargo—"Inherent vice" of cargo—York-Antwerp Rules 1890, *r.* 3—*Merchant Shipping Act* 1894 (57 *&* 58 *Vict. c.* 60), *s.* 502.

A ship was loaded with a cargo of coal, part of which took fire during the voyage through spontaneous combustion, and the rest of the cargo was damaged by water in extinguishing the fire. The owners of the cargo claimed against the shipowners for general average contribution.

Held, that the shipowners were liable on a general average claim, though the fire was caused by the spontaneous combustion of the cargo; and that there was nothing in the "York-Antwerp Rules 1890," *which were incorporated in the bills of lading, or in sect.* 502 *of the Merchant Shipping Act* 1894 *to relieve them from the liability.*

Judgment of the court below affirmed.

APPEAL from a judgment of the Court of Appeal (Lord Alverstone, C.J., Buckley and Kennedy, L.JJ.), reported 10 Asp. Mar. Law Cas. 597 (1907); 98 L. T. Rep. 89; (1908) 1 K. B. 51, affirming a judgment of Channell, J. at the trial before him without a jury.

The appellants were the owners of a ship, the

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

Knight of the Garter, and the respondents were the owners of a cargo of coal which was shipped on board the ship. The coals took fire from spontaneous combustion, and the ship was damaged, and the rest of the cargo was damaged by the water which was poured upon the part which had taken fire. The shipowners made a general average claim in respect of the damage to the ship, and the cargo owners counter-claimed in respect of the damage to the cargo. The shipowners resisted this claim on the ground that the damage was caused by the inherent vice of the cargo.

Channell, J. decided in favour of the claim, and his judgment was affirmed by the Court of Appeal.

The shipowners appealed.

J. A. Hamilton, K.C. and *Maurice Hill*, for the appellants, contended that the owners were protected by sect. 502 of the Merchant Shipping Act 1894, which relieves the shipowner from liability for loss by fire. The words must be construed in their ordinary sense. See

Grey v. *Pearson*, 6 H. L. Cas. 61.

The case of *Schmidt* v. *Royal Mail Steamship Company* (45 L. J. 646, Q.B.; 4 Asp. Mar. Law Cas. 217n.), decided on the repealed Act of 1854, is a decision to the contrary, see also *The Diamond* (10 Asp. Mar. Law Cas. 286 (1906); 95 L. T. Rep. 550; (1906) P. 282); but there is nothing to limit the general application of the section. Further, the damage was caused by the inherent vice of the cargo. A person who puts on board a ship dangerous goods cannot claim an average contribution from people who have been injured by his property. See

Wright v. *Marwood*, 4 Asp. Mar. Law Cas. 451 (1881); 45 L. T. Rep. 297; 7 Q. B. Div. 62;
Burton v. *English*, 5 Asp. Mar. Law Cas. 84, 187 (1883); 49 L. T. Rep. 768; 12 Q. B. Div. 218.

Such goods are outside a claim for general average, except in special cases, though it is not unlawful to carry them. The Court of Appeal said that the only case which debarred from general average contribution was where there was an actual default on the part of the cargo owner or shipowner, as the case may be. See

Schloss v. *Heriot*, 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.

But those cases do not touch the point which is raised here. See also

Taylor v. *Dunbar*, L. Rep. 4 C. P. 206;
Prehn v. *Bailey; The Ettrick*, 4 Asp. Mar. Law Cas. 428, 465 (1881); 45 L. T. Rep. 399; 6 P. Div. 127;
The Carron Park, 6 Asp. Mar. Law. Cas. 543 (1890); 63 L. T. Rep. 356; 15 P. Div. 203;
Carver on Carriage by Sea, sect. 373;
Pirie and Co. v. *Middle Dock Company*, 4 Asp. Mar. Law Cas. 388 (1881); 44 L. T. Rep. 426;
Abbott on Shipping, 13th edit., p. 628;
The Mary Thomas, 7 Asp. Mar. Law Cas. 495 (1895); 71 L. T. Rep. 104; (1894) P.108;
Milburn v. *Jamaica Fruit Company*, 9 Asp. Mar. Law Cas. 122 (1900); 83 L. T. Rep. 321; (1900) 2 K. B. 540;
The Irawaddy, 171 U.S. Rep. 187.

The actual point has never been decided, but the cases as to deck cargoes are analogous. Further, the owners are protected by the "York-Antwerp Rules" as to average adjustment, which are incorporated in the bills of lading.

Scrutton, K.C. and *McKinnon*, for the respondents, supported the judgment of the Court of Appeal.

J. A. Hamilton, K.C. was heard in reply.

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

July 31.—Their Lordships gave judgment as follows:—

The Earl of HALSBURY.—My Lords: This is an appeal by the plaintiffs in the action against a judgment of the Court of Appeal affirming a judgment of Channell, J. in favour of the defendants. The plaintiffs are the owners of the steamship *Knight of the Garter*. The ship *Knight of the Garter* was chartered on the 23rd March 1905 to carry a cargo of coal from Calcutta to Bombay. The facts are not in dispute. The ship was loaded with 8777 tons of steam coal and 195 tons of hard coke. The vessel, being thus loaded, started from Calcutta on the 25th April. The ordinary voyage from Calcutta to Bombay is nine days. She did not reach the Hoogly bar until the 4th or 5th May, and in order to cross it she had to discharge part of her cargo into lighters and reload it outside. She left the Hoogly on the evening of the 6th May. On the 9th May smoke was seen to be rising from one of her holds. On the two following days great heat was developed, explosions were heard, and fire seen, and it was decided to proceed to Colombo. During the voyage from the 9th till the 12th, when she arrived at Colombo, steam was injected into the holds in order to check the fire. Surveyors were consulted, and finally it was decided that the entire cargo should be discharged. This was accordingly done, and during this operation the coals were pumped upon, and in the end the coals were found to be damaged to the extent of 25 per cent., partly by fire and partly by water. The ship herself was also considerably damaged by the fire. An average adjustment was accordingly prepared, but its conclusions were disputed on the ground that the owners of the cargo were not entitled to any general average, because, first, the fire arose from the inherent vice of the coals shipped by them. This, indeed, was the main contention, though there were two other subordinate points to be dealt with hereafter. Mr. Hamilton suggested that it was a new point, but I fail to see any novelty, or, indeed, any point at all in it. The truth is that whatever plausibility existed in the argument was due to the use of a misleading phrase—*i.e.*, "the inherent vice" of the cargo. The phrase is supposed to be justified by what is undoubtedly the fact that the coals took fire from spontaneous combustion. The phrase was used in its proper application by Willes, J., where it was pleaded as an excuse for non-delivery of a furious beast, which, notwithstanding that all reasonable means had been used by the carrier, broke loose from its place of confinement and was ultimately lost to the consignee, but without any default or error on the part of the carrier: (*Blower* v. *Great Western Railway Company*, L. Rep. 7 C. P. 655). So, of course, though the expression is in such a case figurative, it might be used when excusing non-delivery, and it might be applied to anything which by reason of

its own inherent qualities was lost without any negligence by anyone. It is to the credit of the parties here that on neither side has there been any attempt to minimise or to exaggerate the facts as they are, but with all respect to the learned counsel who argued for the appellant, the result is that it is very difficult to say that there is one arguable point of law in his favour. It is absolutely clear that it was a common adventure, that it was for the safety of all, including cargo and ship, that the voyage was put an end to at Colombo, and that measures were properly and prudently taken to save both. *Primâ facie*, therefore, it was clearly a case of general average, and, as I have pointed out, it is the misleading phrase "inherent vice" which has lent plausibility but an absolutely fallacious effect to the argument.

With respect to the point under the York-Antwerp incorporated section of these rules, upon which Channell, J. decided the case, I am unable to agree with him, since if the point which I have dealt with here is a good one, I do not see how the incorporation of the York-Antwerp rule affects the question one way or the other. As to the point under the statute, I agree with the Court of Appeal that it is much too late to raise such a point now even if there were more in it than I think that there is. The real answer, however, is that the statute is not dealing with average at all, and this has been in effect decided long ago either upon the words of this statute or words which would have raised the same point in other statutes. I confess myself unable to see any novelty in this case. It is not denied that there was a common adventure, or that there was a common danger, that there was a sacrifice voluntarily made for the common advantage of all, and that the circumstances show nothing which should exempt either party from the obligation to make good the sacrifices made for the common advantage of both. The judgment of the Common Pleas in *Johnson* v. *Chapman* (2 Mar. Law. Cas. O. S. 404 (1866); 15 L. T. Rep. 70; 19 C. B. N. S. 563), delivered by Willes, J. where he states the English law to be that no one can maintain an action for a wrong where he has assented to or contributed to the act that occasioned his loss is undoubtedly good law, but here the facts do not raise that question at all; the shipowner is a party to taking in his ship the coals, with which it is assumed that both parties are equally familiar, and their liability to spontaneous combustion, and all the other circumstances, climate, and quantity, and depths of hold, and the peculiarities of the river Hoogly, are equally known to both. I am, therefore, of opinion that this appeal ought to be dismissed, with the usual result as to costs.

Lords ASHBOURNE, MACNAGHTEN, JAMES OF HEREFORD, and COLLINS concurred.

Judgment appealed from affirmed, and appeal dismissed with costs.

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

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

Supreme Court of Judicature.

COURT OF APPEAL.

Dec. 16 *and* 17, 1908.

(Before Lord ALVERSTONE, C.J., BUCKLEY and KENNEDY, L.JJ., and Nautical Assessors).

THE ST. PAUL. (*a*)

Collision — Vessel approaching falling snow — Sound signals for snow—Duty to sound—Speed —Collision Regulations 1897, *arts.* 15, 16, 29.

Neither arts. 15 *or* 16 *of the Collision Regulations apply to a steamship approaching falling snow, but good seamanship requires her, in such circumstances, to go at such a rate of speed as to enable her to enter the snow at a moderate rate of speed, and to sound fog signals before entering the snow for the purpose of warning vessels within it.*

Query, where a vessel in charge of a compulsory pilot is approaching falling snow, ought the master to see that fog signals are sounded?

APPEAL from a decision of Sir Gorell Barnes, P. (*The St. Paul and The Gladiator*, 11 Asp. Mar. Law Cas. 152 (1908); 99 L. T. Rep. 552; (1908) P. 320), by which he held the *Gladiator* alone to blame for a collision which occurred between the *Gladiator* and the *St. Paul* about 2.30 p.m. on the 25th April 1908 in the Solent off Fort Victoria, the wind at the time being north-north-west, a strong breeze to moderate gale blowing in squalls, with passing snow squalls or flurries, and the tide being flood of the force of from two to three knots.

The facts are fully set out in the report of the case in the court below (*The St. Paul and The Gladiator, ubi sup.*). The following is a summary of them :—

The case made on behalf of the *Gladiator* was that she was heading N. 77° E., was sounding her whistle for the snow, and was making nine knots through the water when those on board her saw the *St. Paul* about half a mile off and bearing ahead and a little on the port bow. As the *St. Paul* came in sight those on the *Gladiator* heard her sound two short blasts, and she was seen to be acting under starboard helm, so the helm of the *Gladiator* was starboarded 30°, and, as the *St. Paul* continued to come on causing risk of collision, the helm of the *Gladiator* was put hard-a-port to throw her quarter clear; but the *St. Paul* with her stem struck the starboard side of the *Gladiator* about amidships, doing her great damage and causing her to sink.

The case made on behalf of the *St. Paul* was that she was on a course of W. ½ S. magnetic, and was making about nine knots, when those on board her saw the *Gladiator* about half a mile off and half a point on the port bow. As soon as the *Gladiator* was seen, both engines of the *St. Paul* were stopped, and almost immediately afterwards, the *Gladiator* having sounded a short blast, the helm of the *St. Paul* was put hard-a-port, one short blast was blown, and the starboard engine was put full speed astern; and when the *Gladiator* was seen to be acting under a starboard helm the port engine was also put full speed

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

astern, but the *Gladiator* coming on at full speed across the bows of the *St. Paul*, with her starboard side a little forward of amidships, struck the stem of the *St. Paul* doing her considerable damage.

On the hearing of the appeal, the appellants admitted that the *Gladiator* was to blame for excessive speed, although she had not been found to blame for that in the court below; but they contended that the *St. Paul* was also to blame for proceeding at too high a speed as she approached the snow bank, and for not sounding any whistle signals as she approached the snow.

The following Collision Regulations were referred to during the course of the arguments:

Art. 15. All signals prescribed by this article for vessels under way shall be given: 1. By "steam vessels" on the whistle or siren. . . . The words "prolonged blast" used in this article shall mean a blast from four to six seconds' duration. . . . 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.: (*a*) A steam vessel having way upon her shall sound, at intervals of not more than two minutes, a prolonged blast.

Art. 16. Every vessel shall in a fog, mist, falling snow, or heavy rainstorms, go at a moderate speed, having careful regard to the existing circumstances and conditions. A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel, the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over.

Art. 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.

The *Attorney-General* (Sir W. S. Robson, K.C.), *Batten*, K.C., and *J. G. Pease* for the appellants. —On the facts proved and accepted by the court below it was the duty of those on the *St. Paul* to exercise the greatest care because whether they were on their starboard hand side of the channel or not at any moment a ship might emerge out of the snow. [Lord Alverstone, C.J.—Of course a vessel coming up the channel would be bound to keep on its starboard hand side of the channel.] No doubt but vessels even on their proper side of the channel may be near mid-channel, and the President has found these vessels were near mid-channel, and that finding must be accepted. There are two points of navigation in which the *St. Paul* is to blame, first, it was her duty to sound whistle signals, and even though art. 15 of the collision regulations does not apply in terms to her she ought to have sounded them under art. 29; secondly, she approached the bank of snow at an excessive speed; it is admitted that she is not within art. 16, but seamanship demands that she should approach the snow with caution. [Lord Alverstone, C.J.—*The Milanese* (4 Asp. Mar. Law Cas. 318 (1880); 43 L. T. Rep. 107) is an authority which lays down the duty of a vessel approaching a fog bank. Art. 29 requires the *St. Paul* to sound whistle signals under the circumstances which existed. It is said that they would not have been heard, but that is unlikely; if the signals had been given the collision might have been averted. The fact that the wind was from the north-west would not necessarily prevent the signals being heard ahead of the *St. Paul*, and if they had been heard everyone on the *Gladiator* would have been on the alert and there would have been a better chance of averting the collision. Even if the *St. Paul* was under compulsory pilotage the duty of the captain was to see that the whistle was used. It may be that the pilot has sole control of the speed and navigation signals, but it is submitted that the sounding of fog signals is part of the duty of the master and crew:

The Ripon, 6 Notes of Cases, 245.

As to the general duty of a master to a pilot:

The Tactician, 97 L. T. Rep. 621; 10 Asp. Mar. Law Cas. 534; (1907) P. 244.

What constitutes moderate speed depends on the circumstances of each case. Here neither vessel correctly understood the manœuvres of the other; those on the *Gladiator* mistook the course of the *St. Paul*, and those on the *St. Paul* mistook the signal for the snow sounded by the *Gladiator* for a helm signal. This shows the necessity for a slow rate of speed under the conditions which prevailed. The principles which should regulate the speed of a vessel are well stated in *The Normandie* (43 Fed. Rep. 151, 156). Excessive speed would have a marked effect on the chance of hearing sound signals from an approaching vessel. The onus is on the *St. Paul* to justify her speed and to show that the absence of sound signals did not contribute to the collision:

The Fenham, 23 L. T. Rep. 329; 3 Asp. Mar. Law Cas. O. S. 484 (1870); L. Rep. 3 P. C. 212.

Those on the *Gladiator* had a right to expect a vessel in the vicinity of the snow to sound signals:

The N. Strong, 67 L. T. Rep. 299; 7 Asp. Mar. Law Cas. 194; (1892) P. 105.

The appellants also argued that pilotage was not compulsory, but as the decision of the court rendered it unnecessary to decide the point the argument is not reported, but the following cases were cited:

Reg. v. *Stanton*, 8 E. & B. 445;
The Earl of Auckland, 5 L. T. Rep. 558; Lush 387;
The Assaye, 94 L. T. Rep. 102; 10 Asp. Mar. Law Cas. 183; (1905) P. 289.

Aspinall, K.C., *Laing*, K.C., and *Dunlop*, for the respondents, were only called on to argue the point as to the duty of the *St. Paul* to sound her whistle as she approached the snow. It is said that the omission to sound the whistle was negligence. Even if so, the appellants must show that that negligence contributed to the collision, for there is no statutory presumption of fault here; but the evidence shows that those on the *Gladiator* admitted that after the vessels saw one another there was time to manœuvre, but, unfortunately, the *Gladiator* did the wrong thing in starboarding:

The Margaret, 52 L. T. Rep. 361; 5 Asp. Mar. Law Cas. 204 (1884); 9 App. Cas. 873;
The Sanspareil, 82 L. T. Rep. 601; 9 Asp. Mar. Law Cas. 78; (1900) P. 267.

Batten, K.C. in reply.

Lord Alverstone, C.J.—We have listened with the closest attention to this case, and I am sure I may speak for my learned brethren as well as myself when I say we are very much indebted to counsel for the appellants for their most able arguments. Every point that possibly could be urged on fact and law has been urged by them in support of this appeal on behalf of the King's ship. Now the appellants are in this position, that they come into court admitting that the *Gladiator* is to blame. That would have no material bearing upon the appeal in the ordinary sense of the word, inasmuch as it is quite possible that, although the *Gladiator* is to blame, the *St. Paul* might also be to blame; but the importance of it is this, that the blame admitted by learned counsel on behalf of the *Gladiator* is not the blame for which she has been condemned. If the blame in respect of which she has been condemned had been of the character for which counsel contends—namely, going too fast, then very different considerations might have arisen; but it is very important, especially as there is no cross-appeal, to remember that the one finding against the *Gladiator*—the one material finding against the *Gladiator*—is that she caused the collision after the vessels had sighted each other by starboarding her helm. It is not necessary to consider the question of look-out, which may or may not have conduced to her improper starboarding or the question of whether she was right or wrong in the view she took of the signals which were thought to be heard from the *St. Paul*; or the mistake which Captain Lumsden fell into in thinking the *St. Paul* was in fact starboarding. The importance of it is this, that the learned judge has found, with the concurrence of the Elder Brethren, that the two ships saw one another at such a time that with ordinary care and prudence they might have manœuvred so as to pass clear of one another; and I think—although it is not necessary to go quite so far as he has practically found—I should have found they would have gone clear without any action on either ship; but the case must be argued upon the basis that the Crown do not dispute the finding of the learned judge that the *Gladiator* is to blame for improper starboarding. The *Gladiator* was not cast on the ground that she was going too fast, even though she had certainly been in much thicker weather than the *St. Paul* had been, and I can readily imagine and believe, knowing the care with which the King's ships are navigated, that it may very well have been that, notwithstanding the thickness of the weather, there were circumstances which led to its being necessary she should go at the speed she was going at. It is sufficient to say that nowhere in this judgment is the *Gladiator* cast for going too fast before she sighted the *St. Paul*. Now, naturally enough, counsel for the appellants say "I do not admit that blame, but I admit the blame that the *Gladiator* was going too fast, and I ask you, the Court of Appeal, to say that the *St. Paul* was also to blame for two reasons: first, that she was going too fast in the condition of the weather, and therefore got in the proximity of a snow cloud, in which there was a ship, at too high a rate of speed; and, secondly, that in approaching that snow cloud she did not give the signal she ought to have given to a vessel which might have been within it." Now, with regard to the first point, the learned President, with the concurrence of the Elder Brethren, has found that she was not going too fast, and I must say that, apart from what happened near when approaching the snow cloud, I should have come to the same conclusion. It is obvious that there were patches of thick weather due to snow, and I do not myself draw much distinction between fog and snow. There may be a distinction from the point of view of sound, but from the point of view of visibility I should not be disposed to draw much distinction between the duty of a ship in a fog and the duty of a ship with snow about, because experience will tell you that heavy snowstorms will as completely obliterate a ship as fog. Therefore the duty of a ship in the abstract may be quite as high in snow as in fog. Now, the *St. Paul* had come down Southampton Water and passed the Solent Bank, and had been seen by the witness Lady Montagu certainly not less than two miles off, and had been seen by another witness going down at a distance of certainly upwards of 500 or 600 yards; and there is the evidence of what I may call the snow coming on and passing away—I have not heard the word before, but it seems expressive, "flurries" of snow. It seems to me, therefore, there is no reason for interfering with the finding that the vessel was not travelling too fast. For reasons which I will explain in a moment, I think it is abundantly clear that inasmuch as she was not in such circumstances as to make it out she was breaking any statutory rule, it is quite impossible to say the speed of ten knots at which she was going was a speed which did in fact contribute to the collision. I say not breaking a statutory rule. Of course, if we had come to the conclusion that all the time she was in weather which was thick with snow, and so was breaking art. 16, we might have had to consider the question from a different point of view. Therefore, I come to the conclusion that, with regard to the first attack which is made upon the navigation of the *St. Paul*, namely, that she was going too fast in the then condition of the weather, the appeal fails.

I now come to a point which I confess does require careful consideration, and it has received it from counsel for the appellants; and we have heard what I think was a conclusive argument in answer by counsel for the respondents. Now, the learned judge has found as a fact, and I am not surprised on the evidence he was so advised by the Elder Brethren, that as a matter of seamanship it would have been advisable for the *St. Paul* to have sounded fog signals before the time she sighted the *Gladiator*, having regard to the nature of the squall ahead. Perhaps I may be allowed to say I should have come to the same conclusion quite unaided by the advice we have received, and I see no reason for differing from the learned judge in that respect. The importance of that matter is to consider what bearing it has upon the decision which ought to be given in this case. It cannot be said that the learned President was not alive to it, because he states the conclusion he came to, on the advice of the Elder Brethren, with regard to what I may call the proper navigation of the ship under the circumstances, and he has repeated, in emphatic and clear terms, that which I had in my mind before the judgment was read, when he says: "Over and over again we have had cases in

this court where a vessel, not herself in a fog, has been blamed because, seeing fog ahead, although herself not in the fog at all, she has not taken precaution so that her speed shall be moderate when she gets into the fog." If one looks at the case of *The N. Strong* (*ubi sup.*), one of the cases referred to, it will be found that in that case the test of good seamanship was applied both to speed and to the sounding of signals before the vessel got into a fog. Therefore, as I was saying, the learned President was perfectly alive, if I may say so, to the importance of the question. At the end of the judgment in *The N. Strong* (*ubi sup.*) I find these words: "I agree it is not an infraction of the rules which refer, in terms, only to what has to be done in a fog; but the Trinity Masters are clear that, as a matter of precaution, the steamer approaching a thick bank of fog should have eased, and also should have whistled to give notice of her position to any vessel which the curtain of the fog might be concealing;" and the judgment of the President shows that the same rule is to be applied to a thick snow squall. Now, I think this is of great importance, and if it could have been contended successfully on the part of the appellants, or had been contended on the pleadings, or could have been contended upon the evidence, that at the time these two vessels sighted one another they were in such a position that there would be difficulty in the one avoiding the other, or that the *Gladiator* would have had any difficulty as to what manœuvres she was to take, I should have required further argument before coming to the conclusion that this vessel, the *St. Paul*, might not be held also to blame. Of course I may put aside for the moment the suggestion that any signals given before the *Gladiator* came in view would not have been heard by the *St. Paul*. What is the position? I have gone carefully through the evidence. Both vessels put the other when sighted at a distance of about half a mile. There is no dispute about the courses, that of the *Gladiator* being N.77E. and that of the *St. Paul* W. ½ S. Both vessels agree that when first sighted they were port bow to port bow. Now, where were they? They were in a comparatively narrow channel, and I think, and the President thinks so too, they were both in about mid-channel. Under those circumstances the obvious duty of the approaching vessel was to pass port to port. The starboard hand rule would make that imperative. Therefore the *Gladiator* ought to have ported. She has got a large ship slightly on her port bow, and it is almost impossible to imagine that that vessel could have been cleared by starboarding. Therefore, it seems to me the learned judge was right where he said: "There was, as I have already said, not the least difficulty for the two vessels keeping clear of each other and avoiding collision by the exercise of reasonable care. But for the improper starboarding of the *Gladiator* there would have been no collision at all, in my opinion." I agree with counsel for the respondents, and in fact it was admitted by the Attorney-General, that the case originally made in the court below by the *Gladiator* was that she starboarded because those in charge of her believed that the *St. Paul* was starboarding. Under those circumstances, taking the position of the vessels when they sighted one another and the fact that the blow was only at an angle of a very few points, possibly two, it is quite clear it was the starboarding of the *Gladiator* which, in fact, put her across the bows of the *St. Paul*, and to my mind it all points to the conclusion that those vessels could with ordinary manœuvres have passed clear of one another. This is not like the case of vessels going on crossing courses, seeing one another under circumstances of difficulty. It is a case of vessels in a narrow channel, whose plain duty it is under every rule to pass port to port, and that rule being disobeyed in the state of mind into which the captain of the *Gladiator* had unfortunately been brought.

Now, I have only to say that I am quite unable to form any conclusion which would lead me to think that the finding of the President, where he says they are of opinion that the omission to sound fog signals made no difference in the case, and that the signals would not have been heard, was wrong in fact. So far as we have had their assistance, both our assessors think that that judgment is right, and that the sounds would not have been heard. It is sufficient to say there is a great deal in the evidence to support that view. I have only two other observations to make, which I should like to make because I recognise the importance of this case and I do not wish it to be thought that I have gone further in two matters which may come up for discussion on some future occasion. The first is that the learned judge says: "If such a signal had been heard, it would only have indicated a steamer approaching down the channel, and her exact position would not have been ascertained with certainty before she was sighted." I quite understand how that expression got in, and, with regard to the facts of this case, it was a perfectly correct observation to make, but I do not wish to be thought to take the view that there may not be a duty, an equally imperative duty, on a vessel in the position of the *St. Paul*, approaching a fog or snow bank, to sound her whistle, simply on the ground that it would only indicate a steamer approaching. In some circumstances it might be of importance to a vessel in a similar position to the *Gladiator* to know that another vessel was approaching. Therefore, I do not wish to appear to endorse anything which involved the view that such signals would only indicate a steamer approaching. The other point does not arise on the judgment, but has been raised in argument. Again, I do not wish to be held to express any opinion. I notice that in the course of the argument the learned President indicated that if counsel for the Crown was going to contend it was the duty of the captain, as distinguished from the pilot, to blow his sound signals, he would require argument to convince him of that. I reserve my opinion upon that; I am by no means satisfied that in some circumstances it might not be the duty of the captain to be responsible for sound signals as distinguished from the pilot; and it might be the duty of the captain to call the attention of the pilot to the fact that sound signals ought to be given. I have thought it right to make these observations lest silence should hereafter be taken to give consent. While recognising that in many cases the failure to make sound signals might be sufficient in such circumstances to make a vessel to blame, I see no reason for interfering

with what I understand to be the substantial finding of the President in this case, namely, that these two vessels saw one another at a distance at which by ordinary prudence they could have avoided one another, and that the collision was solely brought about by the wrong manœuvre of starboarding unfortunately undertaken by the *Gladiator*. The appeal must be dismissed.

BUCKLEY, L. J.—I agree, and have nothing to add.

KENNEDY, L.J.—In this case there was an appeal brought from so much of the judgment of the court of first instance as decided that there was no blame to be attached to the *St. Paul*. Now, the case so ably presented here was that in two respects there was a case, which had not been sufficiently appreciated in the court below, to show that the *St. Paul* ought also to be held to blame in respect of the speed at which that vessel was travelling just before the collision, and also with regard to the omission of that vessel to give the signal which it was said that under art. 16 she was bound to give; or, at any rate, if it was not given under art. 16 it was said that nevertheless as a matter of good seamanship it was negligent on the part of those on the *St. Paul* not to give the signal, and on that ground also she ought to be held to blame. Now the case, as it seems to me, may be put in a few words. There can be no ground for holding the *St. Paul* to blame, reversing the decision below, unless it can be shown, if there is no statutory provision involved, that there was a breach of good seamanship which either caused or materially contributed to the collision. With regard to the question of speed, I desire to add nothing to what the Lord Chief Justice has said. It seems to me I can only say this, that there was perfect justice in the decision in the court below, that in the circumstances there was no improper speed on the part of the *St. Paul*.

The more difficult question was that of signalling, especially upon the finding of the learned President that there was, as a matter of good seamanship, a position in which it would have been at any rate right for this vessel to have given fog signals or signals such as would be given by whistling a long blast as she was approaching the snow flurry, which veiled the approaching cruiser from her observation; and I myself hope that nothing will be drawn as an inference from the decision in this case that it is not the duty of a vessel approaching anything in the nature of fog, falling rain, or snow, which may hide a ship with which the ship outside may come into collision unless the ship inside the veil is warned —that it is not the duty of that vessel outside to treat it otherwise than as a duty in good time to give warning to the hidden ship. In this particular case it is impossible to find—it not being a question of the statute—of presumption against the vessel which omits to give the signal—that those representing the *Gladiator* are entitled to succeed in their arguments unless they can show that the omission to act did contribute to if not actually cause the collision; and in that, in my opinion, they have entirely failed, as they failed in the opinion of the President. In fact, the evidence of Captain Lumsden is this, that there was in his opinion, and I presume also in the opinion of the officer who assisted in the manœuvre of starboarding, an actual starboarding on the part of the vessel which was approaching. They do not say that if they had kept their course there would have been no collision; on the contrary, as I understand it, the case, put forward on behalf of the cruiser through the witnesses was that if nothing had been done the two vessels would have gone clear port to port; but it was thought on the cruiser that they saw the *St. Paul* starboarding. Therefore they were not brought by the absence of a sound signal from the *St. Paul* into the position of a vessel placed in a difficulty; certainly not into the position of a vessel which unless it acts will have a collision. They were not put in the position of a vessel whose commander thought they would have a collision unless he did something, but they were in the position of a vessel whose commander, having an opportunity of deciding, unfortunately decided wrongly. Whatever was the cause of the mistake, there was a mistake in fact. There was no starboarding of the *St. Paul*, and the error was one which was the sole cause of the collision; and it was not an error induced or contributed to by the absence of the signal. I agree also entirely with what the Lord Chief Justice has said with regard to the matter last mentioned in his judgment, as to the indication to a vessel approaching.

Solicitor for the appellants, *The Treasury Solicitor*.

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

Dec. 14, 15, 16, 1908, *and March* 18, 1909.

(Before KENNEDY, L.J., Sir J. C. BIGHAM, President, JOYCE, J., and Elder Brethren.)

THE KIRKWALL. (*a*)

Collision—Steamship and sailing vessels meeting —Duty of sailing vessel to keep her course and speed—Duty to stand by—Collision Regulations 1897, *arts.* 20, 21 — *Merchant Shipping Act* 1894 (57 *&* 58 *Vict. c.* 60), *s.* 422.

A steamship on a course of about east by north was meeting a sailing vessel heading about west sailing free, the wind being from the north east. The two vessels were approaching nearly end on and a collision occurred, the starboard side of the steamship about amidships striking the stem of the sailing vessel, the angle of the blow being about four points leading forward on the steamship. Shortly after the collision the sailing ship, which had received some damage forward, proceeded on, and the steamship sank, all her crew but two being drowned.

Held (affirming the decision of the Admiralty Court), that the sailing ship was alone to blame for altering her course, and that there was no evidence on which the court could find the steamship to blame for not reversing her engines sooner.

Held, further, that on the facts as found it was unnecessary to consider whether the sailing ship had been guilty of not standing by in breach of sect. 422 *of the Merchant Shipping Act* 1894.

APPEAL from a decision of Sir Gorell Barnes, President, by which he held the owners of the sailing ship *Tasmania* alone to blame for a colli-

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

sion which occurred between their vessel and the steamship *Kirkwall*.

The appellants, plaintiffs in the court below, were the owners of the sailing ship *Tasmania*; the respondents, defendants and counter-claimants in the court below, were the owners of the steamship *Kirkwall*.

The case made by the plaintiffs in the court below was that shortly before 12.10 a.m. on the 6th Aug. 1908 the *Tasmania*, an iron four-masted barque of 2083 tons net and 2238 tons gross register, was, whilst on a voyage from Hamburg to Wallaroo, Australia, laden with a cargo of coke, in Heligoland Bay, North Sea, about seventeen miles west of Borkum Lightship. The weather at the time was dark and clear, the wind north-east, a fresh breeze, and the tide flood of unknown force. The *Tasmania* was heading west magnetic, sailing free under all plain sail, making about six to seven knots an hour. The regulation sidelights for a sailing ship 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. In these circumstances those on board the *Tasmania*, observed the white light of the *Kirkwall* distant five or six miles, and bearing about a point on the port bow. This light was carefully watched, and in a short time the red light and then the green light of the *Kirkwall* came into view on about the same bearing. The *Tasmania* always kept her course, and the *Kirkwall* continued to approach, alternately shutting in both her side lights until she had got very close to the *Tasmania*, still on about the same bearing, when she shut in her red light as if under a hard-a-starboard helm, and, coming on at full speed with her starboard side about amidships, struck the stem of the *Tasmania* a heavy blow, and continuing on under a hard-a-starboard helm, again struck her port bow and continued on until she got round under the *Tasmania's* stern, and on to her starboard quarter and apparently went away. By the force of the collision the head of the *Tasmania* was brought into the wind with the sails aback; she was found to be leaking badly in the port bow, and in about twenty minutes she was put on a course for the Downs, no light or signal being seen or heard from the *Kirkwall*. Those on the *Tasmania* charged those on the *Kirkwall* with not keeping a good look-out, with neglecting to keep out of the way of the *Tasmania*, and with neglecting to slacken the speed or stop and reverse the engines of their ship. The case made by the defendants and counter-claimants in the court below was that shortly before 11 p.m. on the 5th Aug. 1908 the *Kirkwall*, a steel screw steamship of 1652 tons net and 2582 tons gross register, 300 feet long, fitted with engines of 225 horse power nominal, and manned by a crew of twenty-two hands all told, was whilst on a voyage from Huelva to Hamburg with a cargo of copper ore in the North Sea between Terschelling Bar and Borkum Flat Lightships. The wind was easterly, fresh, and the weather was fine and clear. The *Kirkwall* was steering a course of about E. by N. magnetic, and with engines working at full speed was making about seven and a half knots. The regulation lights, including the additional mast-head light and a stern light, were being duly exhibited and were burning brightly, and a good look-out was being kept on board her. In these circumstances the *Tasmania*, when approaching the *Kirkwall* in a position to pass all clear starboard side to the starboard side, altered her course, and with her stem and port bow struck the starboard side of the *Kirkwall* about amidships a heavy blow, causing her to founder shortly after. The chief officer and the boatswain of the *Kirkwall* were picked up by a Hamburg tug about 8.30 a.m. on the following morning, but the rest of the crew, which included the whole of the watch on deck, were drowned.

Those on the *Kirkwall* charged those on the *Tasmania* with sailing away after the collision without rendering, or attempting to render, any assistance; with not keeping a good look-out; with failing to keep their course; and with improperly starboarding.

The following collision regulations and section of the Merchant Shipping Act 1894 were referred to during the course of the case:

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. 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. 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.

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

Sect. 422 (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; and also (*b*) to give to the master or person in charge of the other vessel the name of his own vessel and of the port to which she belongs, and also the names of the ports from which she comes and to which she is bound. (2) If the master or person in charge of a vessel fails to comply with this section, and no reasonable cause for such failure is shown, the collision shall, in the absence of proof to the contrary, be deemed to have been caused by his wrongful act, neglect, or default.

Aspinall, K.C. and *A. E. Nelson* for the plaintiffs.—The steamer is alone to blame. The charge of not standing by is not supported by the evidence.

Laing, K.C. and *D. Stephens* for the defendants.—The charge of not standing by is made

out. The duty placed on the master of the *Tasmania* is clear, in so far as he can stand by without danger to his own vessel he is bound to do so until he has ascertained that the other vessel has no need of assistance. The evidence shows that his vessel was in no kind of danger, and he neglected to obey the clear provisions of the statute. He has shown no reasonable cause for his failure, and so the collision is to be deemed to be caused by his default, and the burden of proving it is not his fault is on his ship, the *Tasmania*.

Nelson in reply.—There was no breach of the statute. The evidence shows that those on the *Tasmania* were apprehensive as to the effect of the collision on their vessel and thought they were in danger. No case has been cited in which a sailing vessel has been held to blame for not standing by after a collision. In this case there is no evidence that the steamship fired a rocket or made any distress signal, and that is a sufficient and reasonable cause for the failure to stand by, if there was any failure.

The PRESIDENT.—The collision in this case took place about midnight on the 6th Aug. 1908, roughly speaking, about seventeen miles to the west—perhaps a little to the southward of west—of the Borkum Lightship, and the plaintiffs' vessel was damaged—not much, but damaged on her port bow and stem in the manner which has been described by the surveyor, and is shown in the photographs put in. The defendants' vessel sank shortly afterwards, and everybody on board her was drowned with the exception of two persons, one of whom was the chief officer, Mr. Thomas Jones, and the other the boatswain. Both were below at the time, and so they can throw no light whatever on the manœuvres of their own vessel or what was seen with regard to the other vessel before the collision; and the difficulty that I feel in dealing with this case—a case of a most disastrous character both in regard to the loss of property and the unfortunate loss of life—is that we have not had the advantage of seeing any witness who can throw any light upon what took place as these vessels were approaching each other. I say that because so far as the plaintiffs are concerned their witnesses have been examined prior to trial, and I must say it would have been a very great advantage if we had seen them, and secondly, because all the defendants' witnesses who were on deck were drowned. So, in dealing with this case one has to consider it under very difficult circumstances and to be guided a great deal by those facts which one can find with any real certainty, and, of course, partly by what has been stated by those witnesses we have seen, together with the evidence of those witnesses who were examined before the trial. What are the broad features of the case? They appear to be these: The *Tasmania* is an iron four-masted barque of 2238 tons gross register, and she was bound from Hamburg to Australia, with a cargo of coke and a crew of thirty hands all told. She had left Hamburg that morning. I do not know whether the captain joined her there, but apparently the chief officer, Mr. Sleggs, joined her at Hamburg, and he stated in his evidence that all the crew joined her there. They were a fresh crew, and so they were only out a few hours when this disaster happened. At the time these two vessels were approaching each other the *Tasmania* was heading W. magnetic, with the wind about N.E. and therefore, as the wind was four points abaft the beam, on the starboard side, she was sailing free. She was under all plain sail, making six to seven knots, and her lights were burning properly. That states the condition in which she was shortly before the collision. The *Kirkwall* was a steel screw steamer of 2582 tons gross register, and she was manned by a crew of twenty-two hands all told, and was in the course of a voyage from Huelva to Hamburg with a cargo of copper ore. She was proceeding on a course of E. by N. magnetic, and making between seven and eight knots. That, I suppose, is practically her regular speed. Now, the first thing to notice is that, having regard to the locality where this collision took place—namely, between the Terschelling Bar Lightship and the Borkum Flat Lightship—nearer the latter than the former—one would expect to find, as the one vessel was coming from Hamburg and sailing free, so that she could keep any course practically she wanted to in the way of coming to the southward and westward, and the other vessel was a steamer proceeding to Hamburg, that these two vessels were on very nearly opposite courses passing the two lightships, which were visible when within range. It was clear weather. Accordingly we find in the evidence that the sailing vessel was sailing W., and the steamer was steering E. by N. On that statement there is only a point between the two courses from being exactly opposite to each other—and when I say that I do not mean that those two vessels kept mathematically upon those two courses. Now, the plaintiffs' case is that from first to last after those on board had made out the *Kirkwall* the helm of the *Tasmania* was never altered, and that the collision was caused entirely by a very large alteration of course on the part of the *Kirkwall*. The master of the plaintiff vessel gave an account of how he first made out the lights of the *Kirkwall*, and how he went below to consult his chart, and how he came up again. When he took up the story after he came up again, he spoke about the steamer showing her masthead and red and green lights alternately. Then he proceeded to state as follows.—"And did she get close? Yes; and all at once she shut in her red light and opened her green broad up.—How close was she when she did that, could you judge? I could not say.—We know it is a matter of time. Was she close, or what? She was three-quarters of a mile, or something like that.—When she made that last alteration? I could not judge; I was standing by the man at the wheel then.—When she opened her green light what happened? She was still on the port bow.—What happened? She altered her course to cross our bows.—What happened? Did the collision take place? Yes; he opened his green light and we went right into him.—What interval of time do you think there was from the time when he opened his green light and the collision? About three minutes." He had previously stated, I think, that these lights were seen about a point on the port bow, but a little further on in his evidence he stated this:—"Do I understand that the steamship that collided with you was broader, when you saw her, than a point on your port bow? Well, the closer he was

getting to us the more he would broaden up. I would not like to say exactly to a point on the bow. —What was the broadest you ever saw the steamer that collided with you? Two points I should think.—When was that? Just before he shut in his red light. Prior to that you were red to red? Red to red, yes." That is a statement of what he saw and how he said the steamer acted at the distance or about the distance or time before the collision to which I have referred. Then he gives an account of how the two vessels were heading at the time of the collision, and he said that at that time his ship's head was west magnetic—that is to say, he had not altered his course at all—and that the steamer's heading was N.W. About that he is quite emphatic. He is asked: "You do not mean that, do you, N.W.? N.W.—Not N.E.? No, N.W.—If she was bound up to the Elbe or the Weser she must have gone right round under a starboard helm? Yes, right under a starboard helm.—About twelve points? Twelve points about.—Do you think this steamer that collided with you altered about twelve points? Yes." Now I wish to refer to the evidence of two other witnesses about the position of the vessels at an earlier time than the moment of collision. They are the mate (Mr. Sleggs) and the second officer (Mr. Chapman). The former said, in the course of his evidence, this:—"What I want to get at is this: What was the broadest on your port bow that this vessel got? A point.—That was the broadest she ever got? Yes.—Was that just before she shut out her red light? Yes.—Now I want to know how far she was from you when she got the broadest—when she shut out her red light? A quarter of a mile I should say.—A point off and a quarter of a mile off and then she shut off her red? Yes." Mr. Chapman, in describing what he had seen at first was asked this:—"And what was the next thing you noticed? The next thing I noticed was, when she was within four or five ships' lengths from us she altered her course, hard a-starboarded her helm, opened her green light, and she crossed our bows." And the position in which she was stated by him further on as follows: "When you first saw the green light of the other ship, I understand you said it was brought on your bow. I want to know what you mean. Do you mean broad on your bow or nearly ahead? It would be nearly ahead.—That is when you first saw her green light? Yes.—How far was she off? At that time she was not any more than three ship's lengths from us when she altered her course.—You said before that she was four or five lengths off when she altered her course. Which is correct? Well, I cannot estimate as to 2ft. or 3ft. at night time.—You mean she was quite close to you? She was close to us, very close to us." Having stated the way in which those three persons say this vessel was approaching, let me just refer to the evidence which shows what the angle of the blow was—the evidence of Mr. Bourne, who saw the barque afterwards. Practically he takes the same view of the angle as the master of the plaintiffs' ship, who makes the angle out to be about four points from right angles leading forward. Having regard to the evidence from the plaintiffs' vessel, the evidence of the surveyor, and the evidence of the photos, which show the damage found on the port bow of the *Tasmania*, I think the angle must have been very much what I have stated—namely, something like four points. Now, the first general remark which I have to make is this, that if the plaintiffs' vessel had never altered her course at all, and the defendants' vessel had altered something like twelve or eleven points—which it is necessary she should have done in order to produce that angle, on the assumption that the plaintiffs' vessel was still keeping her heading of west—it follows almost as a matter of course that the defendants' vessel was broader on the port bow of the *Tasmania* before she, the defendants' vessel, commenced that manœuvre. Two observations result from that. In the first place, that will not fit the plaintiffs' story, because their story is that the other vessel was very nearly ahead, or very slightly on the port bow. The second observation is that that is an extremely improbable thing to expect, because, if a steamer was broad out on the port bow of a vessel in that locality, and was desirous of getting to Hamburg, it is not likely she would starboard to the extent of eleven or twelve points, apparently only for the purpose of following up and hitting a sailing ship a severe blow. It is not only improbable but impossible, if once one starts with the view that there is anything like a correct representation by the plaintiffs' witnesses of the position of the vessels when first approaching each other, for if the steamer was on a very nearly opposite course and was approaching on that course, such an amount of alteration as is put on the steamer by the plaintiffs would inevitably take her right away to the north of the sailing ship, far away clear of any possibility of collision; in other words, the distance at which she would have to act to produce such an amount of alteration would be such that there would be no possibility of her coming in contact with the sailing ship. To my mind it is practically an impossibility for the collision to have happened in the way the plaintiffs say it did. What is the result? To my mind it is this, that the plaintiffs' story cannot be accepted as a true representation of what happened, and that the angle of the blow, which is not in conflict at all, must have been produced by alteration both on the part of the steamer and on the part of the sailing ship—and it must have been a very substantial alteration to produce such a blow. On that point the Elder Brethren are entirely in accord with me. Indeed I do not think it is possible to take a different view on the courses and the admitted angle of the blow. Then the question comes to be this: To what extent did these vessels alter, and, if there was alteration on the part of the sailing ship, what would have happened if there had been no such alteration? According to the view which I take of this case both these vessels must have altered substantially, probably at a time when the vessels had each other very nearly ahead. I think it is not too much to say that there was very nearly the same alteration on both vessels, and I think it follows as a matter of course from that that if there had been no alteration on the part of the sailing ship this collision would never have happened. This is the view which I have reached by inferences from certain facts which I have stated, and of course it is a conclusion which is entirely inconsistent with the statements of the officers of the plaintiffs' vessel, though not inconsistent with some of the evidence.

When one turns to the evidence of the seamen on board the sailing vessel one finds there is a certain amount of conflict between their evidence and that of the master, because the man on the look-out, a man named Martansen, who was on watch from midnight till four o'clock, said this: "I stayed on the forecastle. At the time of the collision? At the time of the collision, too.—You would not know your heading, but was your vessel on her course? On her course at the time she struck. I could not tell you that.—You do not know how your vessel was heading? I know how she headed, because she luffed up to the wind.—What effect had the collision when the vessel struck you on your vessel's head? I do not understand exactly what you are asking me about.—Before the collision was your vessel sailing or what? She was sailing.—After the collision was she sailing? No. She was back sailing for a little time. I believe the man at the wheel luffed her.—You do not know one way or the other. You found she was up in the wind? Up in the wind." That, of course, is not inconsistent with what took place afterwards, and therefore is not in direct conflict with the evidence of the officers. It may be this man was talking about what took place afterwards, but I do not think that was so with regard to what was said by the next witness, the man at the wheel. He was asked:—You remember the collision taking place? Yes, I do.—At the time the collision took place were you on your course or not? I was on my course. I see the light so close that I had to strike him. I put my wheel round and she came up in the wind.—That was at the last moment? That was when she was from here to there (pointing) about five to ten yards—because I had lights right on both sides.—Did anybody give the order or did you do it yourself? The captain told me to luff — to put her helm down.—Was that just when you struck her? Just before she struck us.—When she was five or ten yards away? Yes. That would have no effect on the steering of the ship." Then, in cross-examination, he is asked:—I should very much doubt any officer giving an order to luff when vessels were five to ten yards apart, but in cross-examination the witness says this:—"You got an order before the collision? I had an order to luff.—The captain gave you that order? I could not say. The second officer gave me a hand to luff, because I could not luff so quick to get the helm hard down. I only wanted to know who gave the order? The captain.—Did you luff her up? We luffed her up, but that had no effect.—You got the helm right over? Yes. It does not take more than a minute to get it over.—You got it over by the time you struck? Not quite." Now, that is an absolute contradiction, so far as it goes, of the evidence given by the master and officers, and when I find that the story won't work as told by the plaintiffs' principal witnesses, and when I find that there is this difference on a very vital point in the evidence of the plaintiffs' witnesses, I think it is not unreasonable to take the view that it is impossible to rely on the evidence given on behalf of the plaintiffs, that the sailing vessel was kept upon her course right up to the last moment, especially when one remembers that, if I am right in the view I have taken, it would then have been impossible for this collision to have taken place.

I find as a fact that the sailing ship did not keep her course, and that the alteration which she made, whatever it amounted to, was such that but for that alteration the collision never would have happened. Of course that does not quite end the case; because a sailing ship or any vessel that is bound to keep her course, in considering what she has to do with regard to another vessel which is bound to keep out of her way, comes under art. 21 of the rules, which provides that "Where by any of these rules one of two vessels has to keep out of the way the other shall keep her course and speed." To that rule there is an important note, which says: "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 shall take such action as will best aid to avert collision." That rule is very carefully expressed and must be adhered to as closely as its provisions require; and in order that the vessel which has to keep her course should act she must wait until it is reasonably clear that the other vessel cannot by her own action alone avoid the collision. It is always necessary, in considering that somewhat difficult duty which is cast on the vessel which has to keep her course, not to press the rule so tightly as to leave no latitude for judgment on the part of the vessel which has to keep her course. Distance is a difficult thing to estimate, and action of course must be taken at a time when it is possible there is some doubt, but it cannot be taken prior to a time when the other vessel can by any reasonable action avoid the collision. So, in a case of this kind, one of the principal elements is how far these vessels were apart when the steamer acted, and was that action taken at such a time that up to that time and beyond the sailing ship ought to have kept her course, having regard to the fact that very slight alteration would take the steamer clear of the sailing ship. Now, that is a difficult question, but I think it is quite obvious that when the blow is considered as being at the angle stated the sailing vessel and the steamer must have been a considerable distance apart to allow of any such angle being produced by the action of one or the joint action of both; and I have already said I am perfectly certain that if the sailing vessel had not acted at all, the steamer would never have gone near her. My view is that if one tries to calculate it out, one comes to the conclusion that the sailing vessel acted long before it was necessary, and that the steamer could up to a much later period have avoided the collision without the slightest difficulty. What I think is the probable explanation of this case is that the sailing vessel was falling off and coming to, and the steamer was not keeping a mathematically straight course, and very likely the steamer may have had glimpses of the green light of the sailing vessel, and then may have starboarded, because a trifling starboarding would have avoided the collision; and whilst she was in the act of doing that the sailing vessel acted at the same time, and acted with considerable helm; and that the sailing vessel must have kept her way for some time, and the speed she had on her, to lead to what the surveyor, Mr. Bourne, said was the inference to draw from the damage — namely, that the steamer had come aft on the *Tasmania*; in other

words, that the *Tasmania* was moving a little faster than the steamer at the time of the collision. My judgment is that the sailing ship is alone to blame.

After what I have said the statute does not trouble me, but I do not intend to leave this case without saying a few words with regard to the charge of not standing by. Sect. 422 of the Merchant Shipping Act provides that: [His Lordship read the section and continued:] The defendants say that the plaintiffs' vessel failed to comply with that section. The evidence about that requires to be shortly referred to, because the defendants say that apart from dealing with the case upon the facts, as I have already dealt with it, if the facts are applied to this section there was no reasonable cause for failing to render assistance and to stand by, which it is said the plaintiffs' ship in fact failed to do in this case, and that the plaintiffs have not proved the contrary, and therefore the collision must be deemed to be caused by the wrongful act, neglect, or default of the plaintiffs. That only puts a burden of proof upon the plaintiffs. If they prove that the collision was not due to their wrongful act, neglect, or default, that section is got rid of, and as I have already said it is not absolutely necessary to apply it for the reasons I have already given; but it is desirable one should touch upon the point, because it has been very much discussed in the case, and I want to refer shortly to the evidence about it. The evidence, therefore, of these three persons is to this effect, that no sound or signal or anything was heard from the steamer, and that they assumed from what they saw that she had gone right away on her course. The evidence of the seamen is not exactly in accordance with that. Anderson, A.B., said this: "Did she stop there? No, she went right round on the starboard quarter.—She came on your starboard quarter? Yes, and then the lights went out except the one white light, and then she went on and disappeared at once.—The white light disappeared?—Yes, it went on.—The steamer went on? Yes.—You thought she was going away, did you, or what did you think? I thought she went down, sank.—How far away was she from you? Not so very far.—Did she show any signals? No, no signals at all.—And sounded no whistle? No." Then in cross-examination, he said this: "When you saw the steamer sink, you say she was not very far from you. How far do you think? Well, I could not say any distance.—About roughly? It would be about a quarter to half a mile away.—And you thought that she sank? Yes.—You went on clewing up your sails? Yes, we started getting the lifeboat ready first.—When you thought the steamer sank no order was given to you? No.—Of course if the steamer sank, those poor fellows were either drowned or clinging to something? The skipper said: 'Do not turn in, just drop into the bunk, because we do not know what sort of a mess we have got into ourselves.—You mean your ship? Yes.—He said: 'We do not know what mess our ship will get in'? No. You were not thinking of the other ship? No.—Then it is not true that the stern light was in your view half an hour? No, only quarter of an hour from the time of the collision until the steamer disappeared.—That is your estimate? Yes." Then Martansen said this:—"Did you see this vessel after the collision? I saw her after the collision.—What did you see? I saw her coming round on the port bow and coming up again on the starboard quarter, and I saw a lot of smoke coming up, and afterwards I saw the light go farther and farther down. I cannot say what light it was, whether it was the top light or what light it was, but it was a bright light.—How far away was she from you? It was about ten minutes or a quarter of an hour after the collision. She was not very far.—What did you do?—I stayed on the look-out." In cross-examination he was asked about this:—"What light did you see? Did you see any light? I saw some of the lights at that time.—Then what happened? After that I saw the steamer go right away. She was steaming away, and I suppose our vessel was going ahead a bit. After that I see a lot of smoke coming up.—It may have been steam? No, it was smoke from coal. After that I see the light go more and more down?—You could see that clearly? I could see that clearly. Whether it was her top light or stern light I could not judge.—You could see them going down as if she was sinking? Well, if she was sinking or not, I could not say, but she disappeared.—You mean you saw a light coming from a height and going down lower and lower and lower? Yes.—How far do you estimate it was from you? Well, that is what I cannot tell you, but I know it was not very far, a very short distance." Lastly, Jones, who was at the wheel said this:—"When you saw this light disappear the vessel was so close that you could make out the hull of her? Yes, she could not be very far off.—I agree; it was a dark night? Clear, but dark.—And then she sank? I could not say if she sank. I saw the light disappear, going lower and lower, and I told the captain when he came up on the poop again. The captain asked me if I noticed anything about the steamboat, and I told him just as I am saying it here.—You told him what you had seen? Yes, and the second officer, too; and the captain told me to keep on my course. The ship went up in the wind and went right round, and came to her course again with the helm right down.—Did the captain tell you to go on your course after you had told him what you saw? Yes."—Well, there is considerable discrepancy of a very important character in that evidence. The captain and officers in substance say that there was not enough to indicate to them there was reason to think that this vessel was in difficulties, but in fact they thought she had gone away. The men whose evidence I have read appear to have thought that the vessel had sunk when her light had gone down lower and lower and she disappeared, and they say that the master was told of this. First of all, there is the evidence of the master. It is said that after the collision he went with the carpenter and found the water rushing in on the port bow. He says: "I could see the water rushing in. I think you gave orders to the carpenter to try and stop these leaks as well as he could? Yes. I gave him orders to block the holes up as well as he could.—Did you go back on the deck of your vessel? Yes.—I think your crew came to you, did they not? Yes. They came aft, and asked me to put into the nearest port, as the ship was making water.—What did

you do on board your vessel. Did you get your vessel on her course again? I waited until I saw the steamer disappear from us, and then I put her on her course again.—I think you had lost sight of the steamer. She went round, you told us, on your port side, and then apparently left you? On the starboard quarter—yes." Further on he said this: "How long after the collision was it that you saw her stern light before you went on your way? About ten minutes altogether after the collision.—When you came out of the forepeak had you satisfied yourself that your vessel was all right? No.—Your vessel, you have no doubt about it, was never in any danger of sinking? I just saw the rush of water, and then I came up.—That was only in that damaged part, in the forepeak? Yes.—You had sounded all your holds? Not then, but I sounded them shortly afterwards.—You had no doubt about the safety of your ship? You knew you were safe? Did you put the boats out? No, I got them all ready in the tackles to put out.—Did you put a boat out at all? No.—You knew, did you not, that your stem had struck the side of this steamship? Yes.—And you were a large laden sailing ship? Yes.—Did you give any thought to those on board the steamship? Yes.—What thought did you give? I ordered the boats out in case there were any signals of distress. I ordered two boats to be ready.—However, you did nothing? No, I just held on while the steamer went away from us.—In your view could the steamship, which you had collided with, have disappeared within ten minutes—sunk I mean? No.—You saw the steamer, I understand, that collided with you steaming away ten minutes after the collision? Yes.—On her course? On her course.—How far away was she from you when you commenced to get under way? I lost his stern light.—How far from you did you lose her stern light? A mile to a mile and a quarter, I suppose."—Then the mate says this: "When was the last you saw the steamer? The last time I saw him he was on the starboard quarter. On your starboard quarter? On our starboard quarter.—What could you see of him then? I could see his stern light.—What do you think he was doing? Steaming away.—You saw nothing but his stern light after the collision? No; nothing." He heard no sound or signal of any kind, and the master had already said the same thing. Then, going on with this witness, he was asked: "Did you know that he had sunk? No, I had not the slightest idea. We assumed that she had not sunk. She appeared to be going away from us.—How far away was the last time you saw her stern light? As near as I could judge I should say six or seven miles." Then the second officer says this: "Did you see what happened to the steamer after she struck you? Did you see which way she went? I saw which way she went. She still kept her starboard helm and went right round on our port side and away on the stern on the starboard quarter and away to windward.—Did you see any lights on board of her while she was doing that? The only light I saw on the steamer was her stern light after she got round.—Did you continue to watch her? I did not continue myself, because I was busy with the men on deck, getting the sails off the ship.—How long after the collision did you see it? As near as I can judge it would be twenty minutes to half an hour. I could not judge the time correctly when everything was in such a bustle.—And how far away do you think it was? As near as I could judge, about three miles.—What do you think she was doing? I thought the steamer was bearing away from us.—Did you hear any whistle or shout or see any rocket? I heard no signals whatever and saw no lights. Even when she was altering her course she did not give any signals.—After the collision did you get any orders from your master? I got orders to clew up the sails.—Anything with reference to the boats? We were told to get the boats ready and everything ready to swing the boats out.—Did you do that? I saw that both boats were clear and the tackles hooked on and both ready to swing out.—We know your master went down into your peak, and found that the vessel was making water, and afterwards the vessel was put on her course. How long do you think it was from the time of the collision until you were on your course again? It must have been fully half an hour." Now, counsel for the plaintiffs said yesterday that the last witness, Jones, was examined after the captain had left the room and that he was not recalled. I must say I regret it, because counsel said he would have liked to ask the captain about it, and I suppose the suggestion is that the captain would have contradicted it. It is certainly very unfortunate that the master was not recalled, as he could have been, I assume. Therefore I do not desire to determine, as it were, between officers and men—whether one version or the other was right. I do not think it would be right to do so on a serious matter of this kind.

All I propose to say is that even on the admitted facts of the case the view which I take and which the Elder Brethren take is that there was a failure in fact to comply with the provisions of the section which I have read, first of all because it is now clear, and I have no doubt was ascertained at the time, that there was no danger whatever to the plaintiffs' vessel. I have no doubt whatever that within a very short time after the disaster it was ascertained that the vessel was in no danger, and I think it was ascertainable. It was known this vessel had had a very violent collision with the steamer, and had struck the steamer on the side, probably in a vital part, and what happened afterwards was a curious circumstance. The vessel appears to have been still under starboard helm, and she appears to have disappeared at a very little distance from the sailing vessel. At the very least, I feel satisfied that some effort should have been made to ascertain whether the steamer had gone safely away or whether she had sunk—whether the light disappeared by the vessel going away or by sinking. If the boats had been put out and trouble taken to row over the locality—because it was fine weather—we should not have had that terrible narrative related by the officer who was called, in which he said he was hanging on to a plank from eleven o'clock at night till something like 9.20 the next morning; and in the course of that time I think it was the engineer was lost off the same plank; and others may have had the same fate. My view, therefore, is, and the Elder Brethren concur entirely, that there was a failure to stay by the other vessel until it had been ascertained that she had

no need of further assistance, and to render such assistance as was practicable to her master and crew. I wish, however, to say that I do not attribute this to any wilfulness on the part of the officers or anybody on the plaintiffs' vessel. I think they became too much engrossed in their own condition, and that they were thoughtless of what might have happened to the other ship so as to act as they did. Still, that would mean a failure under the statute, whether it was thoughtless or not; and if it were necessary to decide the case upon any question arising under the statute I think the plaintiffs would have been in the difficulty of having to prove that the collision was not caused by their wrongful act, neglect, or default; and a greater burden might have been cast upon them than has been the case, which they would have had difficulty in discharging. My object in making these observations is that I am assisted by two gentlemen of great experience, and they agree with me that it is most essential that in a disaster of a serious character no vessel should leave until she has taken the utmost steps to ascertain that nobody's life is left in peril and that no property is left in peril. The result of this case is that, for the reasons I have given, the plaintiffs' vessel must be held alone to blame.

On the 23rd Dec. 1908 the plaintiffs delivered a notice of appeal claiming that the decision of the President was wrong, and moving for an order that the *Kirkwall* was solely to blame for the collision, or was in part to blame for it.

The appeal was heard on the 18th March 1909.

Aspinall, K.C. and *Nelson* for the appellants, the owners of the *Tasmania*.—The judge below was wrong in disbelieving the evidence given by those on the *Tasmania*. Further, if he was right to do so, and the theory is accepted that both vessels altered their course, then there was a duty on those on the steamship to stop and reverse their engines. On the theory accepted by the court below, the steamship must have starboarded six points while the sailing vessel was porting five points; they must during that time have realised the sailing vessel was adopting and persisting in a wrong course, and yet they kept on full speed ahead, trusting to their speed to get across the bows of the sailing vessel; they should have stopped and reversed their engines sooner.

Laing, K.C. and *D. Stephens*, for the respondents, were not called on.

Kennedy, L.J.—We see no ground whatever—and, speaking for myself, I do not think it necessary to state the reasons for my conclusion—for allowing this appeal, because we have the judgment of the learned President, which is most minute and full; and it is for the reasons given by him that I concur entirely in the view that the vessel which he has found alone to blame ought to be found alone to blame. Upon the evidence before us we have asked the nautical assessors whose assistance we have whether they see any reason to differ from the view on nautical questions and questions of manœuvring which the learned President said had been expressed to him by the Elder Brethren, and they tell us they see no reason at all to differ from the conclusion which the learned President has stated was the conclusion of those who assisted him.

On that view of the case it is unnecessary for those who represent the sailing ship to enter into the further question upon the statute (Merchant Shipping Act) as to presumption of blame, but it has been suggested here by the learned counsel, who appear to support the appeal, that there was a ground on which the other vessel ought to be held partly to blame. That point is not one which appears, so far as I can make out, to have been argued before the learned President at all. There is no trace of it in the judgment, and from the statements, which, of course, are absolutely fair and frank, of counsel for the appellants, it seems clear that the point was never taken, for reasons of a tactical nature. As it appears upon the pleadings, it is, of course, open to them to take the point, but one would be slow to accept, as a valid ground for holding the owners of the steamship in part to blame, a point which it was not thought worth while even to indicate in argument when the case was tried in the court below. I do not say it is not open to be argued, and we have so treated it, and the court has asked the nautical assessors whether they can see any evidence, in the first place, one way or the other, which makes it clear whether the engines were reversed or not before the collision, or which indicates that, if they were reversed, the reversing took place at a point so late in the history of the facts immediately preceding the collision that, according to the rule, those who were on board the steamship must be taken to have acted wrongly in not stopping or reversing sooner. They tell us that which as a matter of inference from the evidence would certainly be my own view, that in the first place the evidence is perfectly consistent with the engines, which are said to have been going at the moment of the collision, in fact moving astern as well as forward; but, assuming they were reversed, but reversed too late, which is the suggestion, then there is certainly nothing that I can see, and as I understand those who assist us, from the seaman's point of view, to make it certain either at what point action if at all was taken, or that it was not possible from the seaman's point of view for those on the steamship up to a very late moment indeed to have been justified in supposing that they might go clear; in other words, that, as the collision occurred, up to a very late point indeed an alteration in the helm of the sailing vessel would have prevented any collision at all. Under those circumstances it seems to me it would be speculative to find a vessel to blame when we do not know what in fact was the direction of her engines at the time of the collision, and, secondly, that it would be equally speculative to say that there is any point which has been shown to us at which it became wrong for the vessel, if she did continue up to that point, to have so continued, because there was either a seamanlike duty or the pressure of a statutory duty which made it wrong to continue up to that point. Speaking for myself, I am of opinion that it has not been made out to my satisfaction that the steamer was to blame in the respect which has been suggested.

The President.—I agree.

Joyce, J.—I entirely agree.

Solicitors for the appellants, *Lowless* and *Co.*
Solicitors for the respondents, *Botterell* and *Roche.*

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Friday, Nov. 13, 1908.

(Before EVE, J.)

BURGOS *v.* NASCIMENTO; MCKEAND, Claimant. (*a*)

Interpleader—Indorsement of bill of lading—Intention—Agent of consignee—No consideration—Right of action as against judgment creditor and sheriff—Special property.

An unsatisfied judgment creditor of a firm caused a writ of fi. fa. *to be issued for the arrest of a cargo of corkwood belonging to and marked with the firm's name.*

Upon arrival at London Docks the corkwood was seized. An agent for removal and warehousing claimed the corkwood. He claimed it for the consignee, for whom he acted under an indorsement by the consignee on the bill of lading. Such indorsement was made by the consignee previous to the arrival of corkwood.

Held, that, in order to succeed, the claimant must show that he had a right of special property or present possession of the goods, and, although the indorsement of the bill of lading conferred on him the right to demand possession, the object of the indorsement was only to enable him to hold and warehouse the goods for the consignee, who had no intention to clothe him with any property in them, and his claim therefore failed.

Sewell *v.* Burdick (5 *Asp. Mar. Law Cas.* 376 (1884); 52 *L. T. Rep.* 445; 10 *A. C.* 74) *applied. What Best, C.J. is reported to have said in* Morison *v.* Gray (2 *Bing.* 260)*—viz., that the indorsement of the bill of lading to an agent for taking possession conferred a special property on him—was not, having regard to the cases of* Waring *v.* Cox (1 *Camp.* 369) *and* Coxe *v.* Harden (4 *East*, 211) *intended to lay down a principle of general application.*

MOTION.

By a judgment dated the 14th July 1908 in the action by Jose Lopes Burgos (since deceased) and by an order of revivor, his widow Herminia C. de A. da C. Burgos, plaintiff, and Porphirio A. P. Do Nascimento, defendant, it was ordered that the plaintiff, the legal representative of the estate of Jose L. Burgos out of his estate pay the defendant a sum which, to the extent of 5908*l.* 6*s.* 6*d.* interest and costs, remained unsatisfied.

The defendant having obtained information that the plaintiff's representative, who with three others was carrying on the deceased's business of cork merchants in Portugal, was shipping goods to England sold by Herold and Co., commission agents, on the 24th Sept. 1908, instructed the sheriff of the county of London to levy execution under a *fi. fa.* upon seventy bales of corkwood with the J. L. B. mark which arrived at London Docks on board the steamship *Britannia* on the 30th Sept. The execution was issued on the 1st Oct. and levied by seizure of the seventy bales at the docks before any claim had been made to them.

James Alexander McKeand through his solicitors on the 6th Oct. 1908 forwarded to the then solicitors of the judgment creditor the invoices of the goods showing as alleged that Bussey Brothers and Nephew, of Bermondsey, S.E., were the actual owners of the goods, and had transferred the goods to the claimant by indorsing the bill of lading during the transit of the goods.

On the 6th Oct. the sheriff caused an interpleader summons to be issued, and in his affidavit filed in support of his claim McKeand claimed the seventy bales of corkwood as agent for Bussey Brothers and Nephew, "the same having been shipped to them, and they have paid for the same by their acceptance at thirty days, and I hold the bill of lading for the goods, which bill of lading was indorsed to me by Bussey Brothers and Nephew in order that I might remove and warehouse the goods on their behalf."

The interpleader summons came before the master and judge in chambers on the 26th Oct. and the 2nd Nov. Counsel for the claimant founded his claim to the goods upon a special property in the corkwood vested in the claimant under the indorsed bill of lading.

Leave was given to serve the present notice of motion on the execution creditor and the sheriff that the order of the 2nd Nov. barring the claimant might be rescinded, and that the sheriff be ordered to withdraw from possession.

On the same 2nd Nov. the solicitors for Messrs. Bussey Brothers and Nephew gave notice claiming the goods for their clients, but did not appear at the hearing.

J. B. Matthews for the claimant.—Either a special property in the goods or a right to possession must be shown to enable McKeand to succeed against the sheriff and the execution creditor, and here he has both. A factor to whom goods are consigned can maintain trover for them, and, in the case of a simple bailment which does not confer on the bailee a right to exclude the bailor from possession, either bailor or bailee may maintain trover:

Manders v. *Williams*, 4 Exch. 339;
Shipley v. *Kymer*, 1 M. & S. 484.

In *Richards* v. *Jenkins* (55 L. T. Rep. 397; 17 Q. B. Div. 544; 56 L. T. Rep. 591; 18 Q. B. Div. 451) the claimant did not succeed, because he showed neither a special property nor possession of the goods. The indorsement of the bill of lading conferred a special property and right to possession of the goods on McKeand. Even an uncertificated bankrupt, to whom a delivery order for goods has been made, may maintain trover for them:

Fowler v. *Down*, 1 B. & P. 44.

This case is really concluded by that of *Morison* v. *Gray* (2 Bing. 261), which is cited as having that effect in Benjamin on Sale, p. 872, 5th edit. There it was contended that the mere indorsement of the bill of lading while the goods were *in transitu* to an agent of the consignor without any consideration passing would not confer a sufficient property to enable him to maintain an action of trover, but the court held that the agent had a sufficient title to sue in trover; and Best, C.J. said, as reported, that although every transfer of

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

such a bill would not confer the right, yet that was a fair and usual transfer, and the vendor had thereby conferred a special property on the agent. If *Waring* v. *Cox* (1 Camp. 369) and *Coxe* v. *Harden* (4 East. 211) are inconsistent with *Morison* v. *Gray* (*ubi sup.*), the decisions in those cases were wrong. The court, in *Coxe* v. *Harden* (*ubi sup.*), laid stress on the absence of valuable consideration in the plaintiffs; Grose, J. saying, as reported: "The indorsement . . . came too late after actual delivery to the vendees. Besides, to entitle these plaintiffs to sue, it should appear that the bill of lading was indorsed to them for a valuable consideration." *Sewell* v. *Burdick* (*ubi sup.*) was a decision upon the Bills of Lading Act (18 & 19 Vict. c. 119), s. 1, but the reasoning in the judgments of Lord Blackburn (pp. 93, 95, 96, of 10 A. C.) and Lord Selborne, L.C., at p. 81, where he speaks of the right of property and the right of possession passing by the "symbol," the bill of lading, which is at once both the symbol of the property and the evidence of the right of possession," support the claimant's title in the present case. If, instead of a symbolical delivery by indorsement of the bill of lading, these goods had been physically handed to McKeand, his possession could have been the possession of Bussey Brothers and Nephew. The object and intent of the indorsement will be defeated if McKeand, a warehouseman instructed by the consignee of goods coming to this country, lose his title and cannot follow the goods. Until four days had elapsed after arrival, or before they were rightfully claimed, the goods were in the possession of the carrier. The decision in this case will be final, there being no statute providing for an appeal:

Order LVII., r. 11.

Bussey Brothers and Nephew have paid for the corkwood, and the execution creditor can succeed only by showing a superior title to theirs in the firm of Burgos. [Carver's Law of Carriage, sect. 529, 3rd edit., was also referred to.]

Lawrence, K.C. and *Edward Clayton* for the execution creditor.—When the facts are appreciated this is a simple case. McKeand in his affidavit disclosed his principals as the true owners of the goods, which in itself is sufficient to defeat his claim as warehouseman:

Richards v. *Jenkins* (*ubi sup.*).

If the true owner or undisclosed principal comes forward the agent cannot maintain trover. First resolution in

Armory v. *Delamirie*, Strange, 504.

In *Morison* v. *Gray* (*ubi sup.*) Best, C.J. agrees that an indorsement of a bill of lading only transfers a right of action in some cases, and here the sheriff, who is not a wrongdoer, is in lawful possession of the goods. We obtained possession. McKeand never did. "The property will not be transferred when there is no consideration": (per Selborne, L.C. in *Sewell* v. *Burdick*, at p. 80 of 10 A. C.), in which case *Coxe* v. *Harden* (*ubi sup.*) was cited. [EVE, J.—Might not this agent acquire a special property by being put to expense in storing the goods?] He might acquire a lien. The decision in *Morison* v. *Gray* (*ubi sup.*) has been disapproved of in Blackburn on Sales, p. 403, 2nd edit., and in other text-books, and does not apply, for *ex concessis* the right of property passes to the consignee. *Waring* v. *Cox* (*ubi sup.*) and *Coxe* v. *Harden* (*ubi sup.*) are still law. The court in *Morison* v. *Gray* (*ubi sup.*) could have overruled Lord Ellenborough's decision at Nisi Prius in the former case. In the latter case Lord Ellenborough, C.J. says, as reported: "If it were necessary to decide whether or not the plaintiffs could maintain this action, supposing the property not to have passed to Oddy and Co., I should think that they could not; for no decision of a court of law upon the subject of bills of lading has gone further than to say that the assignment of a bill of lading by the consignees for a valuable consideration, and without notice by the party taking it of a better title, passes the property in the goods thereby consigned. But no consideration having been paid by the plaintiffs in this case for such assignment, they took the bill of lading merely as agents for Browne and Co., and without any property in themselves in the goods." And Lawrence, J. says there was no intention to transfer the property by the indorsement. It would be contrary to the intention of the indorsers that McKeand should have a property in these goods transferred to him:

Sewell v. *Burdick*, per Lord Bramwell, at p. 104 of 10 A. C.

The rule laid down in that case governs the present. If McKeand had obtained the actual possession, he could not have maintained an action of trover.

Matthews in reply.—*Coxe* v. *Harden* (*ubi sup.*) is not an authority that no property passes by an indorsement without consideration. The point was there only queried, not decided. *Richards* v. *Jenkins* (*ubi sup.*) shows that if McKeand had obtained possession he could have sued in trover; also *The Winkfield* (9 Asp. Mar. Law Cas. 259; 85 L. T. Rep. 668; (1902) P. 42). The seller reserved the right of disposal of these goods within sect. 19 of the Sale of Goods Act 1893 (56 & 57 Vict. c. 71). An auctioneer can maintain trover, which shows that the fact of McKeand having a disclosed principal does not prevent him suing. Grose, J. in *Coxe* v. *Harden* (*ubi sup.*), as reported, says: "As to the question touching the property in the goods, it is clearly in the defendants. They were originally ordered to be shipped by Oddy and Co., under whom the defendants claim . . . to entitle these plaintiffs to sue it should appear that the bill of lading was indorsed to them for a valuable consideration."

EVE, J.—One Porphirio A. P. Do Nascimento is an unsatisfied judgment creditor for a very large sum of the firm of Jose Lopes Burgos (herdeiros) carrying on business at Castello Branco, in Portugal. In order to satisfy that judgment Nascimento has taken steps to intercept goods belonging to the firm of Burgos on their arrival in this country, and on the arrival of seventy bales of corkwood by the steamship *Britannia* at London Docks, and bearing marks and indicia showing the firm of Burgos was the source of origin, he prevented their removal by having them seized on a wharf at London. The goods having been seized James A. McKeand comes forward and says he claims them as agent for his employers, Messrs. Bussey Brothers and Nephew, whose goods they were. To decide the rights of the execution creditor and McKeand to the goods

I take it that it is common ground that in order that McKeand shall succeed in his claim he must establish—first, either that he has general or a special property in the goods, or, secondly, that he has the right to present possession of them. He seeks to discharge himself of that onus by showing that as agent for Messrs. Bussey Brothers and Nephew to remove and warehouse them he claimed these goods, "the same having been shipped to them and they have paid for the same by their acceptance at thirty days, and I hold the bill of lading for the goods, which bill of lading was indorsed to me by the said Messrs. Bussey Brothers and Nephew in order that I might warehouse the said goods on their behalf." Now, the bill of lading being indorsed to McKeand, certainly operated if the goods were still on board the vessel, as a symbolical transfer of the goods to him. But even if the goods were discharged it operated as a document giving him the right to claim possession, and it is immaterial for the present purpose whether the right which passed by such indorsement was a right of special property or a right to possession. McKeand, if the indorsement of the bill of lading conferred it on him, has the right to the possession of the goods, one of the two attributes necessary to enable him to succeed in this case.

But there is a question which has been the subject-matter of a very able argument both in court and previously in chambers, and it is whether the indorsement of the bill of lading under the circumstances disclosed by McKeand in this affidavit clothed him with any special property in the goods which were the subject of it. His counsel says there is distinct authority for the proposition that the indorsement of the bill of lading invests the indorsee with a special property in the goods, and he says that is to be found in the case of *Morison* v. *Gray* (*ubi sup.*); further, that would be so even if the indorsement is made without consideration. Now, Best, C.J. certainly said in terms, that the indorser by indorsing and delivering the bill of lading to the agent with directions to take possession of the goods had "conferred a special property in the plaintiff sufficient to entitle him to maintain an action of trover." If that is taken apart from the circumstances of that case, and one other particular to which I will refer, that is an authority for the proposition that Mr. Matthews enunciated. Bearing in mind that what the court was there considering was this: first, whether the case and the circumstances it involvedwere distinguishable from the two earlier cases of *Waring* v. *Cox* (*ubi sup.*) and *Coxe* v. *Harden* (*ubi sup.*), and the court came to the conclusion that the circumstance that the transfer not having conferred a complete title on the consignee distinguished it from those cases in which the transfer was completed. It seems to me, therefore, that the real effect of *Morison* v. *Gray* (*ubi sup.*) is that the indorsement of the bill of lading to an agent of the vendor while the goods are *in transitu* does pass the absolute right to the possession of the goods to the agent, and, of course, if the agent was clothed with any right to possession he would be entitled to maintain an action of trover against any person seeking to deprive him of possession. I do not think that there is anything in any of the other cases to which I have been referred that justifies me in taking that sentence from Best, C.J.'s judgment in *Morison* v. *Gray* (*ubi sup.*) as laying down that such a special indorsement to an agent without consideration clothes the indorsee with a special property in the goods. I think that I cannot admit that is a proposition of general application having regard to the earlier cases of *Waring* v. *Cox* (*ubi sup.*) and *Coxe* v. *Harden* (*ubi sup.*), the authorities referred to by Best, C.J. He was in a position to overrule those cases, but he takes the view that the decision he is pronouncing is in accordance with the earlier cases, and that the facts in *Morison* v. *Gray* (*ubi sup.*) differentiate it from them. It is quite true that in a footnote to *Coxe* v. *Harden* (*ubi sup.*) the learned reporter treats this question "whether the mere indorsement of a bill of lading to an agent to enable him to receive the goods on account of his principal without any consideration will enable such agent to maintain trover in his own name for the goods" as being left open. But, although it was not necessary to decide the question in that case, it is impossible to read the judgments of the court in *Coxe* v. *Harden* (*ubi sup.*) without seeing that if they had been called upon to decide the point they would have held that such an indorsement would not entitle the indorsee to maintain trover. The remarks of Lord Ellenborough, C.J. have been read during the argument. Lawrence, J., as reported, says: "It is not necessary to decide the first point relative to the want of title in the plaintiffs to maintain trover; but it seems to me that the plaintiffs' counsel has attempted to carry the effect of the indorsement of a bill of lading much farther than it has hitherto gone. The indorsement of the bill of lading to the plaintiffs in this case was more than Browne and Co. giving an authority to the captain to deliver the flax to the person to whom such indorsement directed the delivery to be made," and Mr. Matthews himself has read the observations in the judgment of Grose, J. which indicate that he was of the same opinion. It may be that if one was left with those authorities only a difficulty would arise in deciding whether the question left open in *Coxe* v. *Harden* (*ubi sup.*) had been definitely determined in *Morison* v. *Gray* (*ubi sup*). I do not think that at this stage of the authorities the question is any longer open. It seems to me that, having regard to the judgments in *Sewell* v. *Burdick* (*ubi sup.*), one must consider the intent with which the indorsement was made. If it was the intention to pass the whole property—the general property—in the goods, the indorsee is to be treated as the sole owner of them, not only against the world, but against the indorser. If, on the other hand, the intention was to confer a special property, a right for a particular purpose, then the effect to be given to the indorsement must be limited to that, and he into whose hands the bill of lading comes ought to be regarded as in cases under the Bills of Lading Act as accepting the indorsement under different circumstances from those in which the whole property was intended to be transferred. And here it seems to me that having got the fact that the main object and purpose of this indorsement, which was to enable him to come to the ship and take possession of the goods and hold them to the orders of Bussey Brothers and Nephew, it would be impossible from that to infer that Bussey Brothers and Nephew intended to pass any

property in the goods. They intended only so to clothe him with authority to demand possession of the goods and warehouse them, and they would be the last persons to say that McKeand, having these rights for a particular purpose, had any special property in the goods, and they would deny that they had any intention to clothe him with it. The moment McKeand's principals are disclosed, the moment that the objects of this arrangement are known, it becomes clear he acquired no property in the goods. In these circumstances it ssems to me he falls short in the second of the two alternatives necessary to establish his title, and the motion fails, and the motion must be dismissed.

Solicitors for the claimant, *Lumley* and *Lumley*.

Solicitors for the defendant, *Rossiter* and *Odell*.

Solicitors for the Sheriff of the County of London, *William* and *T. Burchell*.

KING'S BENCH DIVISION.

Thursday, Dec. 3, 1908.

(Before Bigham and Walton, JJ.)

Millar's Karri and Jarrah Company (1902) v. Weddel, Turner, and Co. (a)

Sale of goods—Contract for delivery by instalments—Defective delivery of first instalment—Repudiation of contract by purchaser—Sale of Goods Act 1893 (56 *&* 57 *Vict. c.* 71), *s.* 31 (2).

A contract was entered into for the sale of 1100 *pieces of timber, to be delivered in two instalments. Upon the delivery of the first the purchasers refused to accept the goods on the ground that they did not fulfil the terms of the contract, and further intimated that they would refuse the second on the ground that the first was such a departure from the contract as to justify them in refusing to accept either parcel.*

The matter was referred to arbitration, and the arbitrator found and awarded that the first shipment was so far from complying with the requirements of the contract as to entitle the buyers to repudiate and to rescind the whole contract, and to refuse to accept the first shipment and all further shipments under the contract.

Upon a motion by the vendors to set aside the award upon the ground that it was bad upon its face:

Held, that the umpire was entitled to draw the inference from the defective delivery of the first instalment that the second would also be bad, and therefore the award could not be said to be bad upon its face.

Motion by Weddel, Turner, and Co. to set aside an award made by Mr. Alfred Lyttelton, K.C., as umpire in an arbitration between Weddel, Turner, and Co. and Millar's Karri and Jarrah Co. 1902, on the ground that the award was bad in law on the face of it, by reason that the umpire had misdirected himself in holding that a breach of contract as to one shipment by Weddel, Turner, and Co. under a contract of sale with delivery by instalments, dated the 15th Feb. 1907, entitled the buyers to repudiate and rescind the whole contract and to refuse to accept the said shipment and all further shipments under the contract.

The contract was in the following terms:—

Sold for account of Messrs. Weddel, Turner, and Co. to our principals: 1100 pieces Tasmanian blue gum at 2*s.* 9*d.* per foot cube, cost, freight, and insurance, and safe port in the United Kingdom, destination to be declared by buyers on or before being advised that bills of lading are ready for signature. All to be 14in. by 14in. square by 65ft. long. The timber to be hewn die square without camber, sound, straight grown, and of good merchantable quality and condition. Shipment of about half the quantity to be made in June, July, August next at buyers' option, and the balance to be shipped October, November, December next at buyers' option. To be paid for by net cash on presentation of and in exchange for shipping documents. Any question arising under this contract to be decided by the brokers hereto, but should either of the principals elect to do so they may call for arbitration in the usual manner.

In fulfilment of the contract an instalment of 750 pieces of timber was shipped by the vendors to the purchasers.

The latter refused to accept delivery, alleging that the timber did not accord with the terms of the contract.

They further intimated their intention to refuse to take the second shipment upon the ground that the first shipment was such a departure from the contract as to justify them in refusing to accept either parcel. The vendors denied the statements of the buyers as to the first lot, and contended that in any event there was no justification for refusing to take the second lot before they had seen it. The vendors tendered the shipping documents in respect of each parcel. The dispute was referred to Mr. Alfred Lyttelton, who in the course of his award said:

I award and adjudge that the 750 pieces of Tasmanian blue gum shipped per steamship *Falls of Halladale* did not comply with the requirements of the said contract of the 15th Feb. 1907. And I further award and adjudge that the said shipment was and is so far from complying with the requirements of the said contract as to entitle the buyers to repudiate and to rescind the whole contract and to refuse to accept the said shipment and all further shipments under the said contract.

Bailhache, K.C. and *Leslie Scott* for the vendors.—The award is bad in law on its face, because the umpire has misdirected himself in holding that the failure on the part of the vendors as to one instalment justified the purchasers in repudiating the whole contract. In *Freeth* v. *Burr* (L. Rep. 9 C. P., at p. 223) Lord Coleridge, C.J. said that the result of the authorities was "that the true question is whether the acts and conduct of the parties evince an intention no longer to be bound by the contract. Now, nonpayment on the one hand, or non-delivery on the other, may amount to such an act, or may be evidence for a jury of an intention wholly to abandon the contract and set the other party free. . . . The principle to be applied in these cases is whether the non-delivery or the nonpayment amounts to an abandonment of the contract or a refusal to perform it on the part of the person so making default." That proposition was approved in *Mersey Steel and Iron Company* v. *Naylor* (47 L. T. Rep. 368; 9 App. Cas. 434). In the present case it is clear that there was no

(a) Reported by Philip B. Durnford, Esq., Barrister-at-Law.

intention on the part of the vendors to repudiate performance of the remainder of the contract, because they tendered the shipping documents in respect of the second shipment. They also referred to

Hoare v. *Rennie*, 5 H. & N. 19;
Simpson v. *Crippin*, 27 L. T. Rep. 546; L. Rep. 8 Q. B. 14.

J. A. Hamilton, K.C. and *E. Morten* for the purchasers.—The award is not bad on the face of it. The question is entirely one of fact for the umpire whether a wrong delivery of 750 pieces of timber out of 1100 is such a failure to perform the contract as to show an intention on the part of the vendors to repudiate it. Being a question of fact, it cannot be said that the award is bad in law on its face.

Bigham, J. — The question in this case is whether the award is bad on its face. The material facts are as follows: On the 15th Feb. 1907 Weddel and Co. sold to Millars and Co. 1100 pieces of Tasmanian blue gum timber at a c. f. and i. price; the wood was to be of a certain size and hewn in a certain way; it was to be without camber, sound, straight grown, and of good merchantable quality and condition. The shipment was to be made in Tasmania in two parcels—namely, about one-half in June and the remainder in October, the destination being the United Kingdom. The payment was to be made against delivery of the shipping documents. The shipments were not made in the required proportions, but the buyers appear to have made no point of this. The first shipment consisted of 750 pieces; the second of 350 or thereabouts. The shipping documents in respect of both shipments arrived before the goods, and were duly taken up by the buyers. When the first parcel arrived the buyers examined the wood and found it did not accord with the requirements of the contract. They refused to accept it, and demanded all their money back, intimating their intention to refuse to take the second shipment upon the ground that the first shipment was such a departure from the contract as to justify a refusal to accept either parcel. The vendors denied the statements of the buyers as to the first lot, and contended that in any event there was no justification for refusing to take the second lot. The dispute was then referred to Mr. Alfred Lyttelton, who, after hearing the evidence, made the award now complained of. It is in these terms: "I award that the 750 pieces did not comply with the terms of the contract, and I further award that the said shipment was and is so far from complying with the requirements of the contract as to entitle the buyers to repudiate and to rescind the whole contract, and to refuse to accept the said shipment and all further shipments under the said contract." It is this award which is said to be bad on its face. It is argued that it violates the well-known rule of law that where goods are sold to be delivered in different instalments a breach by one party in connection with one instalment does not of itself entitle the other party to rescind the contract as to the other instalments. But I do not agree. The rule, which is a very good one, is, like most rules, subject to qualification. Thus, if the breach is of such a kind, or takes place in such circumstances as reasonably to lead to the inference that similar breaches will be committed in relation to subsequent deliveries, the whole contract may there and then be regarded as repudiated, and may be rescinded. If, for instance, a buyer fails to pay for one delivery in such circumstances as to lead to the inference that he will not be able to pay for subsequent deliveries; or if a seller delivers goods differing from the requirements of the contract, and does so in such circumstances as to lead to the inference that he cannot, or will not, deliver any other kind of goods in the future, the other contracting party will be under no obligation to wait to see what may happen; he can at once cancel the contract and rid himself of the difficulty. This is the effect of sect. 31, sub-sect. 2, of the Sale of Goods Act 1893, which reads as follows: "Where there is a contract for the sale of goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of, or pay for, one or more instalments, it is a question in each case depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract, or whether it is a severable breach giving rise to a claim for compensation, but not to a right to treat the whole contract as repudiated." In the present case, says the umpire, the first shipment, consisting of much more than half the whole, was so bad as to lead to the inference that the second shipment, which was to be made at the same place and on behalf of the same parties, would also be bad. That is the sense in which I read what he has written. Can it be said that such an inference could not reasonably be drawn from the conduct of the sellers in relation to the first shipment? I think not. The umpire has so found, and has expressed his finding in intelligible language. I think, therefore, this motion must be dismissed.

Walton, J.—I agree, and for the reasons which have been stated, I only wish to add that it appears to me that there are two flaws in the argument which was addressed to us in support of this motion. It has been said, in the first place, that the award can only be supported on the ground that what the sellers did amounted to a repudiation of the whole contract—that that means or involves an intention to repudiate the whole contract, and it has been said that it is plain that there was no intention to repudiate, because the sellers were insisting that they were performing their contract as far as they had gone, and insisting that they were entitled to have the contract performed in the future. I think that that is a fallacy. Of course, the idea of repudiation, which is the word used in sect. 31 of the Sale of Goods Act, does, no doubt, in a sense involve an intention to repudiate; but, to constitute a repudiation, as Sir George Jessel pointed out in the *Mersey Steel and Iron Company* v. *Naylor* (*sup.*), it is not necessary that the party should say, "I will repudiate the contract," or "I intend to repudiate the contract." If, in fact, he is repudiating the contract, he is doing so, although he may be contending that he is performing the contract, and may be intending and expressing an intention to perform what is left of the contract. As Sir George Jessel said in the passage which I

have referred to, there may, indeed, be a case where one party says in so many words that he does not intend to go on with the contract, but generally the intention must be inferred from the acts of the parties. The second flaw which I think is involved in the argument is this, that a defective delivery of one instalment cannot *per se* amount in effect to a repudiation. I think that is the foundation of a great deal of the argument that has been addressed to us. I desire to point out that I cannot find in the old cases, and certainly not in sect. 31 of the Sale of Goods Act 1893, any such statement of the law. All that the Sale of Goods Act, and we need not look back further than the words of that Act, says is that in the case of defective delivery in the case of one instalment, it is a question in each case depending on the circumstances of the contract whether the breach of contract—that is, in this particular case, whether the defective delivery—is a repudiation of the whole contract (that is the plain meaning of the words), or whether the defective delivery is a severable breach giving rise to a claim for compensation, but not to the right to treat the whole contract as repudiated. I gather that that plainly means that the defective delivery may, having regard to the terms of the contract and the circumstances of the case, amount in effect to a repudiation of the whole contract. Now, what has the umpire found here? He has found that there was a defective delivery amounting to a breach of contract, and he has found that the defective delivery, under the circumstances of the case, was such a breach as amounted in effect to repudiation. He may or may not have been right in such a finding; we do not know what the evidence was upon which he came to that conclusion; we do not know whether there was any evidence upon which he was justified in coming to such a conclusion; but that question is not before us. It seems to me that the terms of the award follow quite properly—I do not mean to say in exact words, but in effect—the terms of the section, and that there is no ground for saying that the award is bad on the face of it. Therefore, I think this motion fails.

Motion dismissed.

Solicitors for Weddel, Turner, and Co., *W. A. Crump* and *Son.*

Solicitors for Millar's Karri and Jarrah Company (1902), *White* and *Leonard.*

Nov. 6 and Dec. 10, 1908.

(Before Bray, J.)

Aktieselskabet Hekla *v.* Bryson, Jameson, and Co. (*a*)

Charter-party—Demurrage—Custom of port of Hull—Wood cargo—Obligations of charterers and receivers of cargo.

A charter-party provided (inter alia) *that the cargo was to be discharged as fast as the steamer could deliver during the ordinary working hours of the respective ports, but according to the custom of the respective ports. A custom was alleged which threw on the charterers and receivers of cargo a duty to provide or arrange for the steamship* (on or before her arrival in dock) *a vacant, available, and suitable berth to which she could forthwith proceed, and to supply and have ready a clear quay space the full length of the steamer, and a sufficient and continuous supply of bogies.*

Held, that such a custom existed and was not unreasonable nor inconsistent with the express terms of the charter-party.

Hulthen *v.* Stewart (9 *Asp. Mar. Law Cas.* 285, 403; 88 *L. T. Rep.* 702; (1903) *A. C.* 389) *distinguished.*

Commercial list.

Action tried before Bray, J. sitting without a jury.

Plaintiffs were the owners of the steamship *Fjordheim,* and the defendants were the charterers of the vessel and receivers of the cargo.

The plaintiffs' claim was for demurrage incurred by the said vessel at Hull.

The facts and arguments are sufficiently stated in the judgment of Bray, J.

Hamilton, K.C. and *A. Adair Roche* for the plaintiffs.

Scrutton, K.C. and *Holman Gregory* for the defendants.

Bray, J.—This action was brought by the plaintiffs, owners of the steamship *Fjordheim,* against the defendants, who were timber merchants at Hull, and charterers and receivers of the cargo of the *Fjordheim,* to recover demurrage incurred in discharging the vessel at Hull at the beginning of Nov. 1907. The main dispute between the parties was whether the obligation of the defendants was to provide a suitable berth for the vessel on her arrival in the Victoria Dock, Hull, and to supply and have ready a clear quay space or sufficient bogies whereon or wherein she could discharge her cargo; or merely an obligation to use their best endeavours to provide such berth, quay space, or bogies. The charter-party is dated the 14th Sept. 1907, and was in a well-known form called the "Scanfin," a form which had been adopted in 1899 by agreement between the Timber Trade Federation and the Documentary Committee of the Chamber of Shipping to be used in the carriage of wood cargoes, and the plaintiffs contended that there was a custom of the port of Hull applicable to this charter which created the obligation I have mentioned. Evidence was given in support of and against the alleged custom, and I think it will be convenient that I should decide first the question of fact as to whether this custom existed or not, and consider afterwards the question whether the defendants as charterers under the charter-party were bound by this custom. Before dealing with the evidence, it will be useful to consider what was the course of business at Hull and the general position, as these facts have an important bearing upon the question whether it was probable that such a custom should exist. It was admitted by both parties that there was a custom applicable to this charter which threw an obligation on the ship to do more than a ship ordinarily has to do in discharging. In the absence of special agreement or special custom, when the master has brought the cargo to the rail of the ship he has done all that he is bound to do. It is then the duty of the charterer to take delivery.

In the case of steamers carrying wood cargoes to Hull it was the duty of the ship master to do more than merely bring the cargo to

(*a*) Reported by Leonard C. Thomas, Esq. Barrister-at-Law

the rail; it was his duty either to stack it on the quay or to put it into what are called in Hull "bogies." Bogies are trucks 8ft. long, made to run on rails laid down by the owners of the dock, and capable of being taken away, usually by horses, into the merchant's yard or other places. They are the property of the dock company, who, in the case of the Victoria Dock, are the North-Eastern Railway. For convenience I shall refer to them as the dock company. They are not intended or fitted for use on the railway generally. The performance of this duty on the part of the ship undoubtedly throws extra expense on the ship, and it does not seem unlikely that in return the ship should require some additional obligation on the part of the charterer, and the plaintiffs suggested that it was in return for this extra burden on the ship that the charterer, according to the custom, was bound to take the risk of any delay on the part of the dock company in providing a clear quay space and sufficient bogies, with the consequence of having to pay demurrage in case of such delay. Up to the year 1899 it appeared that comparatively few cases had occurred where there had been such delay, and these had occurred in the autumn months. The risk, therefore, was not a very serious one. It was said that there was another reason why it was both probable and just that this risk should fall upon the charterer —namely, the arrangements between the dock company and the merchants in relation to the use of the quay space and the bogies. I should say here that in this case the parties have in the main confined their evidence as to the course of business in the Victoria Dock, because the ships that discharge in that dock are almost entirely wood-carrying ships, and a large proportion of such ships go to that dock, and this ship discharged in that dock. It was not suggested, however, that this custom applied only to the Victoria Dock, nor that the course of business in other docks in Hull was substantially different. Now it appeared that at some time more than ten years ago some regulations were made by the dock company after arrangement with the timber merchants. Shipowners were not consulted, nor were their interests regarded. No copy of these regulations was put in evidence, but their effect was stated generally by Mr. Adams, the superintendent of the docks, who was called as a witness by the defendants. Vessels were berthed as far as possible in turn, and the merchant intimated whether he desired what was called a quay berth or a bogie berth. A quay berth was a berth where the ship could discharge only on the quay, where there were no rails on which bogies could run. There were ten of such berths. A bogie berth was a berth opposite a part of the quay where there were rails on which bogies could run. There were five of these, and at these the ship could discharge either into bogies or on the quay space behind the rails, if that was clear. If a vessel discharged on the quay the timber would be piled up on the quay, and the merchant, under the regulations, was allowed without any further payment to keep the timber there so long as it was removed at the rate of thirty standards a working day. Thus, if the cargo were 1200 standards, as in this case, the merchant need not entirely remove it for forty working days, a period of over six weeks. At the end of that time the merchant would have to pay rent or demurrage, but the dock company, if they chose, could remove it at the merchant's expense. As regards bogies, the dock company supplied them to the vessels discharging at bogie berths as far as they could in turn, and the merchant was allowed to take the loaded bogies to his yard and to retain them without further payment provided he returned the discharged bogies at the same rate of thirty standards per day. At the end of that period the merchant would have to pay a rent or demurrage of 6*d.* a day. It was the practice of the dockmaster in times of congestion, if a merchant went to extra expense or inconvenience in discharging the bogies in his yard earlier, to return such bogies to a ship discharging into bogies for the same charter instead of distributing them between all the ships discharging, as he otherwise would do. From this statement of the course of business it is apparent that the provision of quay space and bogies was entirely a matter of arrangement between the dock company and the merchants, and it largely depended on the conduct of the merchants whether there was much congestion or not, for the quicker the merchant cleared the quay space the sooner another ship could come to that berth, and the quicker he discharged the bogies the more would be available for the ships discharging into bogies, and Mr Adams stated that in fact extra efforts were made by merchants in times of congestion both as regards clearing quay space and discharging bogies. It does not seem to me, therefore, either improbable or unjust that the merchants should take a risk of delay in times of congestion when it was largely in their power to diminish such congestion rather than throw the risk on the shipowner who had no voice in the conduct of the business in the dock. Further, the merchant was the person who brought the ship to the dock, and might be considered as the customer of the dock company, and thus in a position to put pressure upon the dock company to do everything to avoid congestion. The conclusion that I draw from the facts which I have mentioned, and which are not disputed, is, first, that the custom claimed by the plaintiffs, if it exists, is part of a wider custom which regulates the duty of the ship as well as the duty of the merchant, and, second, that there is nothing at all improbable in its existence.

Having this in my mind, I come to consider the evidence. The first piece of evidence is that there was an unreported action of *Beatley* v. *Bryson, Jameson,* and *Co.*, the present defendants, tried before Mathew, J. early in 1897, in which that learned judge, and afterwards the Court of Appeal, held that the custom, so far as concerned the supply of bogies by the merchant, was proved to exist.

The pleadings and the shorthand notes of the judgments of Mathew, J. and of the Court of Appeal were put in evidence; the claim was for five days' demurrage at 20*l.* a day for delay in the supply of bogies. The defendants in their defence, par. 4, stated that, if there was any delay, it was not delay for which they were responsible. The ship had discharged a wood cargo in the Victoria Dock, Hull. Mathew, J. found that there was not sufficient quay space, and that the delay occurred through insufficient

supply of bogies. It is further clear from his judgment and that of the Court of Appeal that the fault lay with the North-Eastern Railway, the owners of the dock. It was, nevertheless, held that the defendants were responsible, as by the custom of the port it was the duty of the merchants to supply bogies. Mathew, J. states it thus: "The discharge at Hull that is customary is a discharge either upon the quay or into bogies, the defendants, the merchants, being bound to supply the bogies." Lord Esher says at p. 3 of his judgment: "Well, then, when he heard what the first witness said here, and believed him, he saw at once what is the custom at Hull, and he states: 'The discharge at Hull,' that is the customary mode of discharge at Hull, 'is a discharge either upon the quay or into bogies, the defendants, the merchants, being bound to supply the bogies.' That is the customary mode which he finds, and a part of that is that the charterer or the merchant, as he calls him, is not relieved as he has been in some cases from taking any part at all in the reception of the cargo. He is bound by the customary mode there that he must either find space on the quay or he must find bogies. That is his part of the receiving of the cargo. If that be a part of custom, I can see no answer to the objection when the objection is that he has found that wrongly. It seems to me the only evidence of the mode in which these cargoes are received is that they are to be received by the charterer or receiver as his part of the transaction, either arranging that there should be a quay space or having bogies there ready to receive the cargo. That is part of the custom and mode, and of the contract there, and he has contracted, therefore, that he would have the bogies ready within a reasonable time; he has failed in that, not through any fault of his, but he must take the consequences of that failure of his part of the contract, and it brings it, therefore, to the ordinary case in which he is bound to pay demurrage, and the decision of the learned judge is right." Mr. Scrutton endeavoured to make something of the use of the words "within a reasonable time," but that must mean within a reasonable time to enable the ship to discharge. It is quite plain, as I read his judgment, that he considered that there was an absolute contract on the part of the merchants to supply the bogies, and not merely "to do their best." The words of the charter-party in that case were "to be discharged with customary despatch at Hull during regular working days." I see no escape from the conclusion that the court there found the custom so far as the supply of bogies was concerned to have been proved to exist, and to apply to a charter of this kind. It was urged that at that time the doctrine laid down in *Hulthen* v. *Stewart* (*sup.*) was not acknowledged to be the law. I do not agree with that. The cases of *Postlethwaite* v. *Freeland* (4 Asp. Mar. Law Cas. 129, 302; 42 L. T. Rep. 845; (1880) 5 A. C. 599), *Good* v. *Isaacs* (7 Asp. Mar. Law Cas. 148, 366, 212; 67 L. T. Rep. 450; (1892) 2 Q. B. 555), and *Hick* v. *Raymond* (7 Asp. Mar. Law Cas. 23, 97, 233; 68 L. T. Rep. 175; (1893) A. C. 22) had all been decided before 1897, and two of those cases were, in fact, cited in the argument before Mathew, J. It is true, of course, that in that case no question arose as to the obligation of the merchant to find a berth, but no distinction was made in the present case by the witnesses or by the defendants' counsel between the two customs. They either both exist or neither. This trial and its result, of course, are not conclusive. It is open to the defendants to say that the courts were mistaken or that no such custom now exists, but it cannot be denied that it is a strong piece of evidence in favour of the custom.

The next piece of evidence is this. Early in 1899 the Timber Trades Federation, a national society, and the Documentary Committee of the Chamber of Shipping of the United Kingdom formulated and agreed to adopt the form of charter-party used between the parties here as the form to be used for the wood trade from Scandinavia and Finland —it is called for short the "Scanfin" charter. They then thought it desirable to agree to the customs of the different ports applicable to that form of charter so as to avoid disputes as to what these customs were, and as Hull, I suppose, was the principal port of discharge for wood cargoes, they proceeded to deal with Hull first, and a committee was appointed to find the custom and practice at Hull. It appears that at Hull at that time there was, as there still is, a local association of timber importers called the East Coast Association (I am not sure if that is its full title). All timber importers at Hull were not members of it, but most of the principal importers were, and the association represented a little less than half the timber imported at Hull. This association were asked to nominate three members to represent the merchants, and they nominated three gentlemen—Mr. Fisher, Mr. Wade, and Mr. Horsley—to form part of the committee of six, the other three being nominated by the Chamber of Shipping—Mr. Fenton, Mr. Roche, and Mr. Latus. These six gentlemen met, and unanimously agreed upon and signed the following document. It is headed: "Statement of Custom and Practice concerning the Discharge of Steamships laden with Wood Cargoes at the Port of Kingston-upon-Hull," and the custom with reference to the matters in dispute in this action is found under the headings "Discharging Berth" and "Mode of Discharge." "Discharging Berth.—It is the duty of the receiver of a wood cargo at Hull, where the dock is either named or unnamed in the charter-party, to provide or arrange for the steamship (on or before her arrival in dock) a vacant, available, and suitable berth to which she can forthwith proceed." "Mode of Discharge.—It is the duty of the owner of a steamer discharging a wood cargo as above-mentioned to remove the cargo from the steamer and to place it upon the quay space opposite the steamer or upon carriages on rails (termed 'bogies'), or to lower the cargo into open lighters supplied and brought alongside by the receivers, and to pay for the labour necessary to perform the above work. It is the duty of the receivers of such cargo to supply and have ready a clear quay space the full length of the steamer, and (or) a sufficient and continuous supply of bogies and (or) suitable open lighters alongside." Three out of the six gentlemen who signed it were called as witnesses, Mr. Fenton by the plaintiffs, and Messrs. Fisher and Wade by the defendants. Mr. Roche and Mr. Latus are dead. Mr. Horsley was alive but was

not called. It was suggested but not proved by the defendants that he was ill, but the plaintiffs said he was at business in Hull while the case was being tried. I have no doubt that if the defendants had thought his evidence would have been favourable to them they would have procured his evidence. Mr. Fenton proved that the custom as stated in the document had been the custom and practice in Hull for many years before 1899, that the committee had met, and where they thought it necessary called evidence, that all the six members of the committee had had great experience in shipping and discharging cargoes at Hull, and that the custom was never disputed, and was agreed to by all the six. His evidence was not shaken in any degree by cross-examination. Mr. Fisher was at the time, and both before and after, president of the East Coast Association. He had also been president of the Timber Trades Federation. He stated in his evidence that he agreed to that statement of the custom because he believed it to be common law, and that though undoubtedly merchants paid demurrage they never paid the full amount; it was always a compromise. He seemed to admit it was the practice, but to deny that it was the custom. His evidence was not satisfactory to my mind, and I cannot accept his statement that he signed it believing only that it was the common law. The object of his stating that it was the common law was obvious—namely, to enable it to be argued that since *Hulthen* v. *Stewart* (*sup.*) it was no longer the common law. I believe that to be an afterthought, and I have no doubt that he signed the document as being what it purported to be, a statement of custom and practice then existing. His recollection of what had taken place in 1899 was clearly defective, because he stated and made a point of it that his side were not represented by any solicitor, whereas the shipowners had Mr. Roche. It was shown, however, by a minute of the meeting, that Mr. A. M. Jackson, a solicitor and secretary of the East Coast Association, was present at the first meeting on behalf of the importers, and that the custom in question was agreed to at that meeting. Mr. Fisher had been written to by the plaintiffs' solicitors to come and give evidence in accordance with the signed document. His answer was this: "Dear Sirs,—Yours of the 2nd has been handed to me on my return from a few days' holiday, hence my not being able to reply previously. I have carefully considered your communication, and should very much prefer not to take any part in the action between the owners of the *Fjordheim* and Messrs. Bryson, Jameson, and Co. As you can readily understand, it is not a nice thing for one merchant to appear against another of the same town, and I should have thought there would have been no difficulty in your obtaining sufficient evidence for your purpose from the shipping side of both brokers and owners in Hull." He did not attempt to give any explanation of this letter, which seems to me to be quite inconsistent with his version of the document at the trial. Mr. Wade was also called. His firm were, and I think still are, the largest importers of wood cargoes in Hull. His evidence was somewhat to the same effect as Mr. Fisher's, namely—that he thought it was the common law; but he admitted quite clearly that the committee met to draw up a statement of the settled and established practice at Hull, and that he did believe in and before 1899 that the settled and established practice was as stated in the document. He did, later, try to qualify that by saying that if the receiver did his best he was not liable to demurrage. His evidence was no more satisfactory than Mr. Fisher's, and it was proved that his firm had on several occasions paid substantial sums for demurrage which would have only been payable if the custom existed, and I have no hesitation in finding as a fact that all these six gentlemen, including Mr. Fisher and Mr. Wade, signed the document in the full belief that the settled custom and practice at Hull was that stated under the headings "Discharging Berth" and "Mode of Discharge." It is to be observed that there is no magic in the word "custom." In *Postlethwaite* v. *Freeland* (*sup.*) Lord Blackburn on p. 616, says: "The jurors were told, and I 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," and that is what these six gentlemen meant when they signed this statement.

There was some evidence to show that as regards the commencement of discharge and as regards lighters the committee were stating something which could hardly be considered as settled at that time. No doubt that should make one look carefully at the rest of the document, but no such suggestion was made as regards the custom in dispute, and whether it be common law or custom it had long been settled and acted upon. Now it appears that this document as soon as it was settled was printed in London by the Documentary Committee and copies sent down to and distributed in Hull, certainly amongst all the members of the East Coast Association. It was also printed in a journal called the *Timber Trades Journal*, largely taken in by timber importers, and favourably commented on. There was no evidence that any protest was made by any importer either at any meeting of the East Coast Association or by any letter to the *Timber Trades Journal*, or in any other way, and the inference I draw is that practically every importer who saw or knew of the document accepted it as a correct statement of the custom and practice at Hull. In addition to this the plaintiffs called some nine witnesses to say that this was the custom in their experience before and since 1899. Two of these witnesses were in the timber trade, one of them having been employed for over twenty years by the firm of Wade and Sons. On the other side the defendants called some eight or nine further witnesses who said it was not and never had been the custom. These gentlemen were all in the timber trade. Some of them had seen and known of the document at the time, and made no objection to anyone. One had an extract, I suppose, from the *Timber Trades Journal* framed and put up in his office for reference, he said, in case any question arose. One, a Mr. Sanderson, no doubt a considerable importer, seems to have been much annoyed by not having been asked to become a member of the East Coast Association, and seems to have jeered at it, but I was not much impressed by his evidence. So far as these witnesses were concerned, I considered that the evidence on the part of the plaintiffs was much more weighty and

trustworthy than that of the defendants. The defendant, Mr. Jameson, was called, and said in examination-in-chief that there was no such custom, but in cross-examination he admitted that he knew of the document and took no step whatever to object, and that he did believe at that time that the merchant would be liable for demurrage, but only at common law. As his firm were defendants in the case where the custom was disputed and proved to exist, it is difficult to accept his statement, and I am convinced that the idea that merchants were liable under the common law is an afterthought. Mr. Scrutton, for the defendants, strongly urged that even if the custom existed it had not been acted on and did not now exist. It appears that no difficulty arises in procuring a berth and sufficient bogies except in the autumn. There is always some congestion then, but as a rule not much. There was, however, congestion in the years 1900, 1906, and 1907, and it was, no doubt, the congestion that arose in the two latter years that caused the present dispute, and I gather that this is in the nature of a test case. Mr. Scrutton argued that the custom could not be said to have been acted on unless demurrage was proved to have been paid in a large number of cases. I do not accept this view. Where no claim arose for demurrage the merchants had done their duty, and it was proved, as I have already stated, by the superintendent of the docks, called by the defendants, and other witnesses, that merchants often incurred expense in clearing the quay space and unloading their bogies to prevent delay; but it is unnecessary to decide this point, because it was clearly proved that in twenty-three cases sums large or small had been paid for demurrage, and in some cases demurrage had been set off against a claim for short weight. Counsel on both sides went into cases where the claim might have arisen, and in a good many cases, mostly, however, in 1906 and 1907, some evidence was given that no demurrage was paid, but where correspondence was produced there was a marked absence of letters denying the existence of the custom. Mr. Askew, a representative of Messrs. Wade, promised to search the correspondence which his firm had had, and to produce any such letters, but none were produced. In the case of the *Bygdo* and the *Seaton* there was a letter of the 30th Oct. 1900 denying liability when the claim was made, but as the firm eventually paid 100*l.* it is obvious that they could not have had much faith in their denial. I have now dealt with the more important parts of the evidence as to the existence or non-existence of the custom, There were other points made on each side which I have fully considered but do not think it necessary to further refer to. In the result I have come to the clear conclusion that the custom existed before 1899, in 1899, and continuously down to the date of the charter-party in this case, and I find this as a fact. I further find that it was part of a wider custom which, while imposing this burden on the merchant, imposed a considerable extra burden on the ship. I have already referred to this, and it appears in the statement of custom of 1889 under the heading "Mode of Discharge."

I have now to consider whether this custom is binding in this case on the defendants. It is claimed by the defendants that it is unreasonable and that it contradicts the express terms of the charter. Two cases were cited, *Ropner* v. *Stoate, Hosegood, and Co.* (10 Asp. Mar. Law Cas. 32; 92 L. T. Rep. 328; (1905) 2 K. B. 543) and *Metcalfe, Simpson, and Co.* v. *Thompson, Patrick, and Woodwark*, of which I had a shorthand note, where Channell, J. and Kennedy, L.J. respectively had expressed the opinion that a custom with regard to every ship that the same quantity of cargo should be discharged each day was unreasonable, but the facts in those cases are so wholly different from the present that I need not further refer to them. It will be apparent from the early part of my judgment that I have formed a clear opinion that this custom, from the business point of view, was a perfectly reasonable one. It was said, however, that it was a custom to do something which might in certain circumstances be impossible. What does that mean? Merely that the merchant is taking a risk and may have to pay damages in case the circumstances make it impossible, but business men every day are entering into contracts which involve such a risk as this, and it is a common thing for the merchant to take this risk. He often agrees to discharge in a fixed number of days, a more onerous obligation, and in fact in the case of sailing ships carrying wood cargoes to Hull it is still the practice to fix the lay days. Experience shows that the risk is small, and it is certainly not unjust that it should be borne by the merchant who makes his own arrangment with the dock company and has the power of diminishing the delay, and certainly it is amply compensated for by the increased burden thrown on the shipowner by the other part of the custom. I am clearly of opinion that the custom is not unreasonable. Then it is said it contradicts the charter. The first answer to that seems to be that the custom of the port is expressly incorporated in the words of the charter. There are first the words "customary dispatch," then, "but according to the custom of the respective ports," and lastly "as customary." I see no reason for limiting these words, and the insertion of the word "but" seems to imply that the obligation may be controlled by the custom. It is said that the case of *Hulthen* v. *Stewart* (*sup.*) is against this view. I do not so read that case. No custom was proved there, and I can find no words in the judgment to show what would have been their Lordships' view as to the effect on the obligation of any proved custom. If this part of the custom were contrary to the charter, so must also be that part which places the extra burden on the shipowner. In the case of *Beatley* v. *Bryson, Jameson, and Co.* (unreported) this same point was open, as the words introducing the custom were rather less strong. If the defendants are right here they should have succeeded there. It is said that it was not argued, but it is difficult to suppose that it could have escaped the attention of such eminent commercial lawyers as Lord Esher and Mathew, J. Lord Esher, referring to the charter, says "and, therefore, it is a part of this contract if there is a custom obtaining at Hull that she should be discharged in that customary manner. There is introduced the necessity of giving evidence as to what that custom is," and then he particularly points out that by the custom the shipowner is bound to do more than he would be by the ordinary law. If that is so,

why may not the merchant also be bound to do more than he would be by the ordinary law? I have here a clear decision on the point, and it seems to me to accord with reason. I come, therefore, to the conclusion that the custom as proved is binding on the defendants, and forms part of their contract.

It is a satisfaction to me to be able to come to this conclusion rather than to have to find that what business men have plainly intended cannot be carried out. That being so, and there being this obligation on the defendants, what is their position? The evidence shows that if the *Fjordheim* had been provided with a berth as soon as she arrived in dock she would have begun to discharge on the 5th November. The captain says that with sufficient bogies she could have been discharged in seven to eight days. Another of the plaintiffs' witnesses said six to seven, and no evidence was given to contradict it. I feel I should be quite safe in finding that she could have been discharged in eight full working days if the defendants had fulfilled their obligation under the custom. These working days would expire on the middle of Thursday, the 14th November. In fact, she finished discharging at 4 a.m. on the 22nd, or seven and three-quarter days after the time. This at 27*l.* 10*s.* a day makes the demurrage 213*l.* 2*s.* 6*d.* The reasons I have given, if good, are sufficient to decide this case, and to require me to give judgment for the plaintiffs for that amount; but other points were taken, and it will be well for me to express my opinion on them, and find the facts, in case it should be held by a higher court that there was no binding custom. It was argued for the plaintiffs that if no such custom existed, and if the only obligation on the defendants was to use their best endeavours to procure a suitable berth and provide sufficient bogies, the facts showed that they had not fulfilled their obligation. It was said that she could have discharged into lighters first if the merchant had provided them. If the custom be proved this is immaterial. If it be not proved I do not think the merchant in using his best endeavours would be bound to provide lighters. The discharge of whole wood cargoes into lighters is practically unknown. Parcels intended to go by canal up country are sometimes discharged into lighters, but none of this cargo was intended to go by canal, and it would have been a most unusual, and, in my opinion, quite an unreasonable expense for a merchant to incur, first to discharge into lighters, and then to unload again on to the quay or into bogies. There was also a good deal of evidence to show that sufficient lighters could not have been procured. Then it was said that the defendants could, if they had chosen, have expedited the discharge in one or two ways, first by unloading in their yard the loaded bogies which they had there, and so obtaining additional bogies to supply the deficiency. Second, by clearing the quay space at No. 1 berth which was at the time occupied by the cargo of the *Aasta*, another of their ships, and so enabling the *Fjordheim* to come to a berth earlier, and a berth where she could have discharged without delay on the quay space so cleared. Now I think the defendants, on the assumption that there was no binding custom, were bound to do all that was reasonably possible. The question is what was reasonably possible, and I think that is a question of fact. Regard must be had to expense and inconvenience, and also as to what is usually done by merchants in times of great congestion like this. As I have already stated, it was clearly proved by Mr. Adams and Mr. Ramsay, and other witnesses, that in times of congestion merchants made unusual efforts in one of these two ways to expedite the discharge of their ships, and it was shown that at this time the defendants themselves did make unusual efforts to clear away the cargo of the *Minna*, one of their ships, to enable the *Gustav Boldt*, another of their ships, to obtain a quay berth, and also to clear away the cargo of the *Aasta* to enable the *Hanna*, another of their ships, to go to No. 1 quay berth. The defendants had four ships arriving within a few days of one another at this time, namely, the *Gustav Boldt*, the *Luise Leonhardt*, the *Fjordheim*, and the *Hanna*, and when they gave notice to the dock company of the contemplated arrival of the first three they were warned by the dock company that there might be delay in getting a berth. In the case of the *Fjordheim* the defendants made no extra efforts.

It seems to me, having regard to the practice spoken of, that the defendants should have made extra efforts if they could reasonably have done so. I must consider, therefore, if they could, and I will deal first with the suggestion that they could have removed the cargo of the *Aasta* more quickly than they did. This point was clearly made by Mr. Hamilton in his cross-examination of the defendants' witnesses, particularly in the cross-examination of Mr. Ramsay, the dock company's foreman. The only other witness called by the defendants on this point before they closed their case was Mr. Jameson, one of the defendants, who stated that it would have been impossible, because they could not work with lights at night on account of the danger of fire, and they could not begin removing the cargo of the *Aasta* before she was completely discharged, on account of the danger of having two sets of men working at the same time. After his evidence Mr. Scrutton closed his case, and when he was summing up his case I called his attention to what I thought was the unsatisfactory way in which this point had been dealt with; and, as he seemed surprised, I said I would give him the opportunity of calling one other witness on the point. He availed himself of this opportunity on the following Monday, and called Pawson, the timber foreman of the dock company, as being an independent witness. His evidence seemed to me most unsatisfactory, and I was quite unable to accept it as true. He began by stating positively that it was not reasonably possible for the defendants to remove more than thirty standards a day, although one of their own timber yards adjoined No. 1 quay berth, and was only separated from it by a fence in which there were a large number of doors or openings through which timber could be easily removed. When he stated this, I cautioned him by stating that I thought it was contrary to evidence I had already heard; but he adhered to it. He further stated that it was not reasonably practicable to remove the timber into the defendants' yard while the ship was still discharging. Now Mr. Ramsay had said that he could not say that fifty-five standards

could not be removed in a day, and it was obvious that the dock company and the merchants would never have fixed thirty as the number to be removed if that were the maximum that could be removed in a day. After Pawson's evidence, Mr. Scrutton desired to call another witness. I would not allow that, but I offered to admit any documents; and accordingly Mr. Scrutton put in a book kept by one of the defendants' servants, and verified by him in the witness-box, which showed how and when the *Aasta's* cargo was removed. It showed on what days cargo was removed, and what was paid each week. Advances were made to the men at the rate of 75 per cent., so it was easy to calculate how much had been removed each day. These were the facts that appeared. The *Aasta's* cargo was 630 standards. She began discharging on the 23rd Oct. and finished on the 28th (be it observed 630 standards in four and a half working days, the 27th being a Sunday). Notwithstanding the supposed danger, the defendants began removing the cargo from the quay space into their yard on the 24th, and continued to do so throughout the discharge; and the payment showed that during the 24th, 25th, and 26th they removed over 100 standards—that is to say, at the rate of thirty-three standards a day, and they continued removing the next week at a slightly higher rate, although they only employed one gang. Further, although it was said that the cost of removing would vary from 3*s.* to 7*s.* a standard according as the timber was large or small, and although the timber in this cargo contained a good deal of small, the total cost was 103*l.* 6*s.* 2*d.*, which works out at only 3*s.* 3½*d.* a standard for the whole 630, showing that rather less than the usual expense was incurred. There is no doubt that to employ two gangs instead of one would involve some additional extra cost per standard, owing to the necessity of dumping some of it down without taking it immediately to the stacks. I am satisfied that Ramsay was right when he admitted that it could have been done at the rate of fifty-five standards a day after the 28th, when the discharge ended, without any unreasonable extra cost. The defendants had a length of over 300ft. on the quay space to work on and 450ft. on their own yard; and Mr. Jameson stated that his yards were not very full at this time. It was shown by the book that the *Hanna* commenced discharging before the quay space was entirely cleared; and taking all these facts into consideration, I am satisfied, and so find as a fact, that the defendants could have sufficiently cleared the quay space at No. 1 to have allowed the *Fjordheim* to begin discharging there by noon on the 7th Nov., if not earlier. Discharging on the quay is at least as fast as discharging into bogies; and in my opinion the *Fjordheim* could have finished discharging by the end of the day on the 16th. She in fact finished discharging on the 22nd, at 4 a.m.; and I find as a fact that if the defendants had used their best endeavours, five days would have been saved. I ought to have stated that the *Hanna* arrived in dock two or three days after the *Fjordheim*, and I suppose would have taken the *Fjordheim's* place at a bogie berth. Another way in which some time, though not so much, could have been saved, on the assumption that the *Fjordheim* could only have been taken to the berth where she did in fact discharge, would have been by the defendants unloading in their yard the loaded bogies which they had there. On the 8th Nov. the defendants had 147 loaded bogies in their yards; and, of course, this number was added to each day. Mr. Adams stated that this unloading by extra effort could not be done to any large extent, because of possible want of room in the yards; but in my opinion this could have been done to a substantial extent. If they had done this, they would, according to the practice, have had the benefit of the additional bogies so unloaded. It is a low estimate to say that during the eight or ten days beginning on the 8th, 100 bogies might so have been unloaded. Each bogie holds about three standards. This should have given the defendants sufficient bogies to enable 300 additional standards to have been unloaded. As in fact the ship discharged at the rate of 100 standards a day, I estimate that three days could have been saved. These are the facts that I find, and some of the reasons which have led me to these conclusions. I have not to apply these facts, because of my finding as to the custom; they only become material, as I have pointed out, if my finding as to custom is wrong. My judgment must be for the plaintiff for 213*l.* 2*s.* 6*d.* with costs, subject to a discussion in regard to the figures.

Judgment for plaintiffs.

Solicitors for the plaintiffs, *Botterell* and *Roche.*
Solicitors for the defendants, *Trinder, Capron,* and *Co.*

Nov. 5, 6, 12, 1908, *and Jan.* 29, 1909.

(Before Bray, J.)

Red "R" Steamship Company Limited *v.* Allatini Brothers and others. (*a*)

Bill of lading—Charter-party—Construction of—Lien—Dead freight—Liability of bill of lading holders.

A bill of lading was in the following terms: "Shipped . . . being marked and numbered as in the margin . . . unto order, he or they paying freight for the said goods and performing all other conditions and exceptions as per charter-party . . . per the rate of freight as per charter-party per ton of 2240lb. gross weight delivered in full; sixpence less if ordered to a direct port on signing last bill of lading."

The charter-party provided (inter alia) *as follows: "The said ship shall . . . receive a full and complete cargo of wheat, maize, linseed, and rapeseed. Freight twelve shillings and sixpence sterling per ton . . . all per ton of 2240lb. English gross weight delivered . . . charterers to have the option of shipping other lawful merchandise . . . in which case freight to be paid on steamer's dead weight capacity for wheat or maize in bags at the rates above agreed on for heavy grain . . . but steamer not to earn more freight than she would if loaded with a full cargo of wheat or maize in bags."*

The vessel left port half-loaded with oats and barley, owing to the fact that the charterer could provide no further cargo, and proceeded to a direct port.

Held, that, on the true construction of the bill of lading and charter-party, the plaintiffs were only

(*a*) Reported by Leonard C. Thomas, Esq., Barrister-at-Law.

entitled to payment at the rate of 12*s. per ton gross weight delivered, and could not support a claim in respect of dead freight.*

Held, also, that the defendants were entitled to 5 *per cent. interest on the sum deposited with the dock company.*

Commercial list.

The plaintiffs were the owners of the steamship *Ryall*, and the defendants the holders of the bills of lading and receivers of cargo.

The plaintiffs' claim was to recover 1729*l.* money deposited by the defendants with the Surrey Commercial Dock Company as balance of freight. The defendants had admitted and paid a certain sum, but denied any further liability.

The bill of lading was in the following terms:

Shipped. . . . being marked and numbered as in the margin . . . unto order, he or they paying freight for the said goods and performing all other conditions and exceptions as per charter-party dated at Buenos Ayres the 16th May 1907, per the rate of freight as per charter-party per ton of 2240lb. gross weight delivered in full . . . sixpence less if ordered to a direct port on signing last bill of lading.

The material parts of the charter-party were as follows:

(3) That the said ship shall . . . 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 and (or) maize and (or) linseed and (or) rapeseed in bags and (or) bulk. . . .

(4) Which cargo the said charterers bind themselves to ship, &c., not exceeding what she can reasonably stow and carry over and above her tackle, or apparel, provisions, and furniture.

(6) Freight twelve shillings and sixpence sterling (12*s.* 6*d.*) per ton.

(13) Sixpence per ton less if ordered to a direct port of discharge within the range of this charter-party, said port of discharge to be declared on signing final bill of lading. . . .

(15) All per ton of 2240lb. English gross weight delivered.

(16) Charterers have the option of shipping other lawful merchandise . . . in which case freight to be paid on steamer's dead weight capacity for wheat or maize in bags on this voyage at the rates above agreed on for heavy grain; but steamer not to earn more freight than she would if loaded with a full cargo of wheat or maize in bags.

(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 . . . notice 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 charterers or their agents . . . at the rate of fourpence sterling per gross register ton per day.

(31) 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, if in steamer's favour to be paid in cash on signing bills of lading; if in charterer's favour by usual master's bill payable five days after arrival at port of discharge, or upon collection of freight (whichever occurs first), and such bill is hereby made by owners a first charge on bill of lading freight, and the said freight is hereby hypothecated as security for the said bill. Charterers' liability to cease upon shipment of cargo, provided such cargo be worth the 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 . . . in the docks or other loading places beyond the control of the charterers, the time lost not to be counted as part of the lay days . . . 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.

The ship left the port of loading half laden with oats and barley, and proceeded to a direct port.

The defendants denied liability for any part of the amount claimed, and claimed repayment of the amount deposited with the dock company with interest thereon up to the time when it was withdrawn by agreement between the parties.

J. A. Hamilton, K.C. and *D. Stephens* appeared for the plaintiffs.

Scrutton, K.C. and *Leck* for the defendants.

The facts and arguments are sufficiently stated in the judgment.

Bray, J. read the following judgment:—In this case the plaintiffs, the owners of the steamship *Ryall*, claim from the three defendants, the holders of bills of lading and receivers of the cargo, that they were entitled to three sums of money, amounting together to 1729*l.* 1*s.*, which the defendants had respectively deposited to release their goods from the lien which the plaintiffs asserted they had for balance of freight and for dead freight. The defendants had admitted and paid to the plaintiffs a certain amount for freight, but disputed the balance and also the lien for dead freight. The ship had been chartered by L. Willenz and Co., by a charter dated the 16th May 1907. She commenced loading on the 21st May, but on the 3rd July, when she was only about half-loaded, Willenz, by letter to the ship's agents and verbally, informed them that he was unable to complete the loading owing to unforeseen circumstances making it impossible for him to buy any further cargo, and he told the captain about the same time that he was ruined. The ship sailed on the 5th July. When she arrived in London, the claim was made by the plaintiffs and the money was deposited. Two points were made by the defendants, which I disposed of during the course of the argument—one, that the ship could have obtained more cargo at Buenos Ayres from other persons, and thus have reduced the claim for dead freight; secondly, that she had sailed before the expiration of the lay days, which they contended precluded the shipowners from recovering any dead freight. As to the first point, I considered that there was no sufficient evidence to satisfy me that the ship could have obtained any further cargo; and, as to the second point, without determining whether the lay days had expired or not, it seemed to me that the ship was absolved from any obligation to stay longer by the charterer's announcement to the ship's agents and to the captain that he could find no more cargo.

The questions that remained were questions of law depending upon the true construction of the bills of lading and the charter-party, and on these I reserved my judgment. I will deal, first, with the question whether the full freight had been paid. The defendants contended that all they were bound to pay was 12*s.* per 2240lb. gross weight delivered in full. The plaintiffs claimed that a much larger sum was due, which was to be calculated under clause 16 of the charter-party, or, at all events, it should be 12*s.* 6*d.*, instead of 12*s.* The bill of lading was in these terms: "Shipped . . . being marked and numbered as in the margin . . . unto order, he or they paying freight for the said goods and performing all other conditions and exceptions as per charter-party dated at Buenos Ayres the 16th May 1907, at the rate of freight as per charter-party per ton of 2240lb. gross weight delivered in full." In print there was added: "Sixpence less if ordered to a direct port on signing last bill of lading." In some of the bills of lading, but not in all, these words were struck out. Freight was, therefore, to be paid at the rate of freight as per charter-party per ton of 2240lb. gross weight delivered in full. The words "freight as per charter-party" were in writing. The goods were described in the bills of lading as so many kilos oats in bulk, or so many kilos barley in bulk. In order to see what the rate of freight was, it is necessary to look at the charter-party. The charter-party was the uniform River Plate charter-party, 1904, homewards—steam. The body of it was printed, but several clauses were wholly or partly struck out in red ink, and the blanks were filled in in black ink, and additional words were added in a few places. By clause 3 the ship was to load a full and complete cargo of "wheat and (or) maize and (or) linseed and (or) rapeseed in bags and (or) bulk." Clause 6, which has the word "freight" in the margin, is filled in: "Twelve shillings and sixpence sterling per ton." Clause 13, still under the same marginal heading, says: "Sixpence per ton less if ordered to a direct port of discharge within the range of this charter-party." Clause 15, still under the same heading, says: "All per ton of 2240lb. English gross weight delivered." So far there is a clear rate of freight per ton of 2240lb. gross weight delivered.

The next clause, 16, is the one that gives rise to the difficulty. The marginal heading is there changed, and the heading is "other cargo." It runs—"Charterers have the option of shipping other lawful merchandise"—certain things are excepted—"in which case freight to be paid on steamer's dead weight capacity for wheat or maize in bags on this voyage at the rates above agreed on for heavy grain, but steamer not to earn more freight than she would if loaded with a full cargo of wheat and (or) maize in bags. All extra expenses in loading and discharging such merchandise over heavy grain to be paid by charterers." I will not stop now to discuss its meaning. The remaining clause that has to be considered is clause 31, marginal heading "Bills of lading." "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, if in steamer's favour to be paid in cash on signing bills of lading; if in charterer's favour by usual master's bill payable five days after arrival at port of discharge or upon collection of freight (whichever occurs first), and such bill is hereby made by owners a charge on bill of lading freight and the said freight is hereby hypothecated as security for said bill. 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." Only oats and barley were loaded, and it is clear that the freight that has to be paid by the charterers must be regulated by clause 16. There is no rate of freight for oats or barley *eo nomine*. It is quite easy to calculate the total freights under the first part of clause 16. You take the dead weight capacity in tons of 2240lb. and multiply it by twelve, and you have the freight in shillings. The next part of the clause is much more difficult to construe, and if the freight has to be apportioned amongst the different bills of lading holders, a most elaborate calculation has to be made. I endeavoured to make this calculation in *Brightman* v. *Miller* (unreported), in that case with a different bill of lading, which did not contain the words "at the rate of freight as per charter-party." I felt compelled, after great hesitation, to come to the conclusion that the freight must be calculated under clause 16, and my judgment will show the extreme inconvenience of so construing the bill of lading. In this case, however, I have these words "rate of freight as per charter-party" and the words "per ton of 2240lb." In clauses 6 13 and 15 I find under the heading of "freight," a definite rate stated. In clause 16 the words "rate of freight" do not appear. It provides for a gross sum to be paid by the charterer to the shipowner for the whole cargo, without providing for any apportionment amongst the several bills of lading owners. In my opinion the rate of freight as per charter-party in this case is 12*s.* per ton of 2240lb. gross delivered. My reason for coming to that conclusion is that this is the only rate of freight mentioned in the charter-party. I must, however, notice some of the arguments used by Mr. Hamilton against this construction. He says that clauses 6, 13, and 15 do not apply to oats or barley. That is true, because the cargo provided for is only wheat, maize, linseed, or rapeseed; but clause 6 is in general terms: "Freight.—Twelve shillings and sixpence sterling per ton." The words in the bill of lading are equally general, "rate of freight as per charter-party per ton," &c., without saying for what cargo. In other words, the bill of lading points to a general rate of freight, and in the charter-party you also find a general rate of freight. He suggested that the words "at the rate of" were in print and might be ignored; but they are immediately followed by words in writing, and I must, at all events, try and give the words "at the rate of" a meaning, and I ought not to ignore them unless I am bound to do so, and I see no reason whatever for ignoring them. If I do, I am

plunged into the difficulty that met me in *Brightman* v. *Miller*. I think I ought to make every effort to avoid that difficulty. Then he argued that the rate of freight was 12*s*. 6*d*., not 12*s*. I do not agree with that. In this case direct orders were given. Why am I not to look at all the clauses under the heading of "Freight"? If clause 6 ran "12*s*. 6*d*. unless ordered direct and then 12*s*.," it would be clear, and it seems to me to make no difference whether it is in one or two clauses, particularly as they both come before clause 15, which governs all the clauses. I have already stated that in some of the bills of lading the clause "sixpence less if ordered to a direct port" is struck out, but it was not seriously argued that that made any difference, as the same words are in the charter-party. On the claim for balance of freight, therefore, my judgment must be for the defendants.

Now, as to the claim for dead freight, by clause 31 of the charter-party a lien is given to the shipowners on cargo for "dead freight," and the bill of lading contains the words "and performing all other conditions and exceptions as per charter-party." I think, according to the authorities, these words are large enough to give a lien for "dead freight." As to this, Mr. Scrutton argues that there is no dead freight here at all. Other lawful merchandise was shipped, and, therefore, clause 16 applies as between the shipowner and charterer. So far it is clear. Then he argues this is a lump sum freight. It matters not what amount of cargo was carried—the freight is a fixed sum and there can be no dead freight. It seems to me that that is so. I dealt with it in this way in *Brightman* v. *Miller*, and so, if I remember right, did Walton, J. in *London and Northern Steamship Company* v. *Louis Dreyfus and Co.* (unreported). It is true I had to apportion this gross sum amongst the holders of bills of lading because of the unfortunate language of the bills of lading, but that did not alter the effect of the charter-party as between charterer and shipowner. As between them it seems to me there was no dead freight. The shipowner was entitled to his lump sum, neither more nor less, however much or little he carried. The charterer would not be entitled to say that the shipowner should receive less, because he might have reduced the loss by taking in other cargo for other persons. It would not be a question of reducing damages, because it is not a question of damages; and if I had to say how much of this total sum was dead freight, I should have the greatest difficulty in distinguishing between what was freight and what was dead freight. On this ground my judgment must be for the defendants also on the question of dead freight. I think, however, I ought to notice another point raised by Mr. Scrutton. He says the case is covered by *Gray* v. *Carr* (1 Asp. Mar. Law Cas. 115 (1871); 25 L. T. Rep. 215; L. Rep. 6 Q. B. 522), to which Mr. Hamilton replies that it is covered by the decision of a higher court—the House of Lords—in *McLean* v. *Fleming* (1 Asp. Mar. Law Cas. 160 (1871); 25 L. T. Rep. 317; L. Rep. 2 H. L. Sc. 128). I must confess to a difficulty in seeing how those two cases can stand together, and the same view seems to be taken by the text-writers. But then it is said that the Exchequer Chamber expressly decided, after reading the judgment of the House of Lords, that they could stand together, and that I am bound by the decision of the Exchequer Chamber. I have carefully read the judgments of the four learned judges who formed the majority. I find that each of them referred to *McLean* v. *Fleming* and considered it distinguishable, and if I had to decide this point I should find the greatest difficulty in saying that I am not bound by this expression of opinion on a point absolutely necessary for the decision of the case. Fortunately, I have not to decide it in consequence of the opinion I have formed on the other point. [His Lordship also held that the plaintiffs were entitled to interest on the sum deposited with the dock company for the period during which it was in their custody.]

Judgment for the defendants.

Solicitors for the plaintiffs, *Botterell* and *Roche*.
Solicitors for the defendants, *Thomas Cooper* and *Co.*

Dec. 14, 15, 16, 17, 18, 21, 1908, *Jan.* 25 *and* 29, 1909.

(Before BRAY, J.)

SOUTH AMERICAN EXPORT SYNDICATE LIMITED, AND ANOTHER *v.* FEDERAL STEAM NAVIGATION COMPANY LIMITED. (*a*)

Bill of lading—Exceptions—Certificate of fitness by Lloyd's surveyor—Damage to cargo—Liability of shipowners for unseaworthiness.

By the terms of a bill of lading the owners of a vessel undertook to obtain the certificate of Lloyd's surveyor at (United Kingdom) (Montevideo) that the machinery, insulated spaces, &c., had been properly inspected by him, and were in a fit and proper condition for the carriage of a cargo of frozen meat. Such certificate to be accepted by the shippers as conclusive evidence that the machinery, insulated spaces, and appurtenances were at the time of shipment in fit and proper condition, and seaworthy for the voyage, and as full and complete fulfilment by the owners or charterers of any duty, warranty, or obligation they might be under in relation to, or in respect of the machinery, insulated spaces, or appurtenances.

The bill of lading also provided that "the owners or charterers are not to be responsible for any breakdown of machinery during the voyage even when occasioned by any act, neglect, default, or error in judgment of any of the servants of shipowners," and were also exempted from liability for any damage occasioned by "the act of God . . . sweating, evaporation, or decay, resulting from bad stowage or otherwise . . . insufficient ventilation; or heat of holds, . . . perils of the seas, rivers, or navigation of whatsoever nature or kind, and however caused; whether or not any of the perils, causes, or things above mentioned, or the loss or injury arising therefrom be occasioned by or arise from any act of omission, negligence, default, or error in judgment of the master, pilot, . . . engineers, refrigerating or otherwise . . . or other persons whomsoever . . . whether such act, omission, negligence, default, or error in judgment shall have occurred before or after the commencement of or during the voyage; or any other cause beyond the control of the owners or

(*a*) Reported by LEONARD C. THOMAS, Esq., Barrister-at-Law.

charterers and (or) by or from any accidents or defects, latent or otherwise, in hull, tackle, boilers, or machinery, refrigerating or otherwise, or from unseaworthiness . . . provided reasonable means have been taken to provide against such defects and unseaworthiness."

The ship loaded two parcels of frozen meat, one at Rio Seco and the other at Montevideo.

In an action against the shipowners for damage done to the cargo, the jury found that the ship was unseaworthy in respect of its refrigerating apparatus at the commencement of the voyage; that the damage was caused by this unseaworthiness; and that the unseaworthiness was due to the neglect by the ship's agents at Durban and the chief refrigerating engineer.

Held, that a certificate given on the vessel's departure from the United Kingdom and a certificate given at Durban did not constitute a certificate binding upon the holders of the bill of lading; and that the certificate of a person nominated by Lloyd's agents at Montevideo did not amount to a certificate by Lloyd's surveyor.

Held, also, that the owners could not avail themselves of the exceptions in the bill of lading as they had not taken reasonable means to provide against unseaworthiness.

COMMERCIAL LIST.

Action tried before Bray, J. with a special jury.

The plaintiffs were shippers of a cargo of frozen meat per the steamship *Surrey*, of which the defendants were the owners.

The plaintiffs' claim was for damage done to the cargo.

The material parts of the bill of lading were as follows:

The refrigerated cargo will be carried in the insulated spaces fitted in the vessel. The owners undertake to obtain the certificate of Lloyd's surveyor at (United Kingdom) (Montevideo) that the machinery, insulated spaces, and appurtenances have been properly inspected by him, and are in a fit and proper condition for the carriage of the said goods on the voyage. Such certificate shall be accepted by the shippers and others interested in the said goods, and treated as conclusive evidence that the said machinery, insulated spaces, and appurtenances were at the time of the shipment of the said goods and the sailing of the said vessel in fit and proper condition and seaworthy for the voyage, and as full and complete fulfilment by the owners or charterers of any duty, warranty, or obligation they may be under in relation to or in respect of the machinery, insulated spaces, or appurtenances. The owners or charterers agree that they will, during the said voyage and until discharge of the refrigerated cargo, unless prevented by any of the perils or causes excepted, take all reasonable precautions to ensure that the temperature of the said spaces shall be so maintained as to prevent the said refrigerated cargo from sustaining any damage therefrom, but the owners or charterers are not to be responsible for any breakdown of machinery during the voyage even when occasioned by any act, neglect, default, or error in judgment of any of the servants of the shipowner or charterer. A log of the temperature is to kept and initialled by the master daily, and it is especially agreed that access to the holds be allowed at reasonable times to underwriters, shippers, consignees, or their duly accredited representatives. Delay, loss, or damage from any of the following causes were excepted: " . . . sweating, evaporation, or decay, resulting from bad stowage or otherwise or from the leakage or flow of, or from contact with or evaporation from other goods . . . effects of climate, insufficient ventilation, or heat of holds; risk of craft, of transhipment, and of storage afloat or on shore; fire on board, in hulk, in craft, or on shore either before or after loading; rain, hail, snow, frost, or ice; explosion, barratry, jettison . . . perils of the seas, rivers, or navigation of whatsoever nature or kind, and howsoever caused; whether or not any of the perils, causes, or things above mentioned, or the loss or injury arising therefrom, be occasioned by or arise from any act or omission, negligence, default or error in judgment of the master, pilot, whether compulsory or not, officers, mariners, engineers, refrigerating or otherwise, crew, stevedores, ship's husband or managers, or other persons whomsoever . . . whether such act, omission, negligence, default or error in judgment shall have occurred before or after the commencement, during the voyage, or any other causes beyond the control of the owners or charterers; or by or from any accidents or defects latent or otherwise in hull, tackle, boilers, or machinery, refrigerating or otherwise, or their appurtenances, or from unseaworthiness (whether or not existing before or at the time of the goods being loaded, or the commencement of the voyage), or insufficiency of coals at the commencement or any stage of the voyage, provided reasonable means have been taken to provide against such defects and unseaworthiness. . . . The shipowners are not responsible for the condition of the goods shipped, or from any loss, damage, or deterioration caused by defective condition thereof when shipped or from any other cause whatsoever, whether *ejusdem generis* with those before mentioned or not . . . no claim that may arise in respect of goods shipped by this steamer shall be recoverable unless made at the port of delivery and within one month of the steamer's arrival there. The liability of the owners or charterers in case of loss or detention or injury to goods for which they may be responsible to be calculated on and in no case to exceed the net invoice cost."

At the trial, the learned judge left certain questions to the jury which, with the answers, were as follows:—

1. Was the *Surrey* when she left Rio Seco unseaworthy—that is, not reasonably fit to carry a cargo of frozen meat to London and thence to Liverpool—in any and which of the following respects: (*a*) In respect of the circulating pumps; (*b*) in respect of the high pressure slide valve; (*c*) in respect of the Corliss valve; (*d*) in respect of the insulation of the holds; (*e*) in respect of the refrigerating machinery as a whole? Answer.—She was unseaworthy in respect of (*a*), (*d*), and (*e*). 2. Answer the same question, substituting Montevideo for Rio Seco? Answer.—She was unseaworthy in respect of (*a*), (*d*), and (*e*). 3. Was the injury to the rocking shaft on the 3rd June due to the negligence of any of the engineers or to the improper condition of any part of the refrigerating machinery when the *Surrey* left Rio Seco for Montevideo, or to any other and what cause? Answer.—The injury was not due to the negligence of the engineers, but to the improper condition of the machinery. 4. Was the damaged state of the cargo when it arrived at London due to unseaworthiness when the *Surrey* left Rio Seco or Montevideo in respect of (*a*), (*b*), (*c*), (*d*), and (*e*) mentioned in question 1? Answer.—The damaged state of the cargo was due to unseaworthiness when the *Surrey* left Rio Seco in respect of (*a*), (*d*), and (*e*). 5. If there was unseaworthiness when she left Rio Seco or Montevideo in respect of either (*a*), (*b*), (*c*), (*d*), or (*e*), were reasonable means taken to provide against such unseaworthiness in any and which of such respects, and, if so, was the default due to any act or omission on the part of Morrison, Pollock (the chief refrigerating engineer) or the ship's agents at Durban or Montevideo? Answer.—The ship's agents at Durban and Montevideo were to blame, also Pollock. 6. Was additional

damage caused to the cargo on the way from London to Liverpool? Answer.—Yes. And, if so, was it due to unseaworthiness when she left Rio Seco? Answer.—Yes. 7. Was such additional damage, if any, due to any neglect in repairing defects in the circulating pumps before she left London? Answer.—Yes. And, if so, was such neglect due to default on the part of Morrison or Pollock or both? Answer.—Both Morrison and Pollock were to blame.

Rufus Isaacs, K.C., *Scrutton*, K.C. (*Lewis Noad* with them) for the defendants.—Under the bill of lading there is an agreement to treat a certain document as conclusive evidence, and that document necessarily binds the parties. The jury have found negligence on the part of Pollock and the ship's agent, and therefore the owners are protected by the exceptions in the bill of lading. The words in the bill of lading: "The owners undertake . . . appurtenances" cover the case, and, provided the certificate is given and accepted the evidence relating to other matters is inadmissible. The certificate given was in fact accepted by the shippers. The words "or by or from any accidents . . . unseaworthiness" must either override the preceding clause or a reasonable meaning must be applied to them, bearing in mind the exceptions provided for:

Nelson Line v. *James Nelson and Sons*, 10 Asp. Mar. Law Cas. 581 (1907); 97 L. T. Rep. 812; (1908) A. C. 16.

The defendants were a company which can only act by its servants, and the bill of lading was designed to protect the company from the negligence or default of its servants.

J. A. Hamilton, K.C., *Bailhache*, K.C. (*H. Gorell Barnes* with them) for the plaintiffs.—The certificate given did not satisfy the obligation imposed upon the defendants by the bill of lading. The words in the bill of lading relating to the certificate presuppose that the ship has been made seaworthy. It simply refers to an express obligation to keep down the temperature, assuming that the ship has been made seaworthy in the first instance. In order to avail themselves of the exceptions it was necessary for the owners to express themselves clearly.

Elderslie Steamship Company v. *Borthwick*, 10 Asp. Mar. Law Cas. 24 (1904); 92 L. T. Rep. 274; (1905) A. C. 96.

Nelson Line Limited v. *James Nelson and Sons* (*sup.*).

Cur. adv. vult.

BRAY, J.—This action comprises in reality two actions brought by two different plaintiffs against the same defendants for damages for breach of contracts contained in two bills of lading for the carriage of frozen meat from South America to this country. Both parcels were carried in the ship *Surrey*, which was equipped with insulated holds and refrigerating machinery, and to a great extent, but not entirely, the questions involved are the same. The one parcel was loaded at Rio Seco, and was discharged partly in London and partly in Liverpool, and the other was loaded at Montevideo and discharged in London. Both parcels were more or less damaged through the failure of the refrigerating machinery, and the action was brought to recover the losses severally sustained by the two plaintiffs. The trial took place before me and a special jury at the end of last sittings, and the jury answered certain questions which I put to them, and it was agreed that if it became necessary to find any other facts I should find them. All questions of the amount of the damages were to be dealt with in some other way. The answers returned by the jury were, in the main, in favour of the plaintiffs. They found, amongst other things, that the ship was unseaworthy when she left Rio Seco and Montevideo in respect of its refrigerating machinery, that the damage was caused by this unseaworthiness, and that the unseaworthiness was due to the neglect of the ship's agents at Durban and of Pollock, the chief refrigerating engineer. On these findings each of the plaintiffs asked for judgment. The points raised by the defendants in answer turned mainly upon the true construction of the bills of lading.

I will deal first with the parcel shipped at Rio Seco which belonged to the South American Export Syndicate. That was shipped under a bill of lading dated May 1906, which contained this clause: "The owners undertake to obtain the certificate of Lloyd's surveyor at the United Kingdom, that the machinery, insulated spaces, and appurtenances have been properly inspected by him, and are in a fit and proper condition for the carriage of the said goods on the voyage. Such certificate shall be accepted by the shippers and others interested in the said goods and treated as conclusive evidence that the said machinery, insulated spaces, and appurtenances were at the time of the shipment of the said goods, and the sailing of the said vessel in fit and proper condition and seaworthy for the voyage, and as full and complete fulfilment by the owners or charterers of any duty, warranty, or obligation they may be under in relation to or in respect of the machinery, insulated spaces or appurtenances." The defendants contended that a certificate called the R.M.C. certificate given when the *Surrey* left this country in Jan. 1905, when taken in conjunction with a certificate given at Durban on the 30th March 1906, was a certificate within the meaning of the bill of lading, and concluded the plaintiffs from alleging that the *Surrey* was unseaworthy. I am unable to take this view.

The bill of lading implies, as it seems to me, that the certificate should be given after inspection at the port of loading. The R.M.C. certificate was given on the 26th Jan. 1905, sixteen months before the frozen meat was loaded at Rio Seco, and before this particular voyage was even contemplated, and at a time when it would be perfectly impossible for anyone to say in what condition the machinery and insulated spaces would be at Rio Seco. It was given not by Lloyd's surveyor, but by the chairman of Lloyd's Register, and it was in these words: "This is to certify that the refrigerating machinery and insulation of the steel screw steamer *Surrey*, 5455 tons, of London, Aitchison, master, bound to River Plate, have been surveyed at London and Glasgow by the surveyors to this society, and reported to be on the 26th Jan. 1905 in good condition and fit for the conveyance of refrigerated cargoes, and that the record R.M.C. 105 (Refrigerating Machinery Certificate) has been made against her name in the register book and in the special list of vessels contained therein as being fitted with refrigerating appliances." It does not say that the machinery, &c., were in a

fit condition for the carriage of the said goods on the voyage. It only purports to be a certificate of the condition of the machinery at the time—namely, Jan. 1905. It does not seem to me to become a certificate under the bill of lading, because, at a later period—namely, on the 30th March 1906, when the ship was at Durban, many miles away from Rio Seco, and not a place in the United Kingdom, there was a further certificate given by a Lloyd's surveyor. The last paragraph in that certificate shows that its object was merely to recommend Lloyd's Register in London to continue the R.M.C. certificate. In my opinion, therefore, so far as regards the parcel loaded at Rio Seco there was no certificate which binds the holder of the bill of lading. As regards the parcel loaded at Montevideo, the facts were different, and the bill of lading required that the certificate should be given by Lloyd's surveyor at Montevideo. What happened there was this. The ship's agents requested Lloyd's agents there to nominate a surveyor. They appointed a consulting engineer named Peter Gillespie to inspect the machinery and two of the holds, and he signed two documents called reports, which were countersigned by Lloyd's agents on the 20th and 28th May. These documents were handed to the plaintiffs by the ship's agents at Montevideo, though exactly how and when did not appear. The defendants contended that these certificates complied with the bill of lading, or, if not, that they were accepted by the plaintiffs as a compliance. The ordinary and well-known meaning of "Lloyd's surveyor" is a surveyor appointed by Lloyd's Shipping Register. There is a Lloyd's surveyor at Buenos Ayres, some twenty-four hours from Montevideo, but though I gather that he from time to time came to Montevideo, he was not permanently stationed there. In the ordinary sense of the words, Gillespie was certainly not a Lloyd's surveyor, and I do not think that what happened on previous occasions would justify me in holding that he was a Lloyd's surveyor within the meaning of the bill of lading. Lloyd's surveyors are a class well known in relation to shipping matters. They bear a high reputation as persons perfectly independent and of large experience, and a surveyor who happened to be chosen by Lloyd's agents for a particular purpose may be a person of a different class altogether. It may be, however, that the plaintiffs have by their conduct accepted Gillespie and his certificate as the person and certificate by whom they agreed to be bound. This point was not, in my opinion, raised by the points of defence, but I allowed an amendment to raise the point. I am not sure that I should have done this if I had waited to hear the circumstances under which the so-called certificates were given. Mr. Gillespie made a most imperfect inspection. He never saw but one set of circulating pumps working, and Pollock, the chief refrigerating engineer of the *Surrey*, never gave him a hint that there was anything wrong with the other set. As a fact, as Pollock had ascertained before the caro wasy loaded at Rio Seco, the other set was completely useless. It could not be, and never was used on the voyage. I should hope that no Lloyd's surveyor would have made such a casual inspection. However, having allowed the amendment, I must see if it is proved. The evidence upon this point is the evidence of Emilio Vallebona, a member of the firm of Christopherson Hermann, who were the ship's agents at Montevideo. His evidence is very vague and general. He speaks to no specific interview or document, and the only inference I can draw is this—that on some (I cannot tell how many) previous occasions certificates had been given by other persons appointed by Lloyd's agents on similar occasions, which had been sent to the plaintiffs, who had received them without remark. It is not suggested that they were accompanied by any letter indicating that they were given under the terms of the bills of lading, or were to be accepted as conclusive, or that by any writing or by any oral statement the plaintiffs had accepted them as such. If there had been any such documents they would, of course have been produced, and if there had been an oral statement it could have been proved. The defendants do not seem to have been aware of any conduct on the part of the plaintiffs entitling them to say that the plaintiffs had accepted them, at all events until they received the affidavit of Vallebona, which was sworn at Montevideo at the end of September, and then did not think it of sufficient importance to ask for an amendment. It may be that the plaintiffs were content to put the cargo on board on the faith of this certificate, but I think that it requires something more than silence on the part of the plaintiffs to justify my treating them as having accepted these certificates as conclusive evidence of the seaworthiness. The defendants do not say that they were misled by any conduct on the part of the plaintiffs. The defendants must have known perfectly well that Gillespie was not a Lloyd's surveyor, and, if they wanted his certificate to be taken as conclusive, they should have asked the plaintiffs in so many words to accept it as conclusive. I have nothing to show me whether the plaintiffs would have accepted it, if specifically asked to do so. I feel bound, therefore, to find as a fact that the defendants have not proved either their original or their amended plea.

The next point arises upon another part of the bill of lading. It was this—that if the *Surrey* was, as the jury have found, unseaworthy, the defendants were protected by the clause beginning "the act of God," and ending "beyond the control of owners or charterers." They said that the damage was caused by "heat of holds," "occasioned or arising from the negligence of a refrigerating engineer, ship's husband, or manager, or other person whosoever for whose acts they would otherwise be liable, and that it did not arise from any negligence of the owners or any managing or other director or of the board of directors, and that the words in the following clause, "Provided that reasonable means have been taken," must, having regard to the preceding clauses, be read as "Provided that reasonable means have been taken by the owners or directors." I think that the decision of the Court of Appeal in *James Nelson and Sons* v. *Nelson Line* (10 Asp. Mar. Law Cas. 390 (1907); 95 L. T. Rep. 180; (1907) 1 K. B. 769), a case which was also tried by me, has a material bearing upon this point. In that case the defendants set up the same contention upon a somewhat similar bill

of lading, and, at the defendant's request, I left a question to the jury to raise the point. The court held that the exception of negligence of engineers, &c., which in that case followed instead of preceding the unseaworthiness clause, did not apply to that clause, and they stated their reasons in this way at pages 779 and 780: "Now, the exception or qualification of immunity from loss by unseaworthiness is itself subject to a very special provision in these terms: '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,' which is a special provision in the earlier part of the clause, and it is not possible to read into it, as qualifying it, a provision at the end of the clause which would have the effect of annulling all possible liability on the part of the shipowner, because it would make it impossible to show that all reasonable means had not been taken in a case where, as in the present case, the defendants are a company who are compelled to act through agents, and, if you cannot attribute the want of care to anything done by them through their agents, they stand outside the possibility of being put outside the protection of the clause. In my opinion, the clause dealing with the qualification of the liability for unseaworthiness is complete in itself, and does not require to be interpreted by the subsequent limitation at the end of the clause, which, though perhaps applicable to other exceptions, is not applicable to, and ought not to be applied to, one which stands complete in itself and which addresses itself to the very same point. I think that the two clauses cannot be read together so as to arrive at a rational conclusion; the one part is contradictory of the other, and, therefore, as a matter of common sense and as a recognised canon of construction, we ought if we can to apply all parts of the clause so that they shall not defeat each other." Cozens-Hardy, L.J., the present Master of the Rolls, says: "It surely ought not to be beyond the power of commercial men to express in terse and clear language that which they desire to effect in a transaction of this kind, and if shipowners desire to free themselves from liability for the consequences of the unseaworthiness of their ships, it rests upon them to make their intention perfectly clear; the intention is certainly not clear in this case. In my view, the warranty of seaworthiness implied by law holds good and is in force except in one event, which, having regard to the findings of the jury, has not happened here." I think that I must apply the same reasoning here.

Are the two clauses consistent? In my opinion they are not if "heat of holds" is to be construed as insufficient freezing. I think that the clause beginning with "or by or from any accident," &c., must be read by itself. It apparently deals exhaustively with the question of defects and unseaworthiness, and says that the exception is only to apply provided reasonable means have been taken to provide against such defects or unseaworthiness, implying thereby that if reasonable means have not been taken the shipowner is not to be protected from responsibility for damage caused by unseaworthiness. I have no right to insert the words, "by the owners or directors" after "have been taken." I think that the intention was that the ship would be liable in the case of unseaworthiness if reasonable means were not taken, and the jury have found that they were not. The most favourable view for the defendants would be that the clause was ambiguous, but in that case I should be bound to apply the rule of construction in cases of this kind laid down by Lord Macnaghten in *Elderslie Steamship Company* v. *Borthwick* (*sup.*), and approved by Lord Loreburn in *Nelson Line* v. *James Nelson and Sons* (*sup.*). On p. 19 Lord Loreburn says: "The law imposes on shipowners a duty to provide a seaworthy ship, and to use 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 *Elderslie Steamship Company* v. *Borthwick*, 'an ambiguous document is no protection.'" This defence, therefore, also fails, and, having regard to the findings of the jury, I must find that both the plaintiffs are entitled to judgment against the defendants. The damages must be assessed in the manner in which the parties have agreed.

Solicitors for the plaintiffs: *William A. Crump and Son.*

Solicitors for the defendants: *Parker, Garrett, Holman* and *Howden.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Monday, Nov. 30, 1908.

(Before Sir Gorell Barnes, President, and Elder Brethren.)

The Clutha Boat No. 147. (*a*)

Collision—Fog—Both to blame—"Fairway" of the river—Duty to ring a bell—Speed—By-laws for the Navigation of the Medway 1896, *arts.* 15, 41, 43 (*c*), 47, 48.

A sailing barge was lying at anchor in the Medway in a dense fog to the northward and eastward of the gas buoy opposite Darnett Ness, when she was run into by H.M.S. Clutha Boat No. 147. *The barge shortly afterwards sank. Those on the barge were not sounding their bell. In a damage action by the owners of the barge against the master of H.M.S.* Clutha Boat No. 147:

Held, that the plaintiffs were to blame for not ringing their bell in accordance with art. 43 (*c*) *of the Medway By-laws, as a vessel is in the fairway of a river when she is in a part of the river in which small vessels might go when tacking up and down the river; and that they were also to blame for a breach of art.* 48 *of the Medway By-laws, as not ringing the bell was, having regard to the position of the vessel and the condition of the weather, a neglect of a precaution required by the ordinary practice of seamen.*

Held, further, that the defendant was to blame for the collision for being under way and for proceeding at an excessive speed in the fog in breach of art. 41 *of the Medway By-laws; and that, as the collision was brought about by a combination*

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

of two contributive causes, there would be a decree of both to blame.

DAMAGE ACTION.

The plaintiffs were Henry Peters, the owner of the sailing barge *Alice*, and the owners of her cargo and her master and crew suing for their effects; the defendant was John Henry Cossy, the master of *The Clutha Boat No.* 147.

The case made by the plaintiffs was that at about 6.50 a.m. on the 24th July 1908 the *Alice*, laden with a cargo of cement, carrying two hands, was lying at anchor out of the fairway in Long Reach, river Medway.

The weather was foggy, the wind calm; the tide was flood of the force of one or two knots. The *Alice* was still exhibiting her riding light. In these circumstances a steamship *The Clutha Boat No.* 147, with her stem struck the *Alice* a very heavy blow on the port side amidships and sank her.

Those on the *Alice* charged those on *The Clutha Boat No.* 147 with failing to keep a good look-out; with failing to keep clear of the *Alice*, or to take proper steps to do so; with proceeding at an excessive speed; with navigating out of the fairway; with not stopping or reversing her engines in due time; and with being improperly under way.

The case made by the defendant was that shortly before 6.50 a.m. on the 24th July 1908 *The Clutha Boat No.* 147, a steam twin screw tender attached to Chatham Dockyard, 92ft. long, fitted with compound engines and manned by a crew of five hands all told, was taking some liberty men from the dockyard to H.M.S. *Charybdis* and *Vindictive*, which were moored in Kethole Reach, river Medway. The wind was calm, the weather foggy, and the tide flood of the force of about one knot in the channel.

The Clutha Boat No. 147 was proceeding on a down-river course down the river Medway, sounding her whistle regularly for fog, and a good look-out was being kept on board of her. In these circumstances those on board *The Clutha Boat No.* 147, which had shortly before stopped her engines to listen for sound signals and gone slowly on again, suddenly saw close to and ahead of them the barge *Alice*, all of whose crew were below asleep instead of being on deck ringing her bell, and, before *The Clutha Boat No.* 147 could be stopped, she struck the port side of the *Alice* with her stem.

Those on *The Clutha Boat No.* 147 charged those on the barge *Alice* with not keeping any look-out and with not ringing their bell.

The following Collision Regulations 1897 and Medway By-laws 1896 were referred to during the course of the trial.

Collision Regulations 1897:

Art. 15 (*d*) A vessel, when at anchor, shall at intervals of not more than one minute ring the bell rapidly for about five seconds.

Art. 29. Nothing in these rules shall exonerate any vessel, or the owner, or master, or crew thereof, from the consequence of any neglect to carry lights or signals, or of any negleet 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.

Medway By-laws 1896:

13. The master of every steam vessel navigating the river shall be and remain on one of the paddle boxes or on the bridge of such steam vessel, and shall cause a proper look-out to be kept from the bow of the said steam vessel during the whole of the time it is under weigh, and shall remove or cause to be removed any person, other than the crew, who shall be on the bridge or paddle boxes of such steamer.

15. Every steam vessel when approaching another vessel so as to involve risk of collision shall slacken her speed and shall stop and reverse if necessary.

41. All vessels entering or being overtaken by a fog shall be navigated with the greatest caution and at a very moderate speed, and if necessary come to an anchor.

43. In fog, whether by day or night, the signals described by this by-law shall be used—that is to say: (*c*) All steam vessels and all sailing vessels when at anchor in the fairway of the river shall at intervals of not more than two minutes ring the bell.

47. In obeying and construing the before-mentioned by-laws 13 to 46, due regard should be had to all dangers of navigation, and to any special circumstances which may render a departure from the by-laws necessary in order to avoid immediate danger.

48. Nothing in the before-mentioned by-laws numbered 13 to 46 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.

Bailhache and *Dunlop* for the plaintiffs.—The view of the master of the barge was that he was not in the fairway, and consequently there was no duty on him to ring his bell, though if he had been in the fairway it was thick enough to cause him to ring it. [The PRESIDENT.—How are you going to get out of not ringing the bell?] We were not in the fairway. [The PRESIDENT.—Does that matter, having regard to art. 48?] The court would be slow to find us to blame under that article if we were not to blame under art. 43 (*c*). One question here is what is a fairway; this vessel was not in the fairway. [The PRESIDENT.—The Elder Brethren think it is a fairway. It is a fairway if vessels pass and repass, even though it is not deep water and vessels anchor there; further, you neglected a most reasonable precaution.] No steamers should come to this spot, even if barges might get there when tacking. We are outside the usual track of steamers, and so are not in the fairway.

Laing, K.C. and *A. D. Bateson*.—This is a common law action for negligence, the collision regulations do not apply; there is no statutory presumption of fault. To succeed, the plaintiffs must show that they were sunk without negligence on their part which contributed to the collision. They cannot do that, for the fact that they did not ring their bell did contribute to the collision. The master of *The Clutha Boat* says he could have got out of the way if the bell had been rung, and it is clear that if it had been rung every two minutes those on *The Clutha Boat* must have heard it several times as they approached the place of collision. Apart from not ringing the bell there was no look-out on the barge; if those on her had shouted the defendants must have gone clear.

Bailhache in reply.—The steam vessel says to the barge: if you had rung your bell there would have been no collision. The barge says to the steam vessel: if you had anchored or gone at a

more moderate speed there would have been no collision. Both statements may be true, and in that case both contributed to the collision and both are to blame. The case is governed by

The Bluebell, 72 L. T. Rep. 540; 7 Asp. Mar. Law Cas. 601; (1895) P. 242.

THE PRESIDENT.—In this case the plaintiffs are suing for the damage done to their sailing barge *Alice* by a collision between the *Alice* and H.M.S. *Clutha Boat No.* 147, which took place on the 24th July last, at about 6.50 in the morning. It appears that the *Alice*, which is a barge, and was laden with a cargo of cement, carrying two hands, had anchored in the Medway at a spot about which there is little dispute, which has been marked on the chart in two places, both to the northward and eastward of the gas buoy opposite Darnett Ness, and between that buoy and the shallower soundings on the Mussel Bank. The plaintiffs marked the spot on the chart before me with a red cross, and Lieutenant Bevan has given the bearings of the buoys and flagstaffs, which show a spot a little northerly and westerly of the plaintiffs' spot. That was the place where the wreck was, and it must be very near, possibly not the precise spot, but very near the spot where the collision took place. While lying at anchor at that spot the *Alice* was run into by the *Clutha Boat No.* 147 on the early morning of the 24th July. By that time it must have been broad daylight. There had been a light put up on the *Alice*, and it is said that that light was still burning. I daresay it may have been, but, being broad daylight, I do not think that that matters so very much. One other matter is quite clear, that at the time of the collision the only two men who were on board the *Alice* were down below, and no sound, by bell or otherwise, was being made on board the *Alice*. The *Clutha Boat No.* 147 had come down from Chatham Dockyard with a crew of five hands, and some liberty men, whom they were taking down to two of His Majesty's ships lying in the Kethole Reach. At the time when she started the weather was not very thick, but it was hazy. As she got lower down it was very hazy, and it got so thick that the captain or master, whatever his correct title is, on board that boat could not see or only with difficulty could see the men standing 30ft. or 40ft. forward on the look-out, and the men on the look-out could only see the barge that they struck, although it was broad daylight, at a distance of about seven yards. The collision was nearly at right angles apparently, and the blow was so violent that the whole side of the barge was cut through, in the way indicated by the surveyor, and the cement barrels with which she was laden were also cut into and squashed to a certain extent, as the same surveyor pointed out in some little models which he produced. There is no doubt it was a very violent blow, which sank the barge in a few minutes. I think the *Clutha Boat No.* 147 had more or less lost her way, and got out of the proper course down. She came past the gas buoy called the Folly Bank Gas Buoy, but she did not see the next gas buoy, which shows how thick it was, and she did not see another barge lying there out of the ordinary way which the *Clutha Boat No.* 147 would have gone if she had gone straight down the Long Reach. She must have passed close to it. That being what occurred on this occasion, the plaintiffs are in this difficulty: That they were not ringing their bell, according to the rule which requires that it shall be rung when a vessel is at anchor in the fairway of the river, and I have no doubt myself, and this is a matter upon which I have taken the advice of the Elder Brethren, that this vessel was at anchor in the fairway within any reasonable meaning that you can give to the wording of the rule. It must be noticed that this rule, which I have already referred to, follows rules which deal with lights to be carried by vessels lying at anchor in the river, and I should myself be prepared to rule, if it were necessary, that these rules must be read together, and that where the vessel is at anchor—in the ordinary course of her navigation I mean, not high and dry on the bank somewhere—she ought to ring her bell in circumstances where ringing a bell is required, just as much as she should put up an anchor light. I do not know whether it is necessary to go quite so far as that in this case, because, when one looks at the chart, and the configuration there, it cannot be said that this vessel was out of the fairway completely. She was in a part in which small vessels might and do go, according to the evidence, when they are tacking up and down the river according to the state of the wind. That being so, the plaintiffs' people are in fault in not ringing their bell. But, whether that view is right, or whether it is wrong, is not of great importance here, because, under the 48th article, which requires that there shall be no neglect of any precaution required in the circumstances of the case by a seaman, the Elder Brethren advise me that undoubtedly, in the position in which this vessel was, and in a state of weather when other vessels might get out of their course, it was a most important thing that a bell should be rung, and signals should be made where this vessel was. That is the plaintiffs' story.

With regard to the other side of the case, there is not the slightest doubt in my mind that the vessel which was in charge of the defendant was being taken down in circumstances in which she ought not to have been moving at all. I agree that the fog came on after he had started, and that he was in some difficulty with regard to his liberty men, who liked to be taken down to their ships; but the mere fact that people are going to be taken down to their ships does not justify a man going on in fog so thick that it is not safe to go on in. They might have to wait for their food possibly a little longer, or might have to turn back, or grope along, and possibly wait until there was no danger; but whether he was right or wrong in that, in this case there is no doubt that the vessel's speed at that time must have been serious. No vessel could strike a blow such as is indicated, and say that she could safely go on at a speed which would do that damage, and yet would only allow those on board her to see an object seven yards off. It is impossible to support such a view. The only other difficulty is this. It is said by the plaintiffs, "It is entirely the fault of the defendants, even if we did not ring the bell, because they had no business to be under way." It is said by the defendants, "Although we were in fault for being under way, and going too fast, yet if you had rung your bell we would have heard it, and

would have avoided you, and therefore we are not to blame in fact, in the circumstances, for what we did." I agree with Mr. Bailhache that this case is substantially on all fours with the case of *The Bluebell* (*ubi sup.*), and it could hardly have been left out of consideration there that the other ship in that case, being under steam, was not only the subject of blame, but that she was to blame for contributing to the disaster which happened. It is impossible to follow out the working of the law with such nicety that you can differentiate between the precise amount of blame in one case and in the other case. It is a very difficult thing even to appreciate the precise amount of blame in such a case. But the plaintiffs recover to the extent of half in the Admiralty Court—and in the common law too—if, with ordinary care exercised up to the moment of collision, she could have avoided the collision; and if the other vessel, the defendants' vessel, by the like care, could have avoided the collision. But in a case of this kind it is, to my mind, a case of broader distinction. It is a combination of two contributive causes which produced this disaster; and it is refining it away to nothing, it seems to me, if it is said that the neglect to sound a bell is such that, if the bell had been heard, there would have been no disaster, and therefore that the whole of the damage ought to be borne by the plaintiffs. I do not agree with that view. It is probable, but not certain, that that would have been the case: and the only safe finding one can come to in a case of this kind on the finding of fact is that both these vessels contributed to this disaster, and therefore the fault must be shared. That means that the ordinary decree of both to blame, applicable in a case of this kind, must follow. That must be held to be the result.

Solicitors for the plaintiffs, *J. A.* and *H. E. Farnfield.*

Solicitor for the defendant, *Treasury Solicitor.*

Wednesday, Nov. 18, 1908.

(Before Sir GORELL BARNES, P., and BARGRAVE DEANE, J.)

THE CORDELIA. (*a*)

Charter-party—"In regular turn"—Demurrage.

A plaintiff let his ship to charterers, agreeing that she should "proceed to the Nob, near Topsham, in the river Exe, or to Topsham Quay, as ordered . . . and deliver . . . in regular turn with other seagoing vessels at the average rate of thirty tons per weather working day."

The plaintiff's vessel was berthed at the Nob, and her master gave notice of readiness to discharge. She was kept waiting while another vessel consigned to the defendants at the Nob finished her discharge, when her discharge began. While she was waiting at the Nob to begin to discharge, another vessel consigned to the charterers who were defendants began to discharge into a lighter at another discharging place in the Exe, not named in the plaintiff's charter. The other vessel had arrived after the plaintiff's vessel.

Held, by the Divisional Court (Sir Gorell Barnes, P. and Bargrave Deane, J.), affirming the judgment of the County Court judge, that "regular turn," when applied to vessels discharging at the Nob, meant one at a time in order of arrival, and, as the discharge had taken place with the usual dispatch and in order of arrival at the Nob, no demurrage was payable.

APPEAL from a decision of His Honour Judge Lumley Smith, sitting in Admiralty at the City of London Court, dismissing an action brought by the owner of the *Cordelia* to recover demurrage in respect of the detention of his ship, the *Cordelia.*

On the 22nd Nov. 1907 the plaintiff, the owner of the ship *Cordelia*, entered into a charter-party with the Odams Manure and Chemical Company by which he undertook that the *Cordelia* should load in London "a cargo of Gafsa phosphate in bulk, and, being so loaded, should proceed to the Nob, near Topsham, in the river Exe, or to Topsham Quay, as ordered on arrival, after reporting at the company's offices, Topsham, and deliver the same in regular turn with other seagoing vessels at the average rate of thirty tons per weather working day. . . . Freighter to have the option of keeping the said ship ten days on demurrage at 2*l.* (two pounds) a day."

On the 30th Nov. 1907 the master gave a bill of lading for 180 tons 0cwt. 1qr. 5lb. of unground Gafsa phosphate in bulk "in and upon the good ship called the *Cordelia* . . . bound for Topsham (at the Nob or quay)."

The *Cordelia* arrived at Topsham on the 20th Dec.; her master reported his arrival at the defendants' office on the 21st Dec., and was ordered to proceed to the Nob.

On the 22nd Dec. the *Cordelia* was moored at the Nob in a discharging berth, and notice of readiness to discharge was given to the defendants on the 23rd Dec.

When the *Cordelia* arrived at her berth at the Nob, another vessel, the *Lord Napier*, consigned to the defendants, was discharging.

The *Lord Napier* finished discharging on the 2nd Jan., and early on the 3rd Jan. the defendants began to discharge the *Cordelia*, the discharge being completed on the 11th Jan.

On the hearing of the action in the County Court it was proved that there were three places at which ships discharged in the river Exe for the defendants, at the Nob, at Topsham Quay, two miles from the Nob, and at Exmouth Bight, three miles from the Nob. The defendants possessed three lighters, one of which was used at each place of discharge, and their practice was alleged to be that vessels at each of the three berths took their turn separately and distinct from the other berths.

A vessel called the *C. E. Spooner* arrived in the Exe on the 22nd Dec., and was ordered to discharge at Exmouth Bight on the 30th Dec.

The case made by the plaintiff was that, instead of making the *Cordelia* wait until the *Lord Napier* had finished discharging, the defendants should have sent the lighter that they sent to Exmouth Bight on the 30th Dec. to discharge the *C. E. Spooner* to the Nob to discharge the *Cordelia.* The plaintiff alleged that the vessel was on turn on the 23rd Dec., and that the six weather working days allowed for discharge were over on the 31st Dec.; he therefore claimed eleven days' demurrage at 2*l.* a day.

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

The defendants' case was that the *Cordelia* was discharged in regular turn as provided by the charter, and, as they admitted that she should have been discharged by the 9th Jan., they paid into court the sum of 4*l.* in respect of the last two days on which the discharge took place, the 10th and 11th Jan.

The case was heard in the County Court on the 21st Oct. 1908, when the following judgment was delivered:—

His Honour Judge LUMLEY SMITH.—I do not think in this case the defendants' contention that they are entitled to take away all their barges from the Nob and send them to discharge another ship at the Exmouth Bight and so delay the unloading at the Nob is well founded. I think that they are bound to go on discharging at each of these places. As to the Nob, I think the regular turn at the Nob for seagoing vessels is proved to be one at a time. I think that has been the practice. The witnesses called for the defence say that more could be unloaded at the same time with difficulty, but I do not think that is regular turn. I think regular turn at the Nob meant one at a time. It is admitted that the *Lord Napier* came first, and was entitled to be discharged before the *Cordelia*, and that as soon as the *Lord Napier* was finished the *Cordelia* was taken on. If the plaintiff could have shown that there was any delay in discharging the *Lord Napier*, and that the barges were taken away elsewhere and not used for the *Lord Napier*, and consequently that the day of the beginning of the *Cordelia* was postponed, I think it would have made out the plaintiff's case; but there is no evidence which satisfies me that the *Lord Napier* was not discharged with usual dispatch. That being so, I think the *Cordelia* came on in her regular turn, and there will be judgment for the defendants with costs.

Leave to appeal was granted.

On the 31st Oct. 1908 the plaintiff served a notice of appeal on the defendants praying that judgment should be entered for the plaintiff or that a new trial should be ordered on the grounds that under the charter the time allowed for unloading began to count from the time the *Cordelia* was in her discharging berth at the Nob ready to deliver the cargo; that evidence was wrongly admitted of a practice of the defendants, with regard to vessels ordered to the Nob, to finish the unloading of one vessel before beginning to unload another which is in a discharging berth, but has arrived after her, and to supply, according to their own convenience or engagements, lighters, available for the unloading of vessels at the Nob, to other vessels in discharging berths at other places in the river Exe; that such practice did not constitute a custom of the port, or was unreasonable, uncertain, and inconsistent with the terms of the charter and not binding on the plaintiff; that the delay in commencing to unload was due to the defendants only having three lighters for unloading at Topsham Quay, the Nob, and Exmouth Bight; that no lighter was supplied to the *Cordelia* between the date of her readiness to discharge the 23rd Dec. 1907 and the 2nd Jan. 1908; and that during that time lighters were supplied by the defendants at the Nob to unload the *Lord Napier*, which arrived before the *Cordelia*, and at Exmouth Bight to the *C. E. Spooner*, which arrived after the *Cordelia*.

C. Robertson Dunlop for the appellant.—The time allowed for the discharge of the *Cordelia* runs from the time the vessel was in her discharging berth at the Nob ready to deliver her cargo. The delay was caused by the absence of lighters. No lighter was sent to the *Cordelia* between the 23rd Dec. and the 2nd Jan., but they were sent to another vessel at the Nob which had arrived before the *Cordelia*, and to a vessel at Exmouth Bight which had arrived after the *Cordelia*. Evidence as to the practice of finishing the unloading of one vessel at the Nob before beginning the unloading of another should not have been admitted. It was not proved to be a custom of the port and, even if it was a custom, it was bad, for it was unreasonable and uncertain, and contrary to the express terms of the charter as to regular turn. The charterers are bound to have sufficient lighters to unload vessels as soon as they are in a discharging berth. "Regular turn" means in order of readiness, not in order of entry:

Lawson v. *Burness*, 1862, 1 H. & C. 396.

The method the defendants adopted to discharge does not make it a customary manner of discharge:

The Sheila, *Shipping Gazette*, 3rd Dec. 1907.

[The PRESIDENT.—The *Sheila* has no bearing on this case.] The case referred to by the defendants in the court below—*Barque Quilpué Limited* v. *Brown* (90 L. T. Rep. 765; 9 Asp. Mar. Law Cas. 596; (1904) 2 K. B. 264)—is not in point, for in that case the vessel never got a berth.

D. C. Leck, for the respondents, was not called on.

Sir GORELL BARNES, P.—My opinion is that in this case the learned judge below was quite right. I see no reason to differ from him, and I agree with the reasons which he gave in the decision he arrived at. It looks to me as if the plaintiff expected that his vessel would find a string of barges when she got to the Nob. I am afraid the plaintiff could not reasonably expect more than that he should have his vessel discharged in regular turn with other seagoing vessels which were being discharged in turn and with the usual dispatch. The terms of the charter-party do not justify the plaintiff in expecting more than that. The appeal will be dismissed with costs.

BARGRAVE DEANE, J.—I agree.

Solicitors for the appellant (plaintiff), *Holman, Birdwood, and Co.*

Solicitor for the respondents (defendants), *Robert Greening.*

Dec. 12, 14, *and* 15, 1908.

(Before Sir GORELL BARNES, President, and Elder Brethren.)

THE PRINCE LEOPOLD DE BELGIQUE. (*a*)

Collision — Narrow channel — Swansea entrance channel—Crossing steamships—Duty of steamship navigating against the tide to wait for steamship navigating with the tide—Collision Regulations 1897—*Arts.* 25 *and* 29.

The entrance channel formed by the east and west piers at Swansea is a narrow channel within the meaning of art. 25 *of the Collision Regulations,*

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

but local conditions may in some circumstances prevent the article operating to its full extent.

Where a steamer bound to a dock in the west channel is meeting a steamer coming away from the tidal basin of the Prince of Wales Dock good seamanship demands that the vessel which arrives at the point of intersection of the two channels reasonably in advance of the other should keep on and that the other should wait till she has passed.

Semble: *If both approach the point of intersection about the same time the vessel with the tide against her should wait till the vessel going with the tide has passed.*

DAMAGE ACTION.

The plaintiffs were the owners of the steamship *Burton*; the defendants and counter-claimants were the owners of the steamship *Prince Leopold de Belgique*.

The case made by the plaintiffs was that shortly before 7.30 p.m. on the 2nd Oct. 1908 the *Burton*, a steel screw steamship of 649 tons gross and 344 tons net register, manned by a crew of twelve hands all told, whilst on a voyage from Duclair to Swansea in ballast bound for the Prince of Wales Dock had found the dock entrance foul, and had accordingly turned round in order to proceed down the entrance channel and to wait her turn outside. The weather was fine and clear, the wind was light and variable, and the tide half flood of the force of about a knot. The *Burton* was in about mid-channel heading down channel and with engines working dead slow was making about two knots an hour over the ground and was shaping to pass out down the west side of the channel. 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. Under these circumstances the masthead and red lights of the *Prince Leopold de Belgique* were observed about half a point on the port bow of the *Burton*, and distant about half a mile. Thereupon, so soon as a sailing vessel in tow of a tug which was on the starboard side of the *Burton* had passed up, one short blast was sounded by the *Burton*, and her helm was ported and the signal of one short blast was repeated. The *Prince Leopold de Belgique* was then heard to sound two short blasts, whereupon the *Burton* again sounded one short blast, but, as the *Prince Leopold de Belgique* after opening her green light shut in her red light and again sounded two short blasts, the engines of the *Burton* which had straightened under steady helm on the west side of the channel were immediately put full speed astern, and her helm was put hard a-starboard. But the *Prince Leopold de Belgique* continued to come on as if under a starboard helm, and with her starboard bow struck the stem of the *Burton*, doing her considerable damage. Shortly before the collision the *Prince Leopold de Belgique* was heard to sound three short blasts.

Those on the *Burton* charged those on the *Prince Leopold de Belgique* with not keeping a good look-out; with improperly failing to pass port to port; with failing to keep to her starboard side of the channel; with improperly starboarding; and with failing to ease, stop, or reverse her engines.

The case made by the defendants and counter-claimants was that shortly before 7.22 p.m. on the 2nd Oct. 1908 the *Prince Leopold de Belgique*, a steel screw steamship belonging to Antwerp, of 1218 tons gross and 745 tons net register, manned by a crew of twenty hands, all told, was proceeding up Swansea entrance channel, on a voyage from Bristol to Swansea in ballast, in charge of a duly licensed Swansea pilot. The wind was south-east, a slight breeze, the weather was fine and clear, and the tide flood of the force of about two knots. The *Prince Leopold de Belgique* was bound for the Ocean Dry Dock, and three long blasts were being sounded on her whistle as she proceeded up the channel, that being the usual signal for vessels bound to the said dock. She was making about three knots through the water with engines stopped. Her regulation lights for a steamship under way were being properly exhibited, and were burning brightly, and a good look-out was being kept on board her. In these circumstances the masthead and green lights of the *Burton* were seen bearing about half a point on the starboard bow of the *Prince Leopold de Belgique* and about a third of a mile away. Three long blasts were again sounded by the *Prince Leopold de Belgique*, and shortly afterwards her helm was starboarded a little and two short blasts were sounded on her whistle, which signal was shortly afterwards repeated. As she drew nearer the *Burton* suddenly opened her red light and shut in her green on the starboard bow of the *Prince Leopold de Belgique* and sounded one short blast on her whistle. As soon as the *Burton* opened her red light the engines of the *Prince Leopold de Belgique* were put full speed astern and three short blasts were sounded on her whistle, but the *Burton* continued to come on and with her stem struck the *Prince Leopold de Belgique* on her starboard bow, doing considerable damage.

Those on the *Prince Leopold de Belgique* charged those on the *Burton* with not keeping a good look-out; with improperly porting, and attempting to cross ahead of the *Prince Leopold de Belgique*; and with failing to ease, stop, or reverse her engines in due time or at all.

The following Collision Regulations 1897 were referred to during the course of the case:

Art. 18. When two steam vessels are meeting end on, or nearly end on, so as to involve risk of collision, each shall alter her course to starboard, so that each may pass on the port side of the other.

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 lies on the starboard side of such vessel.

Art. 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.

Laing, K.C. and *A. A. Roche* for the plaintiffs.

Aspinall, K.C. and *Dawson Miller* for the defendants.

THE PRESIDENT.—The collision in this case took place on the 2nd Oct. last, at about half-past seven in the evening. The *Burton* was proceeding down the cut or entrance channel of

Swansea, and the *Prince Leopold de Belgique* was coming in, and they met in collision nearly end-on, at a very slight angle indeed, and the damage was done which the surveyors have spoken to and which is indicated on the photographs. The question is by whose fault it was that this collision took place. The plaintiffs' case, stated very shortly, is that their vessel had come in on the the flood tide and was going into the Prince of Wales Dock, but there was a crowd of shipping, or some other cause which operated to prevent her being docked, and therefore she found it necessary to turn round in the narrow channel that leads up from the Tongue Buoy, and was proceeding out again when she met with the difficulties in which she found herself. Her witnesses say that having turned round they came past the Tongue Buoy and saw the red light of the *Prince Leopold de Belgique* coming up the channel; that they proceeded down, keeping well over towards the West Pier; and that the *Prince Leopold de Belgique* afterwards starboarded, came across the channel and into them, and the collision happened. The defendants' case is that they were coming in in the ordinary way, sounding three long blasts to indicate that their vessel was going up to the Ocean Dry Dock, and they had seen the *Burton* lying more or less athwart the channel leading up to the Prince of Wales Dock, and showing her green light down channel; that afterwards the *Burton* came down, having rounded; and that as they were about to enter into that part of the river which leads up to the Ocean Dry Dock, the *Burton*, which had previously been showing her green light, suddenly blew a short blast and opened her red light; and that then although the engines were reversed, and although they had previously given two short blasts to warn the *Burton*, that vessel came on and struck them, the vessels meeting in the way I have described. So that one case is, on the plaintiffs' part, that they were going down all right, and had got practically past the part of the channel which leads up to the Ocean Dry Dock, and the other vessel starboarded into them; and the defendants' case is that they had got nearly into the position in which they enter the channel leading up to the Ocean Dry Dock, when the other vessel, which was till then showing her green light, came across them, trying to cross the channel. Now, the place where this collision happened undoubtedly is a dangerous place, because anyone who looks at the chart will see that a vessel coming away from the half-tide basin of the Prince of Wales Dock must cross the channel which leads up to the Ocean Dry Dock, and on the other hand a vessel coming in and going up to the Ocean Dry Dock must cross the channel which leads up to the half-tide basin of the Prince of Wales Dock. Vessels must cross each other, and however much the starboard hand rule applies there are circumstances here which prevent it operating to the full extent. In the ordinary navigation each vessel must get across the course of the other at some time. There is no rule, I understand, which applies to this particular point, and having discussed the matter with the Elder Brethren, as far as I can understand vessels must deal with each other on the footing of good seamanship, of course, complying, as far as possible, with the necessity of keeping on their starboard hand of the channel. It results from that, that if one vessel comes to the point of intersection reasonably in advance of the other, she must keep on and the other must wait till she has passed. If both approach the spot at about the same time, then they must act reasonably, and it would be very reasonable that the one which has the tide against her should wait while the other passed.

Apart from those general considerations, which must apply to a case like this, the difficulty of deciding the case must depend upon the exact facts which one finds. Now, the plaintiffs' vessel had been in the difficulties which I have mentioned up this channel to the Prince of Wales Dock, and the first matter to consider is what course would the plaintiffs naturally follow in order to get out of those difficulties? Well, having regard to the extremely narrow channel in which they were, they would have to back and fill and turn round very slowly, and finally get straight down, and certainly, in getting straight down, come close past the Tongue Buoy, and then shape across so as to get gradually over towards the West Pier and pass close to it. The defendants, if they followed the proper course, would keep on the starboard side of the lower part of the entrance, and, if doing what they say they ought to do, would be blowing three long blasts to show they were going to the Ocean Dry Dock. Then, at some point between the fixed white light and the Tongue Buoy they would have to incline over under slight starboard helm, so as to enable themselves to bring the Tongue Buoy on the starboard bow; and that is, roughly speaking, what the two vessels would have to do. Now, the first question that has to be determined, and which helps very much to solve the case, is whereabouts did the collision take place? The plaintiffs say, and they called two independent witnesses who supported their view, that it took place opposite the end of the East Pier, or nearly so. The defendants, on the other hand, said, and they called one independent witness, the master of the tug which was in the channel leading up to the half-tide basin, that it took place further up, some 250ft. or 300ft. from the Tongue Buoy. The plaintiffs said it took place close to the West Pier, some 50ft. or 60ft. from it; and the defendants said it took place in mid-channel. By mid-channel is meant there the middle of the channel between the East and West Pier, before the channel forks and goes on the one side up the river Tawe and on the other side up to the half-tide basin. There is a great conflict of opinion as to the place of the collision, and the materiality of it is that if the plaintiffs' version be correct they had crossed the passage up the river Tawe and the defendants' vessel came wrongfully across the channel into them; if the defendants' view be correct, then the plaintiffs' vessel had not yet crossed the channel which leads up the river Tawe, but was in a position to allow the defendants' vessel to enter that channel, by keeping on her starboard hand until they had passed. My own view is that in that conflict there is a material fact which assists the determination, more or less, of the question, and that is the angle at which this collision took place. A drawing has been put in, and there are the photographs which show the cut which was made in the starboard bow of the *Prince Leopold de Belgique*, and the damage to the bows of

the *Burton*, and what is there seen very nearly fits what I have heard in the evidence about the blow being pretty nearly end on. I think that solves this case pretty largely in favour of the defendants' case. If the story told by the plaintiffs be correct, it is a story, in substance, that they were coming down with their red light open to those on the *Prince Leopold de Belgique*, and that vessel's red light was open to them; that the collision happened within 50ft. or 60ft. of the West Pier; and that the *Prince Leopold de Belgique* came across so as to cause this collision. I cannot myself, nor, I think, can anyone else, make this collision happen at such an angle as that indicated if this story told by the plaintiffs is true. On the other hand, if the collision took place higher up river and nearly in mid-river, there is not the slightest difficulty, because in the natural course, if the plaintiffs' vessel had got fairly straightened down to come down that channel from the half-tide basin, and the *Prince Leopold* had, as she might naturally have, a slight angle across from the East Pier, so as to leave the Tongue Buoy on her starboard hand, the angle at which these vessels would find themselves in collision would be pretty nearly that which this damage indicates. So my view is that the collision, on the inference from the facts, took place where the defendants say, and I must say, having seen their witnesses, I think they gave their evidence extremely well, and have led me to take the view that the collision happened where they say it did. That being so, there is not much more to say about the case, because it seems to me that what I have said carries with it a general view in favour of the defendants.

There are one or two points which assist that view, and they are these. In the first place it is clear that those on the plaintiffs' vessel were in difficulties, and so I do not think they took adequate notice of what was going on below. The tug and tow that have been mentioned in the case were not seen until quite close to. Secondly, the defendants' vessel in coming in would undoubtedly, wherever you put this collision, have the green light of the plaintiffs' vessel almost ahead of her until the *Burton* had succeeded in rounding from the position of difficulty in which she found herself, and that is in substance what the defendants say. Thirdly, the plaintiffs' case is that the red light of the defendant vessel was seen all the way along until the very last, and it seems to me almost incredible, if that were so, that the defendants should try to cross the channel and come into collision with a vessel close over against the west wall. It seems so unreasonable, because if she had not hit the vessel she would have hit the wall or been in difficulty with it. This collision seems to me to have occurred through the plaintiffs not adequately appreciating what was happening down below them and not waiting for the other vessel to pass. I do not think there is anything to be said against the defendants for not acting sooner with their engines than they did, and in my opinion the plaintiffs' vessel must be held alone to blame.

Solicitors for the plaintiffs, *Botterell* and *Roche*, for *Vaughan* and *Roche*, Cardiff.

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

Jan. 26 *and* 27, 1909.

(Before BARGRAVE DEANE, J. and Elder Brethren.)

THE SEYMOLICUS. (*a*)

Admiralty—Collision—Vessels meeting end on—Narrow channel—Lerwick Harbour—Collision Regulations 1897, *arts.* 18, 25, 27, 28.

Lerwick Harbour is not a narrow channel within the meaning of art. 25 *of the Collision Regulations.*

DAMAGE ACTION.

The plaintiffs were the owners of the steam drifter *Lottie*, and the defendants were the owners of the steam drifter *Seymolicus*.

The case made by the plaintiffs was that shortly before 11 a.m. on the 6th July 1906, the *Lottie*, a steam drifter of sixty tons gross register, manned by a crew of ten hands, all told, was in Lerwick Harbour in the course of a voyage from the North Sea fishing grounds to the fish market at Lerwick, with a cargo of about nine crans of fish. The wind was E.S.E., a light breeze, the weather was fine and clear, and the tide about high water, slack. The *Lottie* was proceeding down the harbour from the northern entrance, on a course of about south by west magnetic, and was making three to four knots, a good look-out was being kept on board of her. In these circumstances, as the *Lottie* was approaching the south buoy marking Loofie Baa, those on board her observed, about three to four hundred yards off, and about one point on the starboard bow, the *Seymolicus* coming into sight round a steamship at anchor to the west of the buoy. At about this time the *Seymolicus* sounded two short blasts on her whistle. The helm of the *Lottie* was thereupon put slightly to starboard, and she approached, shaping to pass the *Seymolicus* starboard to starboard, and a smack named the *Choice*, which was also coming to the northward, port to port. Shortly afterwards those on board the *Lottie* saw that the *Seymolicus*, instead of keeping on, and passing the *Lottie* starboard to starboard, as she could and ought to have done, was acting as if under a port helm. The engines of the *Lottie* were put to dead slow, and immediately afterwards stopped, and put full speed astern, but the *Seymolicus* came on, and with her stem struck the starboard bow of the *Lottie* a little abaft the stem a heavy blow, doing her damage, and forcing her head round, and causing her to run into the port bow of the *Choice*, which thereby sustained serious damage.

Those on the *Lottie* charged those on the *Seymolicus* with not keeping a good look-out; with failing to pass port to port, and with failing to take proper steps to do so; with sounding a misleading signal on her whistle; with failing to sound a proper whistle signal; with failing to slacken her speed, or stop or reverse in due time; alternatively with not keeping her course and speed, and with failing to keep to the starboard-hand side of the fairway.

The case made by the defendants was that shortly before 11.30 a.m. on the 6th July the *Seymolicus*, a steam drifter of 67 tons gross, manned by a crew of ten hands all told, was in Lerwick Harbour, off North Ness, bound for a fishing station in the north part of the harbour,

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

where she was to discharge her catch. The wind was about south-south-east fresh, the weather was fine and clear, and the tide was the first hour of the ebb of the force of about a knot. The *Seymolicus* was proceeding up the harbour, keeping on that side of the fairway which lay on her starboard side, and, with her engines working at slow, was making about two knots through the water. A good look-out was being kept on board her. In these circumstances those on the *Seymolicus* observed the *Lottie* about three hundred yards off and bearing slightly on the port bow coming down from the north harbour. The whistle of the *Seymolicus* was immediately sounded one short blast, and she was kept as much to the eastward as was prudent having regard to the shoal on her starboard hand. The *Lottie*, which was travelling at considerable speed, approached in a position to pass all clear port side to port side, but instead of doing so, as she could and ought to have done, she when she drew nearer appeared to act as if under a starboard helm, causing danger of collision, whereupon the engines of the *Seymolicus* were put full speed astern, and her whistle was sounded three short blasts, but notwithstanding these measures the *Lottie* came on, and with her starboard bow struck the stem of the *Seymolicus*.

Those on the *Seymolicus* charged those on the *Lottie* with not keeping a good look-out; with failing to keep clear of the *Seymolicus;* with improperly starboarding; with neglecting to keep on their starboard-hand side of the channel; with neglecting to port their helm; with proceeding at an improper speed, and with neglecting to ease, stop, or reverse her engines.

The following were the material Collision Regulations referred to during the course of the case:

Art. 18. When two steam vessels are meeting end on, or nearly end on, so as to involve risk of collision, each shall alter her course to starboard, so that each may pass on the port side of the other.

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 lies on the starboard side of such vessel.

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.

Art. 28. The words "short blast" used in this article shall mean a blast of about one second's duration. When steam 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."

Laing, K.C. and *H. C. S. Dumas* for the plaintiffs.

Aspinall, K.C. and *D. Stephens* for the defendants.

BARGRAVE DEANE, J.—This was a collision between two steam drifters in Lerwick Harbour, which is a narrow piece of water lying between the mainland of Shetland and the island of Bressay, and as far as I am able to judge by the evidence not very much damage was done to either one vessel or the other; but the real difficulty seems to have been that as a result of the collision the *Lottie* collided with a sailing smack which happened to be passing her on the port side, and that smack, the *Choice*, which is not a party to the proceedings, seems to have received considerable damage. The collision having happened as long ago as July 1906 the parties seem to have been considering their position all that time, until at last it was determined it was necessary to decide which vessel was responsible for the damage to the *Choice*. That, apparently, is the position to-day—I have to decide which, or whether either, or both, of these drifters was to blame for the collision between the *Lottie* and the *Seymolicus*. They are two drifters of practically the same size and horse-power, and the practice seems to be for these vessels, when they have got their fish, to come into Lerwick Harbour, go to the fish market and dispose of their fish so far as sale goes, and then put off to their own particular wharf to discharge the cargo at the call of the purchasers. You can enter the harbour either from the south or from the north, and undoubtedly it is in a sense, considering previous decisions, a narrow channel; but, in my opinion, it is not a narrow channel within the meaning of the decisions. In my opinion it is a harbour. Perhaps the entrance, one end or the other, might be considered a narrow channel, but where this collision took place is distinctly a harbour. Therefore I dispose first of all of the contention that this is a case in which the narrow channel rule applies.

The *Seymolicus* had arrived at Lerwick first. She had been to the fish market and had sold her fish, and then was proceeding to the north with a view to going to Donaldson's Wharf, up near the northern entrance. The *Lottie* came in from the northern entrance, and looking at the chart it appears to be fairly wide at that part of the harbour, but on the port hand as you come down from the north there are shoals which are protected by three buoys, extending down as far as the Loofie Baa. The collision happened close to the buoy off the Loofie Baa. Now, the stories told are about as contradictory as can well happen. To this extent the case is common. The collision took place at a spot about 30ft. or 40ft. from that buoy, the stem of the *Seymolicus* striking the starboard side of the *Lottie* about 6ft. from her stem, and the force of the blow driving the *Lottie* over on to the *Choice*, which was sailing up on the port side of the *Lottie*. Having got to that point, everything else is in absolute contradiction, and I have to say on which side the truth lies. On the one side I have had evidence from the *Lottie*, the evidence of two witnesses from another drifter, called the *Holly*, and the evidence of a man who was engineer on board the *Seymolicus* at the time, and has since left her and is now serving in another vessel. Then, on behalf of the *Seymolicus*, I have had the master, the mate, and the fireman. The case put forward by the *Lottie* is one which agrees throughout, and the story is this, that as she was approaching this buoy she saw the *Seymolicus* coming up, and the vessels would have passed port to port but for hearing a two-blast signal from the *Seymolicus*, which induced the master of the *Lottie* to starboard his helm; that having starboarded his helm following upon that two-blasts signal, the master of the *Lottie* suddenly discovered that the *Seymolicus*, when

pretty close to, had ported, and the collision happened—they were too close to avoid it. Now, that story all depends upon two points. First, did the *Seymolicus* give a two-blast signal, and secondly, what was the distance these two vessels were apart when the *Seymolicus* was seen to be porting? Both these vessels say they were going about three and a half to four knots, and I have no reason to doubt that is the true story. I do not think they were going beyond the speed which the rule of the harbour lays down, which is four knots. The story told on behalf of the *Seymolicus* is this: We did not give a two-blast signal—we gave a one-blast signal; our vessel did not go off to port; and the story told about it is absolutely wrong, and, as a matter of fact, instead of all this happening at a time when the *Lottie* was some 100 yards or so from us, it happened when the *Lottie* was not more than twenty-five or thirty yards from us. As I say, there is a mass of contradiction, but there is another very important contradiction in the case. The master of the *Seymolicus* has had put to him par. 12 of the preliminary Act and par. 3 of the statement of defence, and we have him absolutely denying the truth of the case deliberately put before the court by his counsel and solicitors in the pleadings. That makes one uncomfortable, because one does not quite know where the statement of defence and preliminary act originated, and it is difficult to believe they did not originate with the master. I have come to the conclusion that the weight of evidence is entirely on the side of the *Lottie*. I do not believe that the master of the *Seymolicus* intentionally gave a two-blast signal. I think it is extremely likely that he was alone on the bridge. He was steering, and it may be that he unintentionally and accidentally gave a double blast. That two short blasts were given is proved to my satisfaction. It is sworn by the plaintiffs that the *Seymolicus* not only did that, but ported and went off to starboard, and that is a credible story, whereas the story told by the *Seymolicus* is an impossible one. Therefore, taking the whole of the evidence, I accept the evidence given on behalf of the *Lottie* in preference to that given on behalf of the *Seymolicus*. That, however, does not conclude the case. Undoubtedly the rule applies that vessels meeting nearly end on, as these vessels were, shall pass port to port, and the *Lottie* starboarded. If I thought she starboarded, as the *Seymolicus* says she did, before the whistle of the *Seymolicus* was blown, then I should have held her to blame for starboarding under the circumstances. That is the story told by the *Seymolicus*—that the *Lottie* starboarded before the port helm signal, as the *Seymolicus* says—was blown; but, as I have said, I believe the plaintiffs' story that the first thing which was done was the blowing of the two blasts by the *Seymolicus*, which induced the *Lottie* to starboard instead of porting. Therefore I think the *Lottie* is exonerated from blame for doing that which would have been an infraction of the rules but for the mistaken signal given by the *Seymolicus*. Then I have to consider another point, which is the question of speed, and I confess that gives me some hesitation, and the Elder Brethren also express some hesitation on the question. I do not think, however, that the question of speed comes into this case. My belief is that but for that two-blast signal these vessels would have passed port to port, and that the whole cause of the accident was the incident as to the whistles. But for that there would have been no collision; and I think that that signal was given at a moment when there was time for the *Lottie* to have cleared starboard to starboard but for the porting of the *Seymolicus*. The master of the *Seymolicus* said he did not port. He admits he intended to blow a port helm signal. Did he port? His story is this: He says there was a steamer, anchored, heading to the eastward, with her stem about 100 yards away from the buoy on the Loofie Baa; and he says he was making to pass fifty yards from that steamer's bow; in other words, about midway between that steamer's bow and the buoy, which would put the course fifty yards from the buoy. He says he kept his course and did not alter. There was no tide. He admits that the collision took place 30ft. to 40ft. from the buoy. How did he get there unless he ported? I think it is manifest that there again I cannot accept the evidence of the master of the *Seymolicus*, and I am satisfied he did port his helm, and ported it after a two-blast signal had been given, and the collision was brought about entirely by that. For these reasons I am of opinion that the *Seymolicus* is alone to blame, and that no fault is to be found with the *Lottie*. I ought to say, on the question of whether this is a narrow channel, that I asked a question of the master of the *Seymolicus*, and he said that this was a place in which it would have been right for the *Lottie* to have made a cast out to the eastward in order to come round and approach the fish market. If that is the case, nobody can say this is a narrow channel to which the narrow-channel rules apply.

Solicitors for the plaintiffs, *Dubois* and *Co.*, agents for *Chamberlin* and *Talbot*, Great Yarmouth.

Solicitors for the defendants, *Pritchard* and *Sons*, agents for *J. Wallace*, Sunderland.

Jan. 29, *Feb.* 1, 3, 4, *and* 11, 1909.

(Before BARGRAVE DEANE, J. and Elder Brethren.)

THE CORINTHIAN. (*a*)

Collision—River St. Lawrence—Narrow channel—Steamships meeting end on—Duty to port—Duty to sound whistle signals—Breach of collision regulations having no effect on collision — Collision Regulations 1897, *arts.* 18, 25, 28, 29.

The River St. Lawrence in the neighbourhood of the waters between Bellechase and Crane Island is not a "narrow channel" within the meaning of art. 25 *of the Collision Regulations, but as far as possible the principle of the article should be followed, and vessels ought to pass port side to port side. Where one of two steamships meeting end on ported, blew one short blast, then steadied, and later hard-a-ported, but blew no short blast, it was held that she was not to be "deemed to be in fault" under the provisions of section* 419 *of the Merchant Shipping Act* 1894, *because those in charge of the other steamship saw she was porting, and the blowing of a second*

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

short blast would have given them no further information.

DAMAGE ACTION,

The plaintiffs were the Ulster Steamship Company Limited, the owners of the steamship *Malin Head*; the defendants and counter-claimants were the owners of the steamship *Corinthian*.

The case made by the plaintiffs was that shortly before 6.20 a.m. on the 13th Sept. 1908 the *Malin Head*, a steel screw steamship of 3467 tons gross and 2228 tons net register, having loaded part of a cargo of wood goods at Rimonski was proceeding up the river St. Lawrence to Quebec, in order to complete her cargo for Belfast and Dublin, and was in the south channel of the river St. Lawrence, a short distance above the quarantine or Margaret Tail Buoy. The *Malin Head* was in charge of a duly licensed pilot, and was manned by a crew of thirty-five hands all told. The weather was fine, with occasional haze caused by smoke from bush fires on land, the wind was W.S.W. light, and the tide was the last quarter flood of a force between one and two knots. The *Malin Head* was keeping on the north side of the channel, steering west by south, half south by compass, which as a magnetic course was three degrees more westerly, and with her engines working full speed under reduced steam was making about eight and a half knots through the water. A good look-out was being kept on board the *Malin Head*.

Under these circumstances the *Corinthian* was sighted from one and a quarter to one and a half miles away, bearing ahead, but slightly on the port bow withal. Thereupon the helm of the *Malin Head* was ported a point, then steadied, and one short blast was sounded on her whistle. As the vessels approached a puff of steam was seen coming from the whistle of the *Corinthian*, as if she was sounding one short blast. The *Corinthian*, however, instead of passing the *Malin Head* port side to port side, was seen to sheer to port towards the *Malin Head*, and although the helm of the *Malin Head* was put hard aport, and the engines kept at full speed ahead, as the only chance of avoiding a collision the *Corinthian* continued to come on at a high rate of speed, and with her stem struck the *Malin Head* on her port side, abaft the main rigging, doing her great damage. Just before the actual contact the *Corinthian* sounded three short blasts.

Those on the *Malin Head* charged the *Corinthian* with not keeping a good look-out; with neglecting to pass port to port; with improperly starboarding; and with neglecting to ease, stop, or reverse their engines in due time.

The case made by the defendants was that shortly before 6.26 a.m. on the 13th Sept. 1908 the *Corinthian*, a screw steamship of 6270 tons gross and 4046 tons net register, whilst bound from Montreal and Quebec to Havre and London with general cargo and passengers, manned by a crew of 111 hands all told, was in the St. Lawrence in the south channel, well below Bellechasse. The weather was hazy with smoke from forest fires, the wind a light breeze from the west-south-west, and the tide flood of the force of about two and a half knots. The *Corinthian*, which was in charge of a duly qualified pilot, was proceeding down the channel on the usual and proper course, steering east by north magnetic, and with engines working at half speed was making about eight knots through the water. A good look-out was being kept on board of her.

In these circumstances the *Malin Head* was seen one and a quarter to one and a half miles off about a point on the starboard bow with her starboard side a little open. The helm of the *Corinthian* was starboarded and two short blasts were sounded.

Shortly afterwards the *Malin Head* was seen to be porting, and the engines of the *Corinthian* were at once stopped and put full speed astern; the helm was steadied and three short blasts were sounded.

The *Malin Head* sounded one short blast, and the *Corinthian* afterwards repeated the three short blast signal. The *Malin Head*, however, continued to come on at high speed, swinging across the bows of the *Corinthian* under port helm, and with her port side abaft the mainmast struck the stem of the *Corinthian* a heavy blow, doing considerable damage.

Those on the *Corinthian* charged those on the *Malin Head* with not keeping a good look-out; with improperly porting; with improperly failing to pass starboard to starboard; with failing to ease, stop, or reverse their engines in due time; and with improperly beaching the *Malin Head* after the collision on a rocky, hard, and uneven bottom.

The following collision regulations were referred to during the course of the arguments:

Art. 18. When two steam vessels are meeting end on, or nearly end on, so as to involve risk of collision, each shall alter her course to starboard, so that each may pass on the port side of the other.

Art. 28. 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., one short blast to mean, "I am directing my course to starboard."

Art. 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.

Laing, K.C. and *A. Adair Roche* for the plaintiffs. — This collision happened in a narrow channel. What is a narrow channel depends on the facts:

The Rhondda, 49 L. T. Rep. 210; 5 Asp. Mar. Law Cas. 114; 8 App. Cas. 549.

There are no facts in this case which render it unsafe or impracticable for these vessels to keep to their starboard hand side of the channel. They should have obeyed the rule:

The Clydach, 51 L. T. Rep. 668; 5 Asp. Mar. Law Cas. 336.

Even if a locality is not buoyed on each side vessels should follow the narrow channel rule. The court in such cases is in favour of vessels passing port to port:

The Minnie, 71 L. T. Rep. 526; 7 Asp. Mar. Law Cas. 521; (1894) P. 336;

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

Those on the *Malin Head* were right to port, for the vessels were end on or nearly so, and they were also right to keep their speed. By following that course they gave those on the *Corinthian* time to correct their sheer to port or time to port and correct their starboard helm action. [BARGRAVE DEANE, J.—Was the *Malin Head* to blame for not sounding a whistle signal when she hard-a-ported? *The Anselm* (97 L. T. Rep. 16; 10 Asp. Mar. Law Cas. 257, 438; (1907) P. 151) may be in point.] Art. 28 does not require a vessel to keep on indicating the course which is authorised or required. [BARGRAVE DEANE, J.—That means there was one continuous porting; that the *Malin Head* never steadied.] That is so; the plaintiffs had sounded their whistle, and were not obliged to repeat it. Moreover, those on the *Corinthian* saw the *Malin Head* was porting. The whistle would have told them no more.

Aspinall, K.C. and *Dunlop* for the defendants. —The vessels when they sighted each other were starboard to starboard; the *Corinthian* was therefore bound to starboard, for art. 18 had no application. On the facts as proved these waters cannot be held to be a narrow channel. Even if the *Corinthian* did wrong when she starboarded, those on the *Malin Head* are also to blame, for they gave no whistle signal when they hard-a-ported. When they hard-a-ported they changed their direction; they took a course within art. 28 (*The Uskmoor*, 87 L. T. Rep. 55; 9 Asp. Mar. Law Cas. 316; (1902) P. 250), and therefore should have given a signal on their whistle:

The Anselm (*ubi sup.*).

The duty to give a whistle signal is imperative. The *Malin Head* is also to blame for keeping her speed.

Laing, K.C. in reply.

BARGRAVE DEANE, J.—This is a collision which took place on the 13th Sept. of last year in the river St. Lawrence between two large steamers, somewhere between 6 and 6.30 in the morning. The *Malin Head*, the plaintiff vessel, was a steel screw steamship of 3467 tons gross, and was bound up the river St. Lawrence to Quebec and Montreal, and the other vessel, the *Corinthian*, was one of the Allan liners, and she was proceeding down the river, bound to sea. She is a vessel of 6370 tons gross, and she was bound from Montreal and Quebec to Havre and London. I adjourned this case because I thought it was one in which I should have very careful consideration with the Elder Brethren on various points. There is a great conflict of evidence as to the time and the place of the collision—a matter of four or five minutes in time and about half a mile in distance —and I have to say on which side the evidence leads me to a conclusion. It is said on behalf of the *Malin Head* that this was a narrow channel, and that therefore the narrow channel rule applies, and each vessel should keep on her starboard side of the channel. The defendants deny that this is a narrow channel, and say that even if it is a narrow channel the collision took place to the southward of the channel, and that would be on the starboard side for the *Corinthian* and the port side of the channel for the *Malin Head*, in which case the *Malin Head*, if it were a narrow channel, would be in her wrong water. There are various allegations made. The *Malin Head* was proceeding up, and she passed Crane Island and altered her course to west by south a quarter south, till she got to the Margaret Tail Buoy, when she altered her course again to west three-quarters south—I am speaking now of magnetic course—and she says that course took her to a position which would be on the starboard side of the channel. The pilot on board of her, a man of considerable experience, said that although it has never been declared a narrow channel, he has always acted as though it were, and he thinks he should keep to the starboard side of the river as much as possible; and he says that on this occasion he did and he passed these various points at a distance which would get him on the starboard side. Having passed the Margaret Tail Buoy, it is said that they saw about a mile and a half or a mile and a quarter distant the *Corinthian*, and that her masts and funnel were in line and she was practically end on, proceeding on an opposite course to the *Malin Head*. Thereupon, the master says, the pilot said port a little, and they ported a little, and having ported a point, which brought the vessel a little on the port bow, the master thought that they ought to port more, and the pilot agreed, and the pilot gave an order hard-a-port. They said they did that because they then noticed for the first time that the other vessel was sheering to port as though under a starboard helm. They say that they did not hear any blasts from the *Corinthian*, but they saw what she was doing, and that the only thing which could be done under the circumstances was to keep the hard-a-port helm and to keep the engines ahead. Then the collision took place, a seven-point blow leading aft, and we have photographs which show the nature of the damage, and it is said that the *Corinthian* at that time was going at a considerable speed. That is the story told by the *Malin Head*. There is one other point, which is that those on the *Malin Head* placed the collision in the wake of the Margaret Tail Buoy. I think the Elder Brethren agree with me that the distance has been unintentionally exaggerated, and that these vessels sighted each other at a less distance than a mile and a quarter. They both agree there was a good deal of haze about, owing to forest fires on the Canadian side, and that there was a certain amount of difficulty in the atmosphere, and my belief is that these vessels were much nearer each other when they first sighted each other than they thought. We think they both saw each other at about the same time, and I should think the distance would probably be something under a mile—three-quarters of a mile to a mile.

Now the *Corinthian's* story is this. I am taking for this purpose the chart put in by Mr. Harvey, from the Board of Trade, and I accept this chart as showing the position of the two can buoys, which may be material. The *Corinthian* had come down from Quebec, and she says that she passed the St. Lawrence Light higher up the river at a pretty near distance, and that then she took a course which took her down in a direction to pass the Margaret Tail Buoy. The captain estimates that he passed the light at Bellechase at a distance which he gives, steering a course which would take him down straight upon the

upper can buoy, and that would take him down, as far as I can judge, in about mid channel, and if he was coming down in about mid channel, and the other vessel was coming up to the north of mid channel, the vessels would be port to port, but the *Corinthian* says, "Proceeding down on my course as given I sighted this vessel a little on my starboard bow, and seeing this vessel on my starboard bow, and there being no narrow channel rule, I starboarded to give her a little more room." Now I come to the evidence which has been given on the point. First of all the man on the look-out says, "We sighted the *Malin Head* right ahead." The chief officer on the bridge says, "She was a little on our starboard bow." The pilot says, "She was a little on our starboard bow, and I starboarded to give her a little more room." But immediately the pilot had starboarded a quarter of a point, the captain saw it was not enough and said hard-a-starboard. I say he said so because, although it is denied, the helmsman said he got the order and he did hard-a-starboard. Therefore I think, so far as the evidence of the *Corinthian* is concerned, there is great conflict, and in that contradiction I believe this vessel, the *Corinthian*, did starboard a little and then hard-a-starboarded. Now the pilot on the *Corinthian* was a younger man than the pilot on the *Malin Head*, and had been accustomed to this water for a much shorter time, and he said he knew nothing about the narrow channel rule. In the absence of any direct evidence I am not prepared to hold that this is a narrow channel within the article, and I am still less inclined to do it when I look at the nature of the channel lights and buoys. Although by daylight it would be easy to believe it was a narrow channel, because the buoys would be visible, at night time it would be very difficult, I think, for a vessel going down to keep to the starboard side of the channel with accuracy; and I do not think it is possible for this court to hold it is a narrow channel because it is easily navigated by the narrow channel rule in daylight if it is not easy to do so at night. Therefore, I do not hold that this is a narrow channel, but I think it is a place where, as the pilot of the *Malin Head* said, the principle of the narrow channel rule should be adopted, and vessels as far as possible should attempt to pass port to port. I am dealing, however, for the moment, with the question of narrow channel, and therefore, having got the evidence of the two pilots before me, I am not prepared to hold that it is a narrow channel.

These vessels, however, as I have said, were approaching on opposite courses. Now, why did the captain of the *Corinthian*, when the pilot said starboard a little, at once say hard-a-starboard? It is quite clear that the vessels were so nearly end on that starboarding a little would not be sufficient, and therefore that inclines me still more to believe that these vessels were practically end on. Taking the conflict of evidence between the two, I believe the evidence of the *Malin Head* in preference to that of the *Corinthian*, and I believe that the difference between being exactly end on was that they were rather more port to port than starboard to starboard. Now, I have got the *Corinthian* hard-a-starboarding and the *Malin Head* hard-a-porting. Immediately after that hard-a-starboarding, according to the evidence of the *Corinthian*, an order was given full speed astern, and the engines were put full speed astern. That is said to have taken place, according to the scrap logs, at 6.20, the collision taking place at 6.25. Therefore it is alleged that for five minutes the *Corinthian* was going full speed astern. The collision took place, with the result that we have seen from the photographs, and we have got the statement from the *Corinthian* that, instead of going ahead through the water, she was actually making sternway. If she was making sternway, how on earth could there be the great gash in the port side aft of the *Malin Head* there undoubtedly was. I know it is very difficult to come to an absolute conclusion from photographs or from the nature of the injury as proved to demonstrate the exact speed at which vessels are travelling. All sorts of extraordinary results happen which it may be very difficult to come to a true conclusion about. The conclusion I have come to is that the evidence from the *Corinthian* that she was reversing for five minutes is not true. What is there that ought to guide the court upon this point? Why, the log-book, and when one looks at the deck scrap log and the engineer's scrap log of the *Corinthian* I find a most unsatisfactory state of things. The deck scrap log is not so unsatisfactory as the engineer's scrap log. There is one thing which I can decide on in the deck scrap log, and which shows that it has been tampered with, because I think it is perfectly plain if you look at it through a magnifying glass that the original entry was "Passed the St. Lawrence Light 5.25." That has been altered to 5.23. For some reason —I suppose it is in order to give a greater period of time for the *Corinthian* to run from the St. Lawrence Light to the place of collision, and therefore to show that she was really going at a much slower speed—for some reason that log has been tampered with, and once you find there has been tampering with a log, as I have had occasion to say before in other cases, the court at once looks with suspicion at the whole matter; but taking generally the deck scrap log, I think anyone will see that the entries are smeared, and I think you can detect writing underneath in places. If you look at the engineer's scrap log the matter is worse. It is perfectly plain that in these two lines which affect the collision there has been a rubbing out, and the paper is thinner underneath, as though the surface had been thinned by rubbing, and there is a general appearance of alteration over the whole of that line. Therefore I approach this case distinctly with a bias against the credibility of evidence given by the *Corinthian*.

I believe these two vessels sighted each other when very much nearer. The point of distance and time is very important, because if this vessel did not reverse at the time she says she did that would account for the fact that the injury sustained by the *Malin Head* was caused by the *Corinthian* going ahead and not going astern at the time of the collision. Now, the point that is next made is this. It is said "You the *Malin Head* did not give me a signal when you were porting." Now, it is sworn that the *Malin Head* did at one time—she says when she was first porting—give a single blast. It is admitted by some of those on the *Corinthian* that they did hear a one-blast signal, but they say it was just before the collision. The fact that

the *Malin Head* was seen to be porting by those on the *Corinthian* is admitted. They all say, "We saw she was going off to starboard, and we saw that she was under a port helm, and it was thereupon that we reversed our engines." Now, if they reversed their engines at a much less distance than would be represented by five minutes, how could this injury have been done. The *Malin Head* says, "I blew a whistle when I first ported, and I did not blow again." I have to ask myself whether, in my opinion, the failure of the *Malin Head* to blow a whistle when she hard-a-ported was a possible cause of this collision? I wish to put myself within the wording of the Lord Chief Justice in the case of *The Anselm* (*ubi sup.*). That is a very difficult case for me to deal with; for this reason, that on looking at *The Anselm* (*ubi sup.*), which was a decision overruling this court, I find I said this—that was a case not of alteration of helm but of reversing engines: "No signal was sounded when those engines were reversed, although the rule says that when the engines are reversed three blasts shall be given on the whistle, denoting that fact. Here, again, was a definite breach of the rule, and a breach which I think it is my duty to say was a serious breach. It cannot be too strongly impressed upon officers in charge of ships that they must obey the regulations. If they do not obey the regulations they run a very serious risk. Here again I have to ask myself the question—and I have the advantage of the Elder Brethren's advice. In our opinion his not obeying the regulations did not in this case contribute to the collision." This is a definite finding of fact. I turn to the decision of the Court of Appeal, and in the judgment of the Lord Chief Justice I find this: "Then there is the non-signalling that she was reversing. We are advised by our nautical 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 later on I find this: "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." Later still he says this: "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 can be said to fulfil the obligations upon them if they do not satisfy the court by affirmative evidence that the breach of the rules has no possible effect." That is distinctly a question of fact. I had the advantage of seeing the witnesses in the case of the *Anselm*. The Court of Appeal had not. The Elder Brethren who sat with me also had an opportunity of seeing the witnesses, and they advised me that in that particular case the non-giving of the signal on reversing had no possible effect upon the collision. The Court of Appeal, advised by two different gentlemen who did not see the witnesses, said that as a matter of fact I was wrong. It is a very awkward position which this court is put into when this court, being advised by two nautical gentlemen so competent as our Elder Brethren always are, is overruled on a question of fact by two gentlemen of whom we know nothing, and who have not seen the witnesses. The Lord Chief Justice said this court has to be satisfied that in fact the non-giving of the signal had no possible effect. I am advised in this case by the Elder Brethren, and I agree with them, that in this particular case the non-blowing of the signal when the hard-a-porting took place had no effect, because it is distinctly proved by the *Corinthian's* witnesses that they saw the vessel hard-a-porting for a considerable time before the collision. They put it at five minutes, and, if that be so, who can say that the fact that a blast was not blown had any effect upon the knowledge of those who were navigating the *Corinthian*? I feel, as I have said, that I am in an awkward position with regard to the Court of Appeal, but I have to take my own line, and, as a matter of fact, I am advised and I find that the non-blowing of the signal by the *Malin Head* did not affect the collision, and that therefore she is not to blame for that.

I also find that these two vessels were approaching each other end on or so nearly end on that it was the duty of each, under the rules, to port. The *Corinthian* starboarded, and I think that she was breaking the rule under the circumstances. Why did she starboard? If they were end on or nearly end on, and the rule is clear, why did she starboard? They say they wanted to make the Margaret Tail Buoy, and they say it is not a narrow channel, and therefore they could go where they liked. They say they wanted to make the Margaret Tail Buoy because the weather was sufficiently thick for them to anchor on the north side of the channel if they did not find the buoy. They could not anchor in the middle of the river, but out of the channel on the north side, and it is perfectly clear that when the *Corinthian* saw the *Malin Head* the pilot and master determined to go well to the north, and turned to go up to the north and persevered in that, and then, seeing the other vessel was porting, there was nothing for them to do but reverse the engines, and they reversed them, but it was too late, because it was then impossible to avoid the collision. The fact that this vessel meant to go to the north emphasises rather the fact of her starboarding than that she was on the starboard bow of the plaintiffs' vessel.

Something has been said about the *Malin Head* being beached improperly. I think that the whole matter depends upon whether or not there was at that time a state of atmosphere which enabled her to proceed safely on up the river. It is true she went on and got as far as a place called Indian Cove, not far from Quebec, when she was overtaken by fog. If that is so, and I believe it is, then she did her best to get herself and her cargo up to Quebec, and she probably would have arrived at Quebec, or got into some safe place, before she sank. As it was, having to anchor before she got to Quebec she was overtaken by circumstances as to which no blame attaches to her, and she was beached at the best place she could be beached at. I do not think any blame can be attributed to her for that, and I think she would have been wrong if she had tried to beach herself

at the other place which was suggested. As far as I know I have dealt with all the points, and I think that the fact that the *Malin Head* kept on at full speed to try and avoid the collision was the right course for her to take. If she had reversed she would probably have been struck further forward. I do not think any blame can be attached to her for any other matter, and therefore I must find the *Corinthian* alone to blame.

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

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

Thursday, March 18, 1909.

(Before BARGRAVE DEANE, J. and Elder Brethren.)

THE ANNIE; COOPER *v.* CLARE'S LIGHTERAGE COMPANY LIMITED. (*a*)

Narrow channel—Collision—Negligent navigation—Accident causing death—Payment under Workmen's Compensation Act 1906—*Right to recover from owner of wrong-doing ship—Action* in personam—*Workmen's Compensation Act* 1906 (6 *Edw.* 7, *c.* 58), *s.* 6—*Collision Regulations, arts.* 17 (*b*), 24, 25.

A sailing vessel tacking down the Mersey was overtaking and collided with another sailing vessel also tacking down. The overtaken vessel was close hauled on the port tack, while the overtaking vessel was close hauled on the starboard tack. While freeing the vessels after the collision the master of the overtaking vessel fell overboard and was drowned, and his employers and owners had to pay his dependants 300*l. as compensation under the Workmen's Compensation Act* 1906.

In a damage action by the owners of the overtaking vessel against the owners of the overtaken vessel,

Held, that art. 17 (*b*) *applied, and not art.* 24, *and that the overtaking vessel was not to blame for the collision, as it was the duty of the vessel close hauled on the port tack to keep out of the way of the vessel close hauled on the starboard tack.*

Held, further, that the 300*l. paid to the dependants of the deceased master was damage which arose from the negligent navigation of the overtaken vessel, and was recoverable in an action* in personam.

DAMAGE ACTION.

The plaintiff was the owner of the sailing flat *Julia*; the defendants were the owners of the sailing flat *Annie*.

The case made by the plaintiff was that on the evening of the 10th July 1908 the *Julia* left Widnes under sail bound down the river Mersey for the sand bank opposite Garston. Her regulation lights were being duly exhibited and were burning brightly. About 10 p.m., the tide then being the first of the ebb, the weather fine and clear, with a moderate breeze from the south-west, the *Julia* was a little below Ditton Brook, sailing close hauled on the starboard tack. Those on board her had previously seen another sailing flat, the *Annie*, also tacking down the Mersey, and about the time named the *Annie* was close hauled on the port tack and, showing her green light, was standing towards the *Julia*. The *Annie*, notwithstanding that the two vessels were approaching each other, did not give way, but kept her course, and shortly afterwards with her stem and port bow struck the *Julia* on the port side about amidships, and then, after sliding along the *Julia's* side, got between her stern and the boat which she had in tow, and got her anchor foul in the painter of the boat. In order to get the two flats clear of one another and to prevent further damage the master of the *Julia* proceeded to cut the painter of the boat, and in effecting this operation, which was rendered necessary by reason of the collision, the master was jerked into the river and drowned.

The plaintiff charged the defendants with not keeping a good look-out and with not keeping clear of the *Annie*.

The plaintiff alleged that a claim for compensation having been made in respect of the death of the master on behalf of his widow and children against the plaintiff, the plaintiff was obliged to pay 300*l.* as compensation under the provisions of the Workmen's Compensation Act 1906.

The plaintiff alleged that the payment of the 300*l.* was solely caused by the improper and negligent navigation of the *Annie*, and was in no way caused or contributed to by any fault of those on the *Julia*, and claimed the sum of 300*l.* as damages.

The case made by the defendants was that shortly before 10 p.m. on the 10th July 1908 the *Annie*, a cutter-rigged flat, belonging to Runcorn, of forty-seven tons register, manned by a crew of two hands, was proceeding down the river Mersey, a little above Ditton Brook, bound from the West Bank Dock, Widnes, to Birkenhead, under reefed mainsail. The wind was about south-west, a moderate breeze, the tide was the first of the ebb, of the force of about a knot, and the weather was fine and clear. The *Annie* was tacking down the channel, making about four and a half to five knots. Her regulation side lights and a fixed 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 *Annie*, being on the port tack, the two side lights of the flat *Julia* were observed from a quarter to half a mile astern of the *Annie*. The *Annie* continued on her course, beating down the channel, and the *Julia*, which was under a full press of canvas, came on rapidly, overhauling her. When just below Ditton Brook the *Annie* was on the starboard tack, and the *Julia* was to the northward of her, and about level with her in the channel. On reaching the bank marking the southern limit of the channel the *Annie* proceeded to put about on the port tack; but the *Julia*, which was then pressing her on the starboard tack, instead of going about as she could and ought to have done, continued on the starboard tack, causing imminent risk of collision, and as she failed to give way the helm of the *Annie* was put hard up, as the only chance of avoiding a collision, but, having very little headway, she answered her helm slowly, and the *Julia* coming on, with her port side grazed across the stem of the *Annie*, little or no damage resulting from the impact. Just before the collision the helm of the *Annie* was put hard down, but had no appreciable effect. After the collision the fluke of the *Annie's* anchor

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

caught in the painter of the *Julia's* boat, which was towing astern, and remained fast. The masters of the two vessels then had a conversation as to what should be done, and it was agreed to cut the painter adrift and exchange boats. The master of the *Julia* then cut the painter, and, instead of letting it go, held on to it, and was pulled overboard. A rope was thrown to him from the *Annie*, but he failed to take hold, although it was thrown over his shoulder, and every effort was made to save him, but he sank out of sight and was drowned.

Those on the *Annie* charged those on the *Julia* with not keeping a good look-out; with neglecting to keep out of the way; with improperly attempting to cross ahead of the *Annie;* with improperly neglecting to put about and give the *Annie* room to wind from the south shore; and with carrying too much sail and going at an excessive speed.

The following collision regulations were referred to during the argument and in the judgment:

Art. 17. When two sailing vessels are approaching one another, so as to involve risk of collision, one of them shall keep out of the way of the other, as follows, viz.: . . . (*b*) A vessel which is close hauled on the port tack shall keep out of the way of a vessel which is close hauled on the starboard tack.

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. 24. Notwithstanding anything contained in these rules, every vessel overtaking any other shall keep out of the way of the overtaken vessel.

Art. 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.

Sect. 6 of the Workmen's Compensation Act 1906 (6 Edw. 7, c. 58) was also referred to.

Sect. 6. Where the injury for which compensation is payable under this Act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof: (1) The workman may take proceedings both against that person to recover damages and against any person liable to pay compensation under this Act for such compensation, but shall not be entitled to recover both damages and compensation; and (2) if the workman has recovered compensation under this Act, the person by whom the compensation was paid, and any person who has been called on to pay an indemnity under the section of this Act relating to subcontracting, shall be entitled to be indemnified by the person so liable to pay damages as aforesaid, and all questions as to the right to and amount of any such indemnity shall, in default of agreement, be settled by action, or, by consent of the parties, by arbitration under this Act.

Dunlop and *Bucknill* for the plaintiff, the owner of the *Julia*.—Those on the *Annie* are alone to blame for the collision. The *Annie* was close hauled on the port tack, and should have given way. The vessels were not so far over to the southward that the *Julia* was bound to go about.

Laing, K.C. and *Dawson Miller* for the defendants, the owners of the *Julia*. The *Annie* is not to blame. The *Julia* was the overtaking ship, and should have kept out of the way. She is alone to blame for not, as the overtaking vessel, putting about and giving the *Annie* room:

The Priscilla, (1870) L. Rep. 3 A. & E. 125.

The damage sought to be recovered is too remote, it did not flow from the collision, but from the act of the master in holding on to the painter. Further, the action will not lie, this is not damage done by a ship.

The Vera Cruz, 51 L. T. Rep. 104; 5 Asp. Mar. Law Cas. 270; 9 P. Div. 96.

In a similar case a claim for the amount paid by an owner to the representatives of the deceased seaman was rejected:

The Circe, 93 L. T. Rep. 640; 10 Asp. Mar. Law Cas. 149; (1906) P. 1.

Dunlop in reply.—The facts in this case do not bring it within the *Priscilla* (*ubi sup.*). The amount paid to the dependants of the deceased master is damage which flows directly from the negligent navigation of the *Annie*, and is recoverable under sect. 6 of the Workmen's Compensation Act 1906. The *Circe* was an action *in rem;* this is an action *in personam*, and is really a common law action brought in the Admiralty Court to enforce a right given to the owner of the *Julia* by the Workmen's Compensation Act 1906. The damage is not too remote:

The City of Lincoln, 62 L. T. Rep. 49; 6 Asp. Mar. Law Cas. 475; 15 P. Div. 15.

BARGRAVE DEANE, J.—This is a case in which there is very little evidence before the court—there are two witnesses from the *Julia* and practically only one from the *Annie*—but I find the following facts from the evidence: That the *Julia* was following the *Annie* down until they got somewhere down by Ditton Brook, and that she was in fact the overtaking ship; that these vessels were then tacking backwards and forwards across the river, the wind being a fairly strong S.W. wind; that at one time one might have been a little ahead, according to the tack she was on, and at another time the other may have been ahead, on another tack; but that the *Julia* was gradually overtaking the *Annie*, and I think the fact that they came into collision proves the *Julia* had not quite overtaken and passed her. If the overtaking rule applied, I should hold that it was the duty of the *Julia* to keep out of the way of the *Annie*, and as she did not do so she would be responsible; but I am of opinion that the overtaking rule does not apply in this particular state of facts. There are certain rules connected with the overtaking rule which cannot possibly have any application in such a case as this. For instance, an overtaking ship must keep out of the way of the other vessel, and she must not cross ahead of her. How is that to apply to a case where two vessels are tacking backwards and forwards in a narrow channel? The overtaken vessel must keep her course. How can that happen in a case where the vessels are tacking backwards and forwards across a narrow channel? The rule cannot apply. Neither of these vessels could have kept a course, because they were tacking, and if one had kept her course and not altered she would have gone ashore. She was bound to alter. Therefore, the rule cannot apply to this case under the circumstances. I, therefore, have to

see whether any other rule applies, and I am glad to avail myself here of the assistance of the Elder Brethren. They advise me that it would be absolutely impossible for navigation to continue safely under such conditions as arise here if the overtaking rule applied in this case or in similar cases, and in the case of two vessels tacking backwards and forwards across a narrow channel rule 17 (*b*) must be strictly observed, which says that a vessel close hauled on the port tack shall keep out of the way of a vessel close hauled on the starboard tack. Now, in this particular case I apply that rule. It is quite clear that the master of the *Annie* thought that rule applied, and I think it is equally clear that the master of the *Julia* thought so too. The poor man is dead, but from what he did, or from what the mate said he did, it is clear he took that view also. Now, there is only one exception to the principle which I have been attempting to put forward, and that is the question of what is to be done when two vessels are arriving at a point where both must tack. There we have the case of the *Priscilla* (*ubi sup.*), and I accept the *Priscilla* as being sound in principle. No vessel must suddenly go about under the bows of another, and no vessel must keep her course and run into another vessel which she sees is going about. But that is quite a different matter. When they are actually under way, tacking, then the crossing rule must apply, and so here I find as a fact that this collision did not take place close to either shore, but one-third of the way over from the north to the south shore, and both vessels were under way at the time, in the course of their board, one to the northward and the other to the southward. In the circumstances I think the duty of the vessel on the port tack was to put her helm up and go off and give the other vessel room to pass, and not to hold on her course as she did and run into the other vessel. I think it is extremely likely from what the master of the *Annie* said, that the real reason of this collision was that there was something wrong about the tiller of the *Annie*, so that they were unable for the moment to put it up and allow the vessel to pay off to starboard. That disposes, I think, of the question of responsibility. I hold that in this case art. 17 (*b*) applies and not the overtaking rule, and that therefore the *Julia* is free from blame and the *Annie* ought to have kept out of her way, and is responsible for the collision. Now comes the other question, whether the damages in this case are too remote. In my opinion they are not. I think that the damages flowed directly out of this collision. The only thing that can be said by the defendants is this, that the master of the *Julia*, by error of judgment at the last moment, when put into a position of difficulty, put his hand on a rope outside of where he cut it, like a man who goes and sits on the bough of a tree outside of where he is sawing it off from the stem. The poor man had no idea that he had the whole weight of the other vessel dependent upon that small painter, and the fact was that, having cut the rope, before he could let go he was dragged overboard by the weight of the other vessel on it. I do not think that can be said to have been negligence on his part sufficient for me to say his death was not a matter which flowed directly from the collision. Therefore I must hold that this was the direct result of the collision, and I give judgment for the plaintiffs for the sum of 300*l.*

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

Solicitors for the defendants, *Weightman, Pedder,* and *Co.*

Supreme Court of Judicature.

COURT OF APPEAL.

Dec. 15, 16, 1908, *and Jan.* 18, 1909.

(Before LORD ALVERSTONE, C.J., VAUGHAN WILLIAMS and BUCKLEY, L.JJ., and Nautical Assessors).

THE SCHWAN. (*a*)

Contract of carriage—Damage to cargo—Bill of lading — Exceptions — Seaworthiness — Negligence.

A cargo of sugar was shipped at Bremen to be carried to London under a bill of lading which provided: 1 *The act of God . . . and all accidents, loss, and damage whatsoever from defects in hull, tackle, apparatus, machinery, boilers, steam, and steam navigation, or from perils of the seas . . . 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 . . . and the owners being in no way liable for any consequences of the causes before mentioned. . . .* 10. *It is agreed that the exercise by the shipowners or their agents of reasonable care and diligence in connection with the ship, her tackle, machinery, and appurtenances shall be considered a fulfilment of every duty, warranty, or obligation, and whether before or after the commencement of the said voyage.*"

On the voyage sea water found its way into the hold and damaged the sugar owing to the plug in a three way cock on a bilge pipe not being properly adjusted so as to be only open in two directions at the same time, and also owing to some obstruction getting into the seating of a non-return valve situated between the three way cock and the hold which prevented the non return valve being properly closed.

In an action for damage to cargo:

Held, by the Court of Appeal (reversing the decision of Bargrave Deane, J.), that the shipowners were not liable because the vessel was not unseaworthy, and because the damage caused by the admission of sea water through the improper adjustment of the three way cock, and the non-closing of the non-return valve was due either to the negligence of the engineer, or was a peril of the sea or was due to a defect in the machinery, and that the shipowners were protected by the bill of lading from loss arising from these causes.

APPEAL from a decision of Bargrave Deane, J. in favour of cargo owners against the steamship *Schwan* for damage to a cargo of sugar caused by the admission of sea water into the hold.

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

The appellants were the owners of the steamship *Schwan*; the respondents were Abram Lyle and Sons Limited, the owners of certain bags of sugar shipped on the *Schwan*.

The case made by the plaintiffs was that they had suffered damage by breach of contract in bills of lading dated the 26th Nov, 1907 under which J. H. Bachmann had shipped 5500 bags of sugar in good order and condition on the *Schwan* at Bremen deliverable in the like good order and condition unto order account Lyle, at London, which bills of lading were signed by the ships agents and indorsed to the plaintiffs to whom the property in the goods passed; alternatively the plaintiffs alleged that the sugar was consigned to the plaintiffs, and that the defendants had failed to deliver some bags and delivered others in a greatly deteriorated condition.

Alternatively they claimed damages for the loss of the goods through the unseaworthiness of the vessel.

The particulars of the unseaworthiness given by the plaintiffs were that the main hold bilge suctions and connections and valves thereof, or some of them were obstructed or were otherwise in a defective, imperfect, or inefficient condition, and of defective design, whereby water was enabled to reach the goods lying in the hold, and they further relied on any other particulars of unseaworthiness which might be disclosed.

The defendants did not admit the bill of lading or the shipment of the goods, or the indorsement of the bill of lading, or consignment of the sugar, or that the property in the sugar passed to the plaintiffs, or that any bags were not delivered or delivered damaged, or that the vessel was unseaworthy, and denied that they had been guilty of any breach of contract.

Alternatively they alleged that if there was any contract between the plaintiffs and defendants it was contained in a bill of lading the terms of which were:

In accepting this bill of lading the shipper or other agent of the owner of the property carried expressly accepts and agrees to all its stipulations, exceptions, and conditions whether written or printed. 1. The following are the exceptions and conditions referred to: (1) The act of God . . . and all accidents, loss, and damage whatsoever, from defects in hull, tackle, apparatus, machinery, boilers, steam, and steam navigation, or from perils of the seas, ports, harbours, canals, and rivers, or from any act, neglect, or default whatsoever of the pilot, master, officers, engineers, crew, stevedores, servants, or agents, of the owner in the management, loading, stowing, discharging, or navigation of the ship, or other craft or otherwise, and the owners being in no way liable for any consequences of the causes before mentioned. (10) It is agreed that the exercise by the shipowners or their agents of reasonable care and diligence in connection with the ship, her tackle, machinery, and appurtenances shall be considered a fulfilment of every duty, warranty, or obligation, and whether before or after the commencement of the said voyage.

And that if any damage was caused, it was caused by one or some of the matters in clause 1 of the bill of lading, and that they exercised all reasonable skill, care, and diligence, as required by clause 10.

Laing, K.C. and *Balloch* for the plaintiffs.

Scrutton, K.C. and *Bateson* for the defendants.

The action was tried on the 27th, 28th, and 29th July, and on 31st July the learned judge (Bargrave Deane, J.) gave judgment for the plaintiffs and referred the case to the registrar and merchants to assess the amount of the damages.

The owners of the *Schwan* appealed.

Scrutton, K.C. and *A. D. Bateson* for the appellants the owners of the *Schwan*.—Clause 10 in the bill of lading cuts down the warranty of seaworthiness, the cargo owner can only ask that reasonable care and diligence should be taken by the shipowners and their agents. The judge has held that the engineer was negligent in being ignorant about the construction of the non-return valves and three way cock. The plaintiffs' case is that the *Schwan* was unseaworthy; the defendants' case is that the ship was seaworthy, but the engineer was careless. There were two safeguards to prevent water getting into the hold the three way cock and the non-return valve. A piece of tow and a chip got into the valve and kept it open, and, although the engineer screwed it down, he ought to have seen it was not screwed home. The working of the three way cock was a matter of skill, which could be put right during the voyage at any moment, and even if it was not put right no water could have got into the cargo unless the non-return valve had gone wrong as well. The error which caused the damage could have been rectified in a moment if ordinary skill had been used by the engineer, so the ship was not unseaworthy:

Steel v. *State Line Steamship Company*, 37 L. T. Rep. 333; (1877) 3 Asp. Mar. Law Cas. 516; 3 A. C. 72

Hedley v. *Pinkney and Sons Steamship Company*, 70 L. T. Rep. 630; 7 Asp. Mar. Law. Cas. 483; (1894) A. C. 222.

The ship was practically a new ship built at one of the best German shipbuilding yards, and it is improbable that she left the yard in an unseaworthy condition.

Hamilton, K.C., *Laing*, K.C., and *R. H. Balloch* for the respondents, the owners of the cargo.—The ship owner is responsible for the damage to the cargo if the ship was unseaworthy or if he cannot show that the cause of the loss is excepted by the bill of lading. The evidence as to the condition of the ship when she left the builders' yard is very meagre, it really only amounts to the fact that this kind of three way cock has been put into two other ships. It was common ground that in a new ship foreign matter is often drawn from the bilge into the non-return valve, therefore it is quite a common occurrence for a good non-return valve to fail to work satisfactorily, and under such circumstances to send a ship to sea with a three way cock which will allow water to run through the valve when it is supposed to be closed, is to send it to sea in an unseaworthy condition. The vessel was fitted with a peculiar contrivance, and the engineers were not warned about its peculiarity; this is unseaworthiness; she was not reasonably fit for the voyage and was not made so by her officers. *Cur. adv. vult.*

Jan. 16.—Lord Alverstone, C.J.—This was an appeal in an action for damage to cargo brought in the Admiralty Division by the owners of a con-

signment of sugar which had been carried upon the defendants' steamer *Schwan*, from Bremen to London, and arrived damaged from sea water. The sea water had penetrated into the hold or compartment in which the sugar was being carried, through a certain sea cock—referred to in the evidence as a "three way cock"—and through certain piping in which there was a non-return valve to prevent the inflow of sea water, which might pass through the sea cock into the pipe leading to the bilges, getting into the ship. The sea cock in question was a cock having three pipes to it, one leading to the sea, another leading to the pump, and the third leading to the bilges in which the non-return valve was placed. The cock was so constructed that if left in a certain position, as illustrated on diagram A on the plan produced before us, the passage way to the sea and to the pipe to the bilges might both be partly open, as well as the pipe to the pumps, so that sea water, flowing in through the pipe from the sea, or drawn through by the pumps, might pass, if not stopped by the non-return valve, into the bilges, and so into the hold. On examining the vessel after her arrival in London, it was found that a piece of tow, or spun yarn, had got into the seat of the return valve, so that the valve could not be screwed home, and in consequence a passage was left to the bilge pipe, notwithstanding that the valve was screwed down hard. The cargo was carried under a bill of lading which contained the following clauses:—(1) "The act of God . . . and all accidents, loss, and damage whatsoever from defects in hull, tackle, apparatus, machinery, boilers, steam, and steam navigation, or from perils of the seas, ports, harbours, canals, and rivers, 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 other craft or otherwise, and the owners being in no way liable for any consequences of the causes before-mentioned." (10) "It is agreed that the exercise by the shipowners or their agents of reasonable care and diligence in connection with the ship, her tackle, machinery, and appurtenances shall be considered a fulfilment of every duty, warranty, or obligation, and whether before or after the commencement of the said voyage." Having regard to the above conditions, in order to recover in the action, the plaintiffs must prove that the damage was occasioned by the unseaworthiness of the Schwan; and that the agent of the shipowners had not exercised "reasonable care and diligence in connection with the ship, her tackle, machinery, and appurtenances." It is difficult from the judgment of Bargrave Deane, J. to ascertain whether he found as a fact that the vessel was unseaworthy. He finds that the two matters which caused the damage were first the construction of the three way cock, which allowed water to pass from the sea into the bilges; and, secondly, that the non-return valve could not be properly seated in consequence of the presence of the spun yarn on the seat. He then proceeds to consider whether the peculiar construction of the sea cocks to which I have referred was known to the defendants' engineer, and came to the conclusion that he had not discovered it until the idea that water might have passed through the three way cock occurred to his mind on the voyage from London back to Bremen, after the sugar had been unloaded. He held that inasmuch as the chief engineer, who was in charge of the arrangements of the machinery when the ship was being built in Rostock Yard, had neglected to test the three way cock, and had not discovered that its construction permitted the water to pass from the sea to the pipe and the bilges, the defendants were not protected by clause 10 of the bill of lading, but were liable for damage caused by the condition of the ship as above described. In order to support the judgment it must be assumed that the learned judge thought that the vessel was unseaworthy, but he nowhere says so, and it is unfortunate that he did not deal in any way with the other part of the case, viz., that the water could not have got to the sugar unless it got past the non-return valve, which valve under ordinary circumstances would have prevented the inflow of water but for the fact that it could not be closed for the reason above stated. Clause 1 of the bill of lading protects the shipowner against all damage from defects in the hull, apparatus and the machinery, or from any neglect or default whatsoever of the engineers, crew, or agents of the owners in the management, loading, stowing, or navigating of the ship. If, therefore, the passage of the water through the sea cock to the pipe to the bilges, or the failure of the non-return valve to act, in consequence of the piece of spun yarn under its seat, was due to a defect in the machinery not amounting to unseaworthiness, or to the neglect of the engineer, the defendants would be protected and this action fails. It was, we think, established that the sea cock was of unusual construction, in that the port of the cock leading to the pipe to the bilges might be partly opened, while the port leading from the sea was also partly open, and there is no doubt that, in ordinary cases, the ports in the plug are so arranged that the entrance to the bilge pipe would not be opened at all until the pipe from the sea was closed. The object of the three way cock was to allow water to be pumped out of the bilges when necessary, at which time the pipe to the sea should be closed, and to allow water to be pumped from the sea, for circulation and sanitary purposes, during which pumping the pipe to the bilges should be closed. We were advised by our assessors that a sea cock so constructed is a dangerous cock, and the experience of cases in the courts has shown, on not a few occasions, the danger of sea cocks which are arranged so as to let water into the bilges or holds of the vessel. But we were further advised that a careful engineer could have adjusted the plug so that the pipe to the bilges would be closed when the pipe communicating with the sea was open; and that the non-return valve, if in working order, would be a sufficient protection against the entrance of any water which might get into the pipe to the bilges in consequence of the construction of this particular valve. It was in evidence that the man, if he understood the construction of the sea cock, would have no difficulty in so turning the plug that the pipe to the bilges would be closed whenever the sea cock was open. This was the vessel's second voyage with the same engineer, and we come to the conclusion, having regard to the advice given to us, that the vessel was not unseaworthy, and that so far as the sea cock was

concerned the case falls within the principle of *Steel* v. *The State Lines Steamship Company* (*ubi sup.*). In our opinion its allowing water to pass was due to the neglect, or want of care, of the engineer in not seeing that the plug of the cock was in its proper position [His Lordship referred to the evidence, and continued]: against which neglect the shipowners are protected by the terms of the bill of lading.

We are further of opinion that the defendants are protected against the consequences of the second of the two causes which led to the damage — viz., the fact that the non-return valve could not be closed by reason of the presence of the spun yarn underneath the seat, on the ground that this was either peril of the sea, or a defect in the apparatus, and the machinery, or a defect arising from the neglect, or default, of the engineer. So far as clause 10 applies upon the evidence, there was nothing to show that there had been any want of reasonable care and diligence in connection with this valve while the vessel was being built or afterwards, unless it was due to want of supervision by the engineer on the voyage. So that in so far as it caused, or contributed to, the damage, the defendants would in either event be protected under clauses 1 and 10. It was said that pieces of spun yarn, or chips of wood, may get through the screens and baffle plates, designed to stop them, and so reach the valve, and that this occurrence was not uncommon even during the voyage, and the instructions to surveyors referred to in the evidence direct that such an appliance shall be employed in order to prevent the risk of water getting into the holds. In our opinion there was not sufficient evidence to show that the vessel was unseaworthy when she left Bremen, and that in so far as either one, or both, of the two causes occasioned the damage, they are either defects in machinery or defects caused by the neglect of the engineers, against which the defendants are protected by the terms of the bill of lading. For these reasons we are of opinion that the appeal must be allowed with costs, and judgment entered for the defendants in the action with costs.

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

Solicitors for the respondents, *Cattarns* and *Co.*

Jan. 27 *and* 28, 1909.

(Before Vaughan Williams, Farwell, and Kennedy, L.JJ.)

Republic of Bolivia *v.* Indemnity Mutual Marine Assurance Company Limited. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Marine Insurance—Piracy—"Warranted free of capture . . . piracy excepted"—Organised expedition to establish government—Ship carrying insured goods up a river—Seizure.

A policy of marine insurance on goods and (*or*) *merchandise on a voyage up the Amazon from Para to Puerto Alonzo and* (*or*) *other places on the river Acre and* (*or*) *in that district contained a clause: "Warranted free of capture, seizure, and detention, and civil commotions . . . piracy excepted." The goods and* (*or*) *merchandise were stores and provisions which were shipped, by an arrangement between the Brazilian and Bolivian Governments, by the latter to provision their troops who were in the district of El Acre for the purpose of resisting an organised expedition which was seeking to overthrow the Bolivian Government in that district and to establish a republic of their own. The organisers of the expedition thereupon fitted out two ships which were armed for the purpose of intercepting the vessel carrying the goods for the Bolivian Government, and they stopped the vessel in which the insured goods were carried in the river Acre and seized the goods. In an action on the policy:*

Held, that the defendants were not liable, and that the word "piracy" as used in this policy meant piracy in a popular or business sense, and applied to persons who plundered indiscriminately for their own ends, and not to persons who simply operated against the property of a particular State for a public end, and therefore that this was not a loss by pirates within the meaning of the policy.

Decision of Pickford, J. (99 *L. T. Rep.* 394; 11 Asp. Mar. Law Cas. 117) *affirmed.*

Appeal by the plaintiffs from the judgment of Pickford, J. at the trial of the action without a jury (*sup.*). The action was brought by the Republic of Bolivia upon two policies of marine insurance, and brought alternatively upon the two policies because the one policy was effected to cover the risks which were excepted from the other.

The first policy, dated the 20th Nov. 1900 and effected by Suarez, Hermanos, and Co., was a policy for 375*l*, part of an insurance of a larger amount, and was declared to be

Upon goods and (or) merchandise valued at 7500*l*. (say A. M. 1775 packages provisions, preserves, and merchandise so valued belonging to the Bolivian Government) . . . by vessel called the *Labrea* and conveyances . . . at and from Para to Puerto Alonzo and (or) other places on the river Acre and (or) in that district. To include all risks of or incidental to inland carriage by land and (or) water and (or) by any conveyances whatsoever . . . including the risk of craft to and from the vessel. . . . Warranted free of capture, seizure, and detention, and the consequences thereof, or any attempt thereat, piracy excepted, and also from all consequences of riots, civil commotions, hostilities, or warlike operations, whether before or after declaration of war.

The second policy was subscribed by the defendants for 7500*l*., and was expressed to be an insurance

Against war risk only to cover such risks as are excluded from original marine policies. And it is expressly declared and agreed that no acts of the insurer or insured in recovering, saving, or preserving the property insured shall be considered as a waiver or acceptance of abandonment.

Then the words of the free of capture and seizure clause were set out.

Each policy contained the following clause:

And touching the adventures and perils which the company is made liable unto or is intended to be made liable unto by this assurance, they are of the seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and counter-mart, surprisals, takings at

(*a*) Reported by Edward J. M. Chaplin, Esq., Barrister-at-Law

sea, arrests, restraints and detainments of all kings, princes, and people of what nation, condition, or quality soever; barratry of the master and mariners and of all other perils, losses, and misfortunes, that have or shall come to the hurt, detriment, or damage of the aforesaid subject-matter of this assurance or any part thereof.

The first policy was issued in pursuance of a slip dated the 3rd March 1900, and the second on a slip dated the 8th Nov. 1900.

Those slips were open covers taken out by Suarez, Hermanos, and Co., of Para, who had also establishments in London and Bolivia, and the goods of the Bolivian Government were declared subsequently and insured by the policies above mentioned.

On the 21st Dec. 1900, during the course of the insured voyage, the *Labrea* was stopped at Caqueta by an armed vessel called the *Solimoes*, which was manned by revolutionary forces, and was flying the flag of and acting under the revolutionary Junta of El Acre.

Those on board the *Solimoes* compelled the *Labrea* to come alongside the *Solimoes*, and removed from the *Labrea* the whole of the insured goods.

The plaintiffs claimed that by reason of the above facts they had sustained a total loss under the risks covered by the second policy; in the alternative they alleged that the above facts constituted a loss by piracy within the terms of the first policy.

The defendants denied that the goods had been lost by perils insured against, and, further, they alleged that the policies were void by reason of he non-disclosure of material facts which were known to the plaintiffs—viz., that an expedition was being organised, and that an expedition had been and was being fitted out by Rodrigo Carvalho to stop supplies for El Acre, and that he had enlisted men and had two vessels for that purpose.

The matter arose out of a certain state of affairs which occurred in a territory called Colonias, which was afterwards described as the Free Republic of El Acre, and which was on the borders of Brazil and Bolivia.

The facts were stated by the learned judge in his judgment to have been as follows:—

In 1867, by a treaty between Brazil and Bolivia, the territory of Colonias was either ceded or assured to Bolivia. That treaty between Brazil and Bolivia decided that that territory was Bolivian territory, but there was, however, no demarcation of the frontier until 1898, when a commission of delimitation was appointed by the two Governments and a frontier line was fixed, called the Cunha Gomes line, at a place called Puerto Alonzo, which is just on the Brazilian side of that line, and situated on a river called both the Aquiry and the Acre, a tributary of a tributary of the Pursus, which, in its turn, is a tributary of the Amazon.

Bolivia had not before 1898 exercised any effective jurisdiction in this territory, but there was valuable property there, rubber of considerable value being produced, and both Brazilians and Bolivians, but chiefly Brazilians, had settled there and traded in rubber.

What the exact nature of the government of that territory was in those days is not quite clear, but there was a Custom House at Manaos, on the Amazon, a very considerable way down, and another at Para, at the mouth of the Amazon, and customs were exacted in respect of goods coming down the Amazon from the territory of Colonias. But there was no Bolivian Custom House or Government set up there, and if there was any government exercised at all it was exercised apparently by magistrates appointed by the Brazilian Government, some of whom may have been stationed on what is now the Bolivian side of the frontier line.

After the demarcation of the frontier was effected, the Bolivian Government were minded to take effective possession of the territory and to establish proper Bolivian government there; and the first step they took was to establish a Custom House at or near Puerto Alonzo; but the representatives sent there were turned out and apparently one of them was killed by certain persons, chiefly Brazilians, but there may have been some Bolivians among them who were discontented with the state of affairs that would produce a Bolivian Government there, and had joined in establishing what they called the Free Republic of El Acre. One of the leading spirits was one Galvez.

About the same time as the establishment of the Custom House at Puerto Alonzo and the establishment of the Free Republic of El Acre, the Bolivian Government sent an expedition from La Paz, the capital of Bolivia, under the command of one Munoz in order to take possession. It was a long and difficult march from La Paz, and the expedition was several months on the way, but it did eventually arrive within the territory, and then the Free Republic of El Acre, for a time at least, disappeared.

It was suggested that Galvez went to Buenos Ayres, and, according to the evidence of the representative of the Bolivian Government, he took with him, no doubt for safe custody, the contents of the Republican Treasury. Where the rest of the republicans went to he did not know, but some of them crossed the Brazilian frontier, and in Brazilian territorv set themselves to work either to re-establish the original Free Republic of El Acre or to establish a Government of their own—at any rate, to oust the Bolivian Government.

The Brazilians near the frontier line seemed to have been very much in sympathy with the republic, or, at any rate, those persons who were resisting the establishment of the Bolivian Government. That appeared quite clearly from a speech of the Governor of Manaos, which is the capital of the province of Arizonas, the Brazilian province next adjoining this territory.

The Bolivian expedition, although it had arrived at, and taken possession of, the territory, was in rather a difficult position; it was a very long way from the base or from the capital, and it was very difficult to supply the expedition with provisions and stores. It could not very well get them from the Brazilian side of the frontier, because the Brazilians were not well affected to this taking possession by the Bolivian Government, and it was very difficult to get provisions from the Bolivian capital because the distance was so great, and the means of getting them to the place so difficult. Accordingly it was arranged between the Brazilian and Bolivian Governments

that the expedition should be provisioned from Brazil by sending the stores and provisions up the Amazon from Para, and this was done on a vessel called the *Labrea*.

At that time the Bolivian Government was represented in England by Señor Aramayo, and a firm named Suarez, Hermanos, and Co. were their agents here. This firm had a house in Para, and there they acted for the Bolivian Government in conjunction with an agent named Ballivian—who had been sent for the purpose of seeing to the sending up of the provisions to the Bolivian Government, the ordinary representative De Silva probably acting in conjunction with them also. The head of the firm of Suarez, Hermanos, and Co. at Para was a Don Nicolas Suarez, and he owned a place from which rubber was obtained in Acre, and also in other parts.

One of the persons who had been concerned in the Free Republic of El Acre was a gentleman of the name of Carvalho. He had been manager in Acre for Don Nicolas Suarez, and, when the republic was set up, Carvalho was said to have used the property of Don Nicolas Suarez for the purposes of the republic or for his own purposes, and to have destroyed a considerable part of the place. Carvalho alleged that Galvez was responsible for this. He was called to account for what he had done when he got to Para. It was important for him that the Bolivians should not establish any stable government in Acre, and he started or assisted in a movement either for the purpose of the re-establishment of the Free Republic of El Acre or the establishment of another republic on his own account.

At all events he and others fitted out an expedition in Para to intercept the stores that were being sent up for the Bolivian force, and he intended to intercept them at or near Puerto Alonzo, and, having got possession of the stores, to make himself master of the place and establish a government there if he could. With that object they fitted out either two or three vessels, which were armed, one of them, the *Solimoes*, being fitted with a quick-firing gun and carrying armed men. This expedition went up the Amazon and got somewhere into the neighbourhood of Puerto Alonzo, and there they stopped a number of steamers, but they did not interfere with any except the *Labrea*. They did not take goods from any of the others when they ascertained that they were not carrying goods for the Bolivian Government. When, however, the *Labrea* arrived, they stopped her, and, finding she was carrying goods for the Bolivian Government, they took possession of her. The *Solimoes* was flying a flag which the persons on board the *Labrea* thought to be the Acre flag; the witnesses described it differently, but they took it to be the flag of the Republic of El Acre. Those on the *Solimoes* took the stores and then crossed the Bolivian frontier and attacked or were attacked by the Bolivian forces, with the result that the revolutionary force was defeated and disappeared. Where Carvalho went to did not appear.

The main question was whether, in these circumstances, the loss of the plaintiffs' goods occurred by piracy. Pickford, J. gave judgment for the defendants. He held, in the first place, that the policy for 7500*l.* was void by reason of the concealment of a material fact, and, as regards the policy for 375*l.*, he was of opinion that there had not been a loss by "piracy" within the meaning of the policy. The plaintiffs appealed against the latter finding, and contended that there had been a loss by "piracy," and that the defendants were liable on the policy.

Scrutton, K.C. and *F. D. Mackinnon* for the appellants.—There is in this case a loss by pirates within the meaning of the policy. You do not cease to be a pirate by leaving the high seas and committing robbery and depredations on land. In this case both Brazil and Bolivia were properly constituted States; the ship seized was Brazilian, so that international law must be held to apply. As to what is piracy has been defined by Sir Charles Hedges in *Rex* v. *Dawson* (13 State Trials, 354) as follows: "Piracy is only a sea term for robbery, piracy being a robbery within the jurisdiction of the Admiralty. . . . If the mariners of any ship shall violently dispossess the master and afterwards carry away the ship itself or any of the goods with a felonious intention in any place where the Lord Admiral hath jurisdiction, this is robbery and piracy." This definition was approved by the Judicial Committee of the Privy Council in

> *Attorney-General for the Colony of Hong Kong* v. *Kwok-a-Sing*, 29 L. T. Rep. 114; L. Rep. 5 P. C. 179, 199.

The Admiralty jurisdiction extends over vessels, not only when they are sailing on the high seas, but also when they are in the rivers of a foreign territory, where great ships go:

> *Rex* v. *Allen*, 1 Mood. C. C. 494;
> *Reg.* v. *Anderson*, 19 L. T. Rep. 400; L. Rep. 1 C. C. R. 161.

Piracy is therefore merely robbery within the Admiralty jurisdiction. Thus Shakespeare, in "The Merchant of Venice," act 1, scene 3, makes Shylock say: "There be land rats and water rats, water thieves and land thieves—I mean pirates." This shows that in his time the term "piracy" was not confined to robbery on the high seas. In Murray's Oxford English Dictionary piracy is defined as: "The practice or crime of robbery and depredation on the sea or navigable rivers. . . ." In this case the seizure took place in a river "where great ships go," and was piracy within the meaning of the criminal law. Does it, then, make any difference that although the policy is in form a marine insurance policy, the transit was a river transit? Where goods were insured under a policy of marine insurance partly by land carriage and partly by sea, it was held that a loss caused by the fraud and negligence of the land carriers was covered by the policy:

> *Boehm* v. *Combe*, 2 M. & S. 172.

So in this case the policy must be held to apply to the river transit. In *Nesbitt* v. *Lushington* (4 T. R. 783) it was held that if an armed force board a ship and take part of the cargo, the underwriters were not liable on a count stating the loss to be by a seizure by people to the plaintiffs unknown; for "people" in the policy meant "the governing power of the country." Under the general words in the policy, even if the seizure of the goods did not amount to actual piracy in the strict sense of the term,

it was *ejusdem generis*, and more like piracy than anything else. They referred to

Dean v. *Hornby*, 22 L. T. Rep. O. S. 222; 3 E. & B. 180;
Reg. v. *Tivnan and others*, 10 L. T. Rep. 493; 5 B. & S. 645;
Wheaton's International Law, 4th edit., p. 201;
Hall's International Law, 5th edit., p. 257;
Larsen v. *Sylvester and Co.*, 11 Asp. Mar. Law Cas. 78; 99 L. T. Rep. 94; (1908) A. C. 295;
Rex v. *Allen*, 1 Mood. C. C. 494.

J. A. Hamilton, K.C. and *D. C. Leck* for the respondents. — The judgment of Pickford, J. is right. By the terms of the policy, unless seizure or hostilities amount to piracy, the underwriters are warranted free of loss. For the purpose of ascertaining the meaning of "piracy" you must see what is the dividing line between (*a*) piracy, (*b*) capture or seizure, and (*c*) hostilities or other warlike operations, whether before or after war. The real question is, What is meant by pirates in this policy? Pickford, J. said he had to look at the policy itself for the meaning of the word "piracy." To describe what had been done by the *Solimoes* as piracy is fantastic. A pirate has been described by Lord Coke as *hostis humani generis* (3 Inst. 113)—the enemy of all. That is the essence of the definition. As to what has been held to be piracy is shown by

Palmer v. *Naylor*, 23 L. J. 323, Ex.;
Nesbitt v. *Lushington* (*sup.*).
Arnould on Marine Insurance, 8th edit., sect. 903.

Piracy is an exception to the rule that the courts of a country have criminal jurisdiction only over their own subjects within their territory; as regards piracy however, all countries are interested in its suppression. It is not piracy to be *de facto* carrying on warlike operations on behalf of an independent though a small State. That would be a rebellion. As to who are pirates, see The Neutrality of Great Britain during the American Civil War, by Mountague Bernard, p. 118. [Vaughan Williams, L.J.—Piracy is a maritime offence.] Piracy cannot take place independently of the sea, but in this case the acts complained of took place on a tributary of a tributary of the Amazon:

Hall's, International Law, 5th edit., pp. 257 *et seq.*;
Parsons', Marine Insurance, vol. 1, p. 563.

It must be a criminal act done within the jurisdiction of the Lord High Admiral. The criminal jurisdiction applicable to the present case would be that of the State in whose territory the tributary was where the seizure had taken place:

Chalmers and Owen's Marine Insurance Act 1906, appendix 2, note (*e*).

Mackinnon, in reply, referred to

Hall's International Law, 5th edit., p. 30;
Oppenheim's International Law, vol. 2, sect. 876.

Vaughan Williams, L.J.—In my opinion this appeal fails. I have the judgment of Pickford, J. before me, and I entirely agree with what has been said by the learned judge as to the meaning of "piracy." He says in his judgment: "As I have said, I think you have to look at what is not a very good expression, but the popular meaning of the word 'pirates.' I do not know that it takes us much further, but I might say the business meaning of the word 'pirates.' I do not know that that can be better expressed than it is in Hall on International Law, 5th edit., at p. 259, where he says this: 'Besides, though the absence of competent authority is the test of piracy, its essence consists in the pursuit of private, as contrasted with public, ends. Primarily the pirate is a man who satisfies his personal greed or his personal vengeance by robbery or murder in places beyond the jurisdiction of a State. The man who acts with a public object may do like acts to a certain extent, but his moral attitude is different, and the acts themselves will be kept within well-marked bounds. He is not only not the enemy of the human race, but he is the enemy solely of a particular State." That, I think, expresses what I have called the popular or business meaning of the word "pirate," and I find in the definitions which are cited in a note at p. 260 of Hall on International Law, 5th edit., that several of the definitions contain words which carry out that idea, but by no means all of them do. The first one which is cited, which is from Molloy (book 1, chap. 4, sect. 1) is 'a sea thief, a *hostis humani generis*, who, to enrich himself, either by surprise or open force, sets upon merchants or other traders by sea.' A writer with whom I confess I am not acquainted, Riquelme, is cited in the same note, and he says this: that a pirate is a person who is preying by force *contra los buques de todos los pueblos*. And Ortolan, cited in the same note, says he is a man who is pillaging by arms *les navires de toutes les nations*. Those two definitions (I have not read the whole of them) seem to be either taken from the same source, or the one copied from the other, and there are other definitions which embody the same idea. No doubt there are definitions which do not embody that idea, but that, I think, is the common and ordinary meaning of pirate—a man who is plundering indiscriminately for his own ends and not a man who is simply operating against the property of a particular State for a public end, the end of establishing a Government, although that act may be illegal, and although that act may be criminal, and although he may not be acting on behalf of a society which is, to use the expression in Hall on International Law, politically organised. It may be piracy within the meaning of the doctrines of international law, but, in my opinion, it is not piracy within the meaning of a policy of insurance, because, as I have already said, I think you have to attach to piracy a popular or business meaning, and I do not think, therefore, that this was a loss by piracy. There is another passage in Hall on International Law, at p. 262, which throws some light upon the matter; that is speaking of 'Depredations committed at sea upon the public or private vessels of a State, or descents upon its territory from the sea by persons not acting under the authority of any politically organised community, notwithstanding that the objects of the persons so acting may be professedly political," and he says such acts as those are, within the meaning of international law, piratical. But he goes on to say this: 'Sometimes they are wholly political in their objects, and are directed solely against a particular State, with careful avoidance of depredation or attack upon the persons or property of the subjects of other States. In such cases, though the acts

done are piratical with reference to the State attacked, they are for practical purposes not piratical with reference to other States, because they neither interfere with nor menace the safety of those States nor the general good order of the seas. It will be seen presently that the difference between piracy of this kind and piracy in its coarser forms has a bearing upon usage with respect to the exercise of jurisdiction.' I think the meaning of 'piracy' in a policy of insurance is what is called in this book piracy in its coarser sense, and, therefore, I do not think this is a loss by piracy within the meaning of this policy."

I adopt that statement of Pickford, J.'s as the basis of my judgment. It was said on behalf of the plaintiffs that the learned judge had given no specific definition of what he held to be the meaning of piracy in this particular policy. I do not agree. I think that in the passages from his judgment which I have already read he does give a most plain definition both in affirmative and in negative words, and he expressly disclaims any intention of deciding what is the meaning of piracy in international law. He takes the present policy and says that the word "piracy" as used here means piracy in a popular or business sense. So far as the facts are concerned, if that is the true meaning of the word it was for the learned judge to construe the document and find the facts, and then to decide whether the facts so found came within the definition laid down by him. If his definition is right, the facts do not come within it, and the facts are not really in dispute here. I ought now to say a few words on the policy itself. The clause containing the affirmative words of the policy is as follows: "And touching the adventures and perils which the company is made liable unto, or is intended to be made liable unto, by this assurance, they are of the seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and counter-mart, surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes, and people of what nation, condition, or quality soever; barratry of the master and mariners, and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the aforesaid subject-matter of this assurance or any part thereof." The enumeration which I have just read includes the word "pirates," and contains the general words "all other perils." The first contention raised on behalf of the plaintiffs is this, that their loss was covered by the policy, inasmuch as the persons who caused it come within the words "pirates" in that clause. In my opinion it is not so covered for the reasons I have given. But then it is said that, although it is not strictly piracy, the general words at the end of the clause so plainly include matters which though not strictly piracy are *ejusdem generis* therewith that I ought to say that this risk as constituted by the acts of the plaintiffs was covered by this policy. As to that contention there is this difficulty, that the policy contains a free of capture clause, which is in the following terms: "And it is expressly declared and agreed that no acts of the insurer or insured in recovering, saving, or preserving the property insured shall be considered as a waiver or acceptance of abandonment. Warranted free of capture, seizure, and detention, and the consequences thereof, or any attempt thereat, piracy excepted, and also from all consequences of riots, civil commotions, hostilities, or warlike operations, whether before or after declaration of war." It seems to me that, although piracy is excepted from the warranty clause set out above it is piracy only, and not other things like piracy, which is excluded. And that I say because there are several things here not unlike piracy which are expressly mentioned in the clause as things for which the defendants are not to be liable which are left part of the subject-matter of the policy, such things as riots, civil commotions, hostilities, or warlike operations.

Under those circumstances I think it is impossible for the plaintiffs to rely on the doctrine of *ejusdem generis*, because in the free of capture clause amongst the things left are "riots, civil commotions, hostilities, or warlike operations, whether before or after declaration of war," which are an extremely near description of the very events which took place in this case, and which are events *primâ facie* not piracy, but *ejusdem generis*. But for that clause these things would be left within the operation of the policy, and are the very things sought to be covered by the *ejusdem generis* doctrine. The only other matter to be noticed is that at the end of the clause which sets out the perils insured against there are the words: "And of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the aforesaid subject-matter of this assurance or any part thereof." Having regard to the free of capture clause, it is impossible to say that these words cover the present case. Pickford, J. has decided this case, expressly leaving out of determination all definitions of piracy for the purposes either of international or municipal law. He has decided the case merely on the meaning of the word "piracy" in this particular policy. Although I have not got to decide it, I do wish to say, in case of any difficulty arising hereafter as to the judgments here or below, that there is no pretence for calling what happened in this case on the borders of Brazil and Bolivia piracy for purposes of international law. In the first place, I do not think that the place where this happened, which was not on that part of the Amazon where it runs into the ocean, but on a branch river running into another branch river of the Amazon, is a place where piracy could be committed at all. After all, this is a policy of marine insurance, and the loss sought to be covered is alleged to be a loss by piracy or something *ejusdem generis* with piracy.

In my opinion, whatever the definition of piracy may be, it is a maritime offence, and what took place on the river far up country on the borders of Brazil and Bolivia did not take place on the ocean at all. It is not the theatre on which piracy could be committed. It is a place which cannot be said to be, like the ocean, under the jurisdiction of no particular Power. This particular place is under the jurisdiction of either the one or the other Power. This part of the river is not the highway of the world where the ships of all nations go protected only by the law of nations. Ships here go into a river running through occupied land under the government of specific nations which exercise

jurisdiction there. I only wish to say one word distinguishing between piracy *jure gentium* and piracy by municipal law. Whatever other limitation there may be in this policy, it only extends to piracy *jure gentium*, and not to robbery on a river which at that point has been running through land for a long distance, and had to run for a further distance through land both banks of which belong to Brazil. I am quite satisfied with Pickford, J.'s judgment, and do not propose to go through the various reasons which he has given. In my judgment this appeal fails, and must be dismissed with costs.

FARWELL, L.J.—I also am of opinion that the judgment which Pickford, J. has arrived at is correct. I desire to express no opinion on the last point which Vaughan Williams, L.J. has mentioned—namely, whether this is or is not a piracy in the abstract. I neither express dissent from, nor do I express assent to, his proposition, and I should like to consider it further when the question arises. It is a subject with which I am not at all familiar. To my mind the question which we have to consider here is whether in this policy the word "piracy," contrasted as it is with "riots, civil commotions, hostilities, or warlike operations, whether before or after declaration of war," can possibly be extended so as to comprehend within it such acts and misdeeds as the learned judge has found were taking place on the borders of Bolivia and Brazil. It is quite plain, when one considers the acts named, that they run on a sort of narrow border line, and that some of the acts might easily be described under the head of some of the others. One can see very well that there may be hostilities by pirates, and there may be riots by pirates, and so on, but a hard-and-fast line here is drawn so as to insure against piracy, and the company is also expressly exempted from liability in respect of other things named. This really answers the argument founded on the "all other perils" clause, which is a clause the generality of which is restricted, as is pointed out in rule 12 of the rules for the construction of policies contained in the 1st schedule to the Marine Insurance Act 1906, and which includes only perils similar in kind to the perils specifically mentioned in the policy. It is impossible under any rule of construction to hold as included in a class brought in *ejusdem generis* with a specific subject-matter other acts or things which are actually specified in the document itself as included in another category. However it might be if there were no such specifically excluded category, it is impossible on the face of the express terms of that category to say that any act therein included can be brought in under general words as *ejusdem generis* with the particular acts. That being so, the only thing remaining is to consider whether the acts which the learned judge has found do or do not come within the words "riots, civil commotions, hostilities, or warlike operations, whether before or after declaration of war." I do not desire myself to put it on any ground which could suggest that there was anything approaching war or belligerency in the sense of there being two hostile States. I do not think that is in the least necessary. The facts show that the piece of land in question which had been delimited to Bolivia on paper in 1867 had never been effectively occupied till 1898, but had been in the tenure and in the enjoyment of a number of Brazilians and was subject to Bolivia. When the Bolivian army advanced towards the spot, the Brazilians moved over the frontier into their own country, and they there attempted to make the life of the Bolivian army intolerable in the piece of land which they had had in occupation, and they did this in Brazil itself by what I can only call stirring up civil commotion. It really was as much a revolution against their own Government, which had made the delimitation, and which was giving effect to it, as it was against Bolivia, who had taken over the territory which under the bargain Brazil had given them. What Professor Mountague Bernard, a great authority on this subject, says on p. 91 of his book, the Neutrality of Great Britain during the American Civil War, in a note which sums up a variety of other matters, is this: "Civil war is never formally declared; it becomes such by its accidents, the number, power, and organisation of the persons who originate and carry it on. When the party in rebellion occupy and hold in a hostile manner a certain portion of territory, have declared their independence, have cast off their allegiance, have organised armies, have commenced hostilities against their former Sovereign, the world acknowledges them as belligerents, and the contest as a war." The incidents come about long before you know the first serious step has been taken, and, as the learned author points out, you may commence by a riot and follow it up by civil commotion, and to my mind this is the stage at which these incidents had arrived. Had the rest of the Federated States which adjoin this strip of vacant land joined with the particular adventurers, it might have very well developed into a civil war. I think, myself, it is plain that it is within the words "civil commotion," and that brings it within the express terms of the exception. I think, therefore, the judgment of Pickford, J. was quite right.

KENNEDY, L.J.—In this case the learned judge trying it as a judge and a jury has decided both law and fact, and I cannot find, having regard to the very careful and able arguments that have been addressed to us, any ground for saying that he was wrong either in law or in fact. The policy here, and the only one with which this appeal is concerned, though there were two at the trial, is a policy of insurance upon: "Goods and (or) merchandise . . . belonging to the Bolivian Government . . . by vessel called the *Labrea* . . . at and from Para to Puerto Alonzo, and (or) other places on the river Acre and (or) in that district." The policy upon its face in regard to both the port of departure and the port of arrival is a riverine policy for the carriage of goods, not by sea, but by river in the sense in which that word is commonly used, Para being the port at the mouth of the Amazon, which is a large river, very large indeed at that point, and no doubt narrower upwards, but I believe for thousands of miles, certainly for hundreds, it is one of the largest, if not the largest, river in the world. None the less, the persons who entered into this contract on behalf of the insurance company were accepting an insurance which they knew to be a riverine insurance in respect of a voyage in which at no part does the vessel go to the high seas, and though I suppose there would be a point at Para of union of sea and river, it being an estuary, at the very

point of starting, and higher up for a mile or two, yet the place in question was not merely up the river itself, but on a tributary of a tributary of the river.

The word upon which the action turns is the word "piracy," and I, speaking to the best of my judgment for myself, think that the view which my brother Pickford was prepared to take, though he clearly refrained from deciding it—namely, that it might be a loss by piracy under this policy, if it was covered, though it was not on the open sea, and not within the jurisdiction of the Admiralty—was right, and that the mere fact that the seizure took place on a river would not prevent the insurance company from being held liable. It cannot be said that piracy meant something which can only happen during a voyage on the high seas, and, as is clear upon the arguments which were referred to and the judgments which have been cited, piracy is a word which is open, at any rate, to various shades of differences of meaning. Even as a legal term, strictly used, it may be used differently when looked at from the point of view of the international lawyer or from the point of view of the criminal lawyer. This is a policy made here in London, in respect of a river transit, and I think, in construing its terms, that whatever shade of meaning would make them applicable to this policy ought to be taken as the meaning which should be applied in construing the policy. The policy would, as regards the word "piracy," have a meaning in that case which would be deprived of all effect unless the interpretation that Pickford, J. has said if necessary he should take to be correct for the purposes of this case is the right one. Now, I do not at all myself mean to indicate that I differ from the view which has been taken and expressed by Mr. Carver at sect. 94 of his invaluable work on the Law of Carriage by Sea—namely, that piracy, it is generally true to say, is forcible robbery at sea, whether committed by marauders from outside the ship, or mariners, or passengers within it. The essential element, however, is the voluntary dispossessing of the master and afterwards carrying away the ship itself, or any of the goods, with felonious intent. That the word "piracy" meant piracy at sea, to my mind, is one of those things which for the purposes of this policy I am content to say is not the view of the term which the assured or insurers must be taken to have had in mind, because it could not apply to this particular voyage. Now, assuming that is so, the question remains as to what was done in this case. But before we get to what was done, as has already been pointed out by Vaughan Williams, L.J. and Farwell, L.J., no doubt the judge must direct himself, if he is sitting alone, as to what piracy means, and as to how he is to regard the piracy in the case of the particular contract with which he is concerned.

Piracy has been regarded by my brother Pickford, I think, from the right point of view, as a word which, so far as it is to be treated as a matter for legal construction, has to be treated as a word in the sense in which such a word would be construed in a business document of this kind by business men, and I think, from that point of view, what he has said is correct. Certainly I find nothing to quarrel with in it when he says that that business sense would be the sense in which a man would understand it when speaking of a person as a pirate plundering indiscriminately for his own ends, and not a man who is simply operating upon the property of a particular State for such ends. I will not say more than that. In this case the end that these people were labouring for and endeavouring to achieve was the taking of the goods out of this ship, the *Labrea*. If there had been a jury I am not myself prepared to say that it would have been wrong to have got at this business meaning, as Pickford, J. calls it, in a business document by asking the question of the jury. While, of course, it is for the judge to construe the document, it is, or may be, and often is in mercantile cases, within the province of the jury, where there are special terms of a business nature and having possibly special business meanings, to give the judge the benefit of their findings as to the meaning of a particular term, and if it has (and if there is evidence to support it) a special business meaning. The judge has to construe the contract. A special word or trade term in that contract may be properly left to the jury. In this case the learned judge has asked himself the question as he tells us, and he has given an answer which I think myself entirely fits the facts. To my mind, to speak of these people, however wrong they may be, however lawless they may be, as regards the laws of Brazil, as pirates in this policy is, to my mind, without using a more forcible word, fantastic, and is an argument which certainly seems to be an entire misuse of terms when it says that what these people were doing was, as Vaughan Williams, L.J. has put it in one word, filibustering. They took out the cargo in order to carry out their political venture in the other country. I do not believe that any business man would say that in this document and in this contract when the word "piracy" is used it means that which comes much more nearly under the capture and seizure definition. Civil commotion or hostilities for warlike operations is not work done by pirates for the purposes of this policy. For that reason, therefore, I do not think one need express an opinion as to those cases which are certainly covered by Mr. Carver's definition to which he refers in the note, such as *Nesbitt* v. *Lushington* (*sup.*) and *Palmer* v. *Naylor* (*sup.*). He covers it in his own statement of the law by saying that: "Piracy is forcible robbery at sea, whether committed by marauders from outside the ship or by mariners or passengers within it." The matter may possibly have to be reconsidered further, but I think myself that the appellants in this case have gone further than I should at any rate be prepared to go. Considering the policy of insurance in regard to piracy, I think it did not create any right in all nations, so to speak, to treat the persons in question here as pirates, as *hostes humani generis*, but be that as it may, and assuming that the full statement of the law covers all cases of marauding from without, and all cases of risings within, here I should say that it would clearly cover the present case, because it might have been their express purpose to loot the vessel and carry her off. Whether that be a safe general statement or not, I am clearly of opinion in this particular case that the learned judge has given the right judg-

ment on the facts, and also that he is right on the law.

Appeal dismissed.

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

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

Saturday, Feb. 13, 1909.

(Before FARWELL AND KENNEDY, L.JJ.)

STEAMSHIP NEW ORLEANS COMPANY LIMITED *v.* THE LONDON PROVINCIAL MARINE AND GENERAL INSURANCE COMPANY LIMITED. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Practice—Marine insurance — Preservation and inspection—Ship stranded out of jurisdiction—Constructive total loss—Action on policy—Order to bring subject-matter of action to United Kingdom—Jurisdiction of court—Discretion—Order L., rr. 1, 3.

Where shipowners claimed in an action as for a constructive total loss under a policy of marine insurance, the underwriters applied under Order L., rr. 1, 3, *for an order that the ship might be brought to the United Kingdom at their risk and expense.*

Held (reversing the decision of Bray, J.), that the court had jurisdiction to make the order, and that the order should be made.

APPEAL by the defendants against an order made by Bray, J. on the 1st Feb. 1909.

The plaintiffs were the owners of the screw steamship *New Orleans* of 3515 tons gross and 2262 tons net, built in 1901, and were interested to the amount of 1000*l.* under a policy of marine insurance for that amount dated the 28th April 1908 on the hull, materials, machinery, and boilers of the steamship.

The defendants subscribed the policy for the sum of 1000*l.*

The following were the particulars of the policy: (1) The steamship, her hull, materials, machinery, and boilers were valued at 28,000*l.* (2) The time during which the steamship was insured was for twelve calendar months from the 26th April 1908 to the 25th April 1909, both days inclusive. (3) The premium was 6*l.* per cent. (4) The perils insured against included perils of the seas.

In addition there were insurances to the amount of 18,000*l.* on disbursements against total loss. There were further insurances on freight. The cargo of phosphate which was on board her was insured for 9650*l.*

About May last year the *New Orleans* was on a voyage from the Ocean Islands to Hamburg laden with a cargo of phosphate, on or about the 14th May she stranded at Pula Laut off Borneo. A contract was entered into by the Salvage Association on behalf of the underwriters with the Nordischer Bergungs Verein for the salving of the steamer. The vessel was floated on the 10th Aug. and proceeded to Singapore in tow where she arrived on the 31st Aug. and was dry docked on the 4th Oct. By reason of such stranding, which constituted a peril of the seas the steamer was very seriously injured. Notice of abandonment was given on behalf of the plaintiffs to the defendants.

On the 18th May the plaintiffs claimed 1000*l.*, being the amount due under the policy of insurance, together with interest as for a constructive total loss.

The defendants applied to Bray, J. for an order that the steamship *New Orleans* might be brought to the United Kingdom and the cargo delivered to the consignees or alternatively that the Salvage Association be authorised, without prejudice to all questions between the plaintiffs and defendants and other underwriters on ship and freight to bring the vessel to the United Kingdom with the cargo on board at their risk and expense, and deliver the cargo to the consignees, the Salvage Association receiving the freight payable on delivery of the cargo, and paying all expenses of the voyage and accounting to the proper parties for the balance of freight (if any). This application was based on Order L., rr. 1, 3.

Order L. r. 1. When by any contract a *primâ facie* case of liability is established, and there is alleged as matter of defence a right to be relieved wholly or partially, from such liability, the court or a judge may make an order for the preservation or interim custody of the subject matter of the litigation, or may order that the amount in dispute be brought into court or otherwise secured.

Order L. r. 3. It shall be lawful for the court or a judge upon the application of any party to a cause or matter, and upon such terms as may be just, to make any order for the detention, preservation, or inspection of any property or thing, being the subject of such cause or matter, or as to which any question may arise therein, and for all or any of the purposes aforesaid, to authorise any persons to enter into or upon any land or building in the possession of any party to such cause or matter, and for all or any of the purposes aforesaid to authorise any samples to be taken or any observation to be made or experiment to be tried which may be necessary or expedient for the purpose of obtaining full information or evidence.

Bray, J. said he had no jurisdiction to make the order and refused the application. The defendants appealed.

T. E. Scrutton, K.C. (*F. D. Mackinnon* with him) for the defendants.—Singapore is a very expensive port at which to have repairs effected. The Tanjong Pagar Dock Company, stated that they would not be willing to execute permanent repairs at less than 26,100*l.*, and that the necessary material for the work was not available there and would require to be specially sent out from this country. The affidavits filed on behalf of the defendants show that the vessel could be repaired in England for 13,000*l.* to 15,000*l.*, and that temporary repairs sufficient to enable the vessel to complete the voyage with the cargo on board could be done at a cost of 2300*l.* The plaintiffs say that the cost of repairs at Singapore would be about 17,000*l.*, but that if the ship were brought to this country, the cost of such repairs would amount to 20,000*l.* The defendants who act for all the underwriters, both of ship cargo and freight say they are entitled to an order empowering them to bring the ship home at their risk and expense, and they have the consent of the cargo-owners

(*a*) Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.

in making this application. It is therefore for the preservation of the property that this order ought to be made:

Strelley v. *Pearson*, 43 L. T. Rep. 155; 15 Ch. Div. 113.

The ship ought also to be brought home for inspection to this country which is, "The only place where its inspection could be of any use": (per A. L. Smith, L.J. in *Chaplin* v. *Laing*, 78 L. T. Rep. 410; *sub nom. Chaplin* v. *Puttick* (1898) 2 Q. B. 160, 162).

Adair Roche for the plaintiffs.—It has not been suggested that the ship is to be repaired when she comes home, but only that she is to be inspected. There is no evidence that she would deteriorate more rapidly by lying at Singapore than in this country. The facts are that by the 30th Oct. everything had been done to put the ship in the position in which she is now. No ground has been shown that the ship would be better preserved by coming to this country. The voyage would be attended with serious risk, whereas if the ship is repaired at Singapore she would at once be able to earn a remunerative freight. The plaintiffs say that as prudent uninsured owners they would not run the risk of bringing her home. The actual inspection of the ship is not necessary to get tenders for repairs. The defendants have had a survey made by their own surveyor at Singapore, and they can get tenders on that survey.

FARWELL, L.J.—In this case Bray, J. has not expressed any opinion as to the exercise of his discretion on this matter, but has declined to make the order on the footing that he has no jurisdiction under Order L., rr. 1 and 3. I consider that that is taking too narrow a view of the rules. I think the matter may be put on both the ground of preservation and the ground of inspection, and that the two authorities cited by Mr. Scrutton are authorities in support of that. Mr. Scrutton's clients take the whole of the risk. They propose to bring the vessel home without prejudice to any question that may arise at the trial. To my mind, on the statements that we have had from Mr. Scrutton, that is very much to the advantage of all parties. I have been puzzling my mind as to why it is that Mr. Roche's clients should object. It appears to me that they are afraid of the effect of the evidence upon their claim which may be afforded by the fact that the ship has been enabled to get home. That seems to be a reason rather in favour of bringing the ship home, if somebody is willing to take the risk of bringing her home, than a reason against it. It is an application of the very ancient maxim, *solvitur ambulando*. There seems to be no reason why she should not be brought home if Mr. Scrutton's clients will take the risk of bringing her home, and Mr. Roche's clients are put in no sort of difficulty or risk whatever by its being done. Further, on the question of inspection of the vessel I think if there is jurisdiction to order a chattel to be sent out of this country to South Africa as the Court of Appeal held in *Chaplin* v. *Puttick* (*sup.*) for the purpose of inspection there, *à fortiori* it is within the jurisdiction of the court to order a chattel—namely, a ship to be brought here for trial. I think it is plain that the inspection here will assist at the trial. On those grounds I think the order ought to be made, and I think the terms of it will need a little consideration. I think it is a good suggestion that Bray, J., having doubted his jurisdiction, the matter should go back to him with our views as to the jurisdiction and let him settle the exact form of the order.

KENNEDY, L.J.—I agree, and I only wish to add this to the remarks Farwell, L.J. has made. There seems to be really in the minds of those who instruct Mr. Roche some fear that they might be prejudiced, because it might be said that this vessel can be safely navigated with repairs, and therefore she is not a constructive total loss, and it will be argued that, although no prudent uninsured owner would take the risk of sending her to Europe, nevertheless she has arrived here, and it might be assumed that this experiment somehow or other prevents the jury from considering that which they no doubt ought to consider—namely, whether a prudent uninsured owner would take this voyage and repair the ship and navigate her or not. To my mind this is an order of the court for a special purpose made upon special terms at the risk of the underwriters, and I do not think that there is the least danger of any unfairness whatever arising, but rather, I should say, there would be if anything the advantage of knowing what in fact the vessel can do as a test of some of the evidence which is commonly given in these cases.

Appeal allowed.

The matter having been settled by agreement between the parties, it became unnecessary to apply to Bray, J. to settle the exact form of the order.

Solicitors for plaintiffs, *Downing* and *Handcock*.

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

HIGH COURT OF JUSTICE

KING'S BENCH DIVISION.

Tuesday, Jan. 26, 1909.

(Before LORD ALVERSTONE, C.J., BIGHAM and WALTON, JJ.)

GENOCHIO (app.) *v.* STEWARD (resp.). (*a*)

Life-saving appliances—Rules of Board of Trade—Rule requiring life-belt "for each person on board"—Persons on board other than crew—Ship "proceeding on voyage or excursion"—Merchant Shipping Act 1894 (57 & 58 *Vict. c.* 60), *ss.* 427-430.

The rule of the Life-Saving Appliances Rules made by the Board of Trade under sect. 427 *of the Merchant Shipping Act* 1894, *as to steamships not certified to carry passengers and employed solely in the coasting trade, requiring that such ships should carry life-belts "so that there may be one for each person on board the ship," is not confined to providing a life-belt for each one of the crew on board, but requires a life-belt for each person on board the ship whether such person is one of the crew or not.*

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

A British ship, not certified to carry passengers and employed solely in the coasting trade, with a crew of seven and twenty-seven other persons on board, proceeded from a port to another vessel which was lying also within the limits of the port. She had on board seven life-belts, and no more.

Held, that the ship was, under the rule, bound to have on board one life-belt for each of the thirty-four persons on board; and, further, that she was "proceeding on a voyage or excursion" within the meaning of sect. 430 of the Act, and that the master was liable to a penalty for not having a life-belt for each person on board.

CASE stated by justices for the borough of King's Lynn, in the county of Norfolk. At a court of summary jurisdiction held at King's Lynn on the 5th Oct. 1908 an information was preferred on behalf of the Board of Trade by Henry Genochio (the appellant), collector of customs and superintendent of mercantile marine at the port of King's Lynn, against George Steward (the respondent), master of the British steamship *Swift*, of Ipswich, for an offence against the Merchant Shipping Act 1894, ss. 428 and 430, and also against the Life-Saving Appliances Rules, division D, class 3, made under sect. 427 of the aforesaid Act.

The information was heard and determined by the justices, and they dismissed the complaint and information.

The appellant was the collector of customs and superintendent of mercantile marine, an officer of the Board of Trade at the port of King's Lynn, and the respondent was the master of the British steamship *Swift*, of Ipswich, in the county of Suffolk.

The information laid by the appellant charged that the respondent, being master of the British steamship *Swift*, of Ipswich, did within six calendar months last past, to wit, on the 15th July 1908, at or about the hour of 6.30 o'clock in the afternoon, at the Alexandra Dock pier-head, in the river Ouse in the port of King's Lynn, fail to provide on the steamship *Swift*, or to see that the steamship *Swift* was provided with, sufficient life-saving appliances in accordance with the Life-Saving Appliances Rules, and, further, on the said 15th July 1908 allowed the steamship *Swift* to proceed to sea on a voyage without being provided in compliance with the said rules, contrary to the form of the statute in such case made and provided, namely, sects. 428 and 430 of the Merchant Shipping Act 1894 (57 & 58 Vict. c. 60), and also against the Life-Saving Appliances Rules, division D, class 3, made under the 427th section of the Merchant Shipping Act 1894.

At the hearing of the information before the justices it appeared that the steamship *Swift* was a British steamship registered in the port of Ipswich; that she was engaged in the coasting trade; that she was not certified to carry passengers; that she was lying at the Alexandra Dock pier-head, in the river Ouse, in the port of King's Lynn, on the 15th July 1908, and that the respondent was at that time master of the steamship; that at or about 6.30 in the afternoon of the same day there were on board the steamship *Swift* seven life-belts and no more, and that at or about the same time there were on board the steamship thirty-four persons, being her crew of seven men, the captain and chief engineer of the steamship *Huron*, two women, one child, and twenty-two other men, making thirty-four persons in all; and that the steamship *Swift*, having thirty-four persons as aforesaid aboard, and having no more than the seven life-belts, proceeded from the pier-head aforesaid for the Lynn Roads, where the steamship *Huron* was lying waiting to be lightened, and that the *Huron* was then lying in the Lynn Roads, within the limits of the port of King's Lynn, being at the mouth of the river Ouse, and about twelve miles from the pier-head.

By sect. 427 of the Merchant Shipping Act 1894 it is enacted as follows:

(1) The Board of Trade may make rules (in this Act called Rules for Life-Saving Appliances) with respect to all or any of the following matters, namely: (*a*) The arranging of British ships into classes having regard to the service in which they are employed, to the nature and duration of the voyage, and to the number of persons carried; (*b*) the number and description of the boats, lifeboats, life rafts, life jackets, and life buoys to be carried by British ships, according to the class in which they are arranged and the mode of their construction, also the equipment to be carried by the boats and rafts and the methods to be provided to get the boats and other life-saving appliances into the water, which methods may include oil for use in stormy weather; and (*c*) the quantity, quality, and description of buoyant apparatus to be carried on board British ships carrying passengers, either in addition to or in substitution for boats, lifeboats, life rafts, life jackets, and life buoys. (*d*) All such rules shall be laid before Parliament so soon as may be after they are made, and shall not come into operation until they have lain for forty days before both Houses of Parliament during the session of Parliament, and on coming into operation shall have effect as if enacted in this Act.

Under the provisions of sect. 427 of the Merchant Shipping Act 1894 certain Life-Saving Appliances Rules were made by the Board of Trade, and a copy of the rules, duly sealed with the seal of the Board of Trade, was produced before the justices and accepted in evidence, and was appended to and formed part of this case, as was also a certified copy of the vessel's register, showing her to be a British ship.

In these rules, according to the provisions of sect. 427, sub-sect. 1 (*a*), of the Merchant Shipping Act 1894, British ships are divided into classes with regard to the services in which they are employed, and to the nature and duration of the voyage, and to the number of persons carried. The rule applying to steamships not certified to carry passengers and employed solely in the coasting trade is as follows:

Life-Saving Appliances Rules—Division D, class 3.—Steamships not certified to carry passengers, and employed solely in the coasting trade. (*a*) Ships of this class shall carry one boat of sections (A), (B), or (C), so fitted that it can be readily put out on either side of the ship, and amply sufficient to carry all the persons on board. (*b*) They shall carry two approved life buoys. (*c*) They shall carry life-belts, so that there may be one for each person on board the ship.

The Merchant Shipping Act 1894 also provides:

Sect. 428. It shall be the duty of the owner and master of every British ship to see that his ship is provided, in accordance with the rules for life-saving appliances, with such of those appliances as, having regard to the nature of the service on which the ship is

employed, and the avoidance of undue incumbrance of the ship's deck, are best adapted for securing the safety of her crew and passengers.

Sect. 430 (1). In the case of any ship—(*a*) If the ship is required by the rules for life-saving appliances to be provided with such appliances and proceeds on any voyage or excursion without being so provided in accordance with the rules applicable to the ship; or (*b*) if any of the appliances with which the ship is so provided are lost or rendered unfit for service in the course of the voyage or excursion through the wilful fault or negligence of the owner or master; or (*c*) if the master wilfully neglects to replace or repair on the first opportunity any such appliances lost or injured in the course of the voyage or excursion; or (*d*) if such appliances are not kept so as to be at all times fit and ready for use; then the owner of the ship (if in fault) shall for each offence be liable to a fine not exceeding one hundred pounds, and the master of the ship (if in fault) shall for each offence be liable to a fine not exceeding fifty pounds. (2) Nothing in the foregoing enactments with respect to life-saving appliances shall prevent any person from being liable under any other provision of this Act or otherwise to any other or higher fine or punishment than is provided by those enactments, provided that a person shall not be punished twice for the same offence.

It was contended by counsel for the respondent: (*a*) That there was no evidence that the steamship *Swift* "proceeded on a voyage," within the meaning of the 430th section of the Act; (*b*) that on a true construction of the Life-Saving Appliances Rules, read in conjunction with the sections of the Act under which they were made, it was only required that there should be one life-belt provided for every member of the crew and passengers, and that there was no evidence that those on board other than the crew were passengers; (*c*) that no offence under the Act was established, because (1) the said persons were not passengers, and (2) the trip was not a voyage.

It was contended by counsel for the appellant: (*a*) That if there were any ambiguity in the wording of the sections of the Act, that section which comes last should prevail, and the rules have had given to them by the Act itself the force of the Act; (*b*) that the rules definitely enjoin that there shall be provided and carried a life-belt for every person on board, whether passengers or crew, and that, even if it were material to consider the status of the persons on board the *Swift*, they were "passengers" within the meaning of the 428th section of the Merchant Shipping Act 1894; (*c*) that the steamship *Swift* on the 15th July 1908 "proceeded on a voyage," within the meaning of the 430th section, when she cast off from the pier-head.

After both counsel had addressed the court, counsel for the respondent, in reply to a question by one of the magistrates, said that for the purposes of his argument the justices might take it that the steamship *Swift* was proceeding to the steamship *Huron*.

The attention of the justices was called to the cases of *Mayor, &c., of Southport* v. *Morris* (68 L. T. Rep. 221; (1893) 1 Q. B. 359) and *Hedges* v. *Hooker* (60 L. T. Rep. 822; 6 Asp. M. C. 386).

The opinion of the justices on hearing the evidence was that upon a true construction of sects. 427, 428, and 430 of the Merchant Shipping Act 1894, and the Life-Saving Appliances Rules made in pursuance thereof, the steamship *Swift* was on the 15th July 1908 on leaving the dock pier-head provided with sufficient life-saving appliances, having regard to the nature of the services in which she was then engaged; that the twenty two men, the captain and chief engineer of the steamship *Huron*, two women and one child, then on board the *Swift*, were neither passengers nor members of her crew, and that therefore it was not required that the vessel should be provided with a greater number of life-belts than was sufficient for her crew—namely, seven; that the steamship *Swift* did not then proceed on a voyage or excursion within the meaning of sect. 430 of the Merchant Shipping Act 1894; and they therefore dismissed the case.

The question for the opinion of the court was whether upon the above statement of facts the justices came to a correct determination and decision in point of law.

Sect. 4 of the Merchant Shipping Act 1906 (6 Edw. 7, c. 48) provides:

> Sects. 427 to 431 of the principal Act [the Act of 1894] relating to life-saving appliances shall, after the appointed day, apply to all foreign ships while they are within any port of the United Kingdom as they apply to British ships: Provided that His Majesty may by Order in Council direct that these provisions shall not apply to any ship of a foreign country in which the provisions in force relating to life-saving appliances appear to His Majesty to be as effective as the provisions of Part 5 of the principal Act, on proof that those provisions are complied with in the case of that ship.

Sir *Samuel T. Evans* (S.-G.) (*B. W. Ginsburg* and *Rowlatt* with him) for the appellant.—The Board of Trade consider the point an important one from the public point of view, and the Board say that, in accordance with the rules, the *Swift* ought to have had one life-belt for every person on board—in all, thirty-four life-belts. The *Swift* was a steamship of some size, and apparently belonged to persons who were the consignees of a cargo which was being brought to King's Lynn by the *Huron*, and the *Swift*, besides her own crew, was carrying several persons to lighten the *Huron*. Sect. 427 gives power to make these rules. It is not suggested that they are *ultra vires*, but it is said that they do not apply. Sect. 430 is the important section. We submit that the ship was required to have a life-belt for every person on board, and, further, that she "proceeded on a voyage or excursion" without having these appliances, and that therefore the master was liable to a penalty. The rule expressly requires this class of ship to carry life-belts so that there may be one for each person on board. It cannot be contended that "each person on board" means "each passenger on board." The rule for steamships having passenger certificates is the same as to life-belts. They are [division A, class 3 (*f*)] to carry approved life-belts "so that there may be at least one for each person on board the ship." That means for everybody on board the ship, whether they are crew, or passengers, or any other persons. The life-belts are not limited to crew and passengers. Division A, class 4, contains the rule for foreign-going steamships not certified to carry passengers. They are to carry—under heading (*b*)—approved life-belts so that there may be one "for each person carried on board the ship." Then there are rules for emigrant foreign-going steamers, and for steamships not certified to carry passengers plying

anywhere within the home trade limits, where there must be at least one life-belt "for each person carried on board the ship." In all these rules, although in the case of passenger steamers there are various appliances in the way of buoys and life-belts, in the case of all vessels they require that a life-belt for each person on board should be provided. The word "person" has been advisedly used, so that whenever there are any number of persons on board, that ship shall have a life-belt for each person. Sometimes the words are "for each person on board," and sometimes "for each person carried on board"; but the distinction is not as to whether the ship carries passengers or not, as in some cases of passenger ships the word "carried" is left out. The rule is perfectly clear, and it is not suggested that it is one which the Board of Trade were not entitled to make, and it is not necessary to refer to decisions upon other Acts, or other parts of this Act, as to who is a "passenger" and who is not. Secondly, the vessel was "proceeding on a voyage or excursion." Those words in sect. 430 are of the widest possible kind, and if she was not so proceeding it is impossible to say what she was doing.

Horridge, K.C. (*E. A. Harney* with him) for the respondent.—What the Act means is that there is a duty on the part of the shipowner to make provision for the safety of the crew and passengers. It is in the nature of a permanent provision, and has to be made before the ship sails and with regard to future use. The shipowner cannot get a life-belt because an extra person comes on board. It is an appliance which has to be certified by the Board of Trade as an appliance to be carried. If the ship is a passenger ship, then it has a passenger certificate to carry so many passengers, and if the ship carries more than the certified number, the owner is liable to be proceeded against. In that case he knows how many life-belts to provide, namely, for the crew, and passengers. If the ship does not carry passengers, then he must have life-belts for all the crew, and if he takes passengers he may be summoned for taking passengers without a licence. The obligation upon the shipowner does not, under these sections, having regard to the authorities, impose any duty on him to provide life-belts except to those classes of persons. These twenty-seven persons were neither crew nor passengers. It is true they were on board, but they were not "persons on board" within the section. Those words must be construed in conjunction with the word "carry," and these persons were not "carried" within the meaning of sect. 427, which gives power to make rules with regard to the number of persons "carried." It means carried under some contract or obligation to carry. Sect. 428 makes that clear. It imposes on the shipowner the duty of providing such appliances as "are best adapted for securing the safety of her crew and passengers." The obligation therefore is to provide appliances for the crew and passengers. If the rules are to be taken literally, these persons were persons on board; but they were not persons "carried on board," and "persons on board" and "persons carried on board" are used indiscriminately. If persons come on board as mere volunteers to whom the shipowner owes no duty, then there is no duty on him to provide these appliances. The question arose in 1884 in Ireland in the case of *Reg.* v. *Divisional Justices of Dublin* (15 Cox C. C. 379), in which O'Brien, J. delivered a dissenting judgment in which he held that the meaning of "carry" in this connection was a carrying for profit, and that the idea of hire was always included in it. He said: "Persons who are on board a ship by permission are not carried in a legal sense; they are not passengers; they are licensees." That case was under the Merchant Shipping Act of 1854, but the same words are used in the same class of sections in the Act of 1894 with respect to persons carried. He held that every person on board was not necessarily carried on board in a legal sense. The judgment of O'Brien, J. in that case was followed in 1889 by Lord Coleridge, C.J. in *Hedges* v. *Hooker* (60 L. T. Rep. 822; 6 Asp. M. C. 386). Further, the question whether the ship was proceeding on a voyage or excursion was a question for the justices. The charge here was for proceeding to sea, not for proceeding on a voyage or excursion, and the case finds that the vessel was still within the port. In the case of *Hedges* v. *Hooker* (*ubi sup.*) the section under which the summons was taken out contained the same words, and the court held that the vessel was not plying or proceeding to sea. The facts as to the character of the harbour, what the vessel was going to do, and whether it was within the limits of the port, were all matters for the justices in determining whether the vessel was proceeding on an excursion or a voyage, and they found that she did not proceed on either. By the Merchant Shipping Act 1906 these rules are now extended to foreign ships that come to this country.

Lord ALVERSTONE, C.J.—In my judgment the magistrates ought to have convicted in this case. I will say a few words about the decisions under the Merchant Shipping Act of 1854, which, I think, have no real application in this case; but, even if they had, they are clearly distinguishable. This present legislation under the Merchant Shipping Act of 1894, beginning at sect. 427, is really a re-enactment, not of anything in the Merchant Shipping Act 1854, but of the provisions of the Merchant Shipping (Life-Saving Appliances) Act 1888, which was "an Act to amend the law with respect to the appliances to be carried by British merchant ships for saving life at sea." I will say nothing about foreign ships. We will deal with that question when it arises. The ship in the present case was a British ship. Sect. 3 of that Act of 1888 gave the Board of Trade power to make rules as to life-saving appliances; and sect. 4 provided that if a ship proceeded to sea except in accordance with those rules there should be certain penalties incurred. Therefore, although we may be guided by any decisions under the Act of 1854, which laid down some principle, the important question is, what is the meaning of the rules made under the Act of 1894. The framers of these rules have, in my opinion, obviously known of these previous decisions. There was a decision in the year 1884, in Ireland, in which the majority of the court held in *Reg.* v. *Divisional Justices of Dublin* (*sup.*) that where the owner of a tug-steamer took out on the vessel a number of persons not for payment, but gratuitously, to see fireworks, he ought to have had put up a duplicate of a passenger certificate in some conspicuous part of the ship. That

was not followed by Lord Coleridge, C.J. in *Hedges* v. *Hooker* (*sup.*), who decided that where a number of persons who had not paid anything had gone on a vessel from Ipswich on a trip down the river Orwell to go to Felixstowe, and had returned to Ipswich in the evening with the party on board, that steamship was not a "passenger steamship" within the meaning of sects. 303 and 318 of the Merchant Shipping Act 1854. The whole point of those decisions under that Act was whether the ship was a passenger ship or not. Counsel for the respondent has pointed out that a ship may become a passenger ship for the purpose of being summoned and made liable to certain penalties if she carried more than twelve persons, but the decisions were only that the vessel was not a passenger steamship. In my opinion, those decisions have nothing to do with the construction of these particular rules.

These rules subdivided — as is contemplated by sect. 427 of the Act of 1894—British ships into classes. Therefore these rules have been framed with very great care, having regard to that provision. First come steamships carrying emigrant passengers; then come rules for steamships having passenger certificates. Those are division A. But then there are a number of special provisions with regard to vessels that carry passengers obviously as passenger ships. Then there are rules with regard to foreign-going ships carrying passengers, and there are rules as to steamships not certified to carry passengers, plying anywhere within the home trade limits. Then comes division D, with several classes in it, and among them the rules as to the class said to be infringed in this case. Division D, class 3, provides: "Steamships not certified to carry passengers and employed solely in the coasting trade. . . . (*c*) They shall carry life-belts so that there may be one for each person on board the ship." Counsel for the respondent is obliged to say that that either means each passenger on board under the passenger rules, or it means each member of the crew on board, because these are persons whom the owner will know are going on the ship. He declined to give to the words "persons on board" their natural meaning. I cannot see any reason why, when the Board of Trade have departed from the expression "passenger," which they thoroughly well understood, and have departed from the expression "crew," which, of course, they equally well thoroughly understood, we are not to read the words in their plain meaning—one life-belt for each person. I cannot help thinking that there was a reason for adopting the words "person on board," because if we look at "steam launches" lower down in clause 6, it says that steam launches proceeding for a short distance to sea are not to carry boats, but shall carry life-belts so that there may be one for each person on board. I can imagine a number of cases in which people on board a steam launch are not passengers on board in the technical sense of the word, and are certainly not the crew, and yet, so far as I read those rules, it is intended to provide that, unless there are substitutional or perhaps additional protections beyond one life-belt for each person, the general rule is that there shall be one life-belt for each person. I can see no reason why the words "one life-belt for each person on board" should not be so construed. Counsel for the respondent has pressed upon us that this is very hard upon the owner of the ship, because he will have to provide extra life-belts every time he takes people on board, but that obligation is not applicable to the facts of this case. He was sending out people to lighten a vessel. He could send them out by passenger steamer or by this kind of steamer. It seems to me if he chooses to send them out by this kind of steamer there is no reason why he should not provide a life-belt for each person, and in the interests of safety I do not think that the narrow construction contended for by the respondent should be put upon these words. In my opinion the Board of Trade have advisedly adopted the words "each person on board" to get rid of any difficulty about passengers or crew, and I think, therefore, that this appeal should be allowed and that there ought to be a conviction.

BIGHAM, J.—I agree. I think the provisions of the Act of Parliament and of the rules are quite clear. By sect. 427 of the Act of 1894, the Board of Trade may make rules with respect, amongst other things, to the arranging of British ships into classes, having regard to the services in which they are employed and to the number of persons carried, and further, with regard to the number of life-belts to be carried by British ships, according to the class in which they are arranged. The Board of Trade made rules and classed British ships in a number of classes and divisions from A to E, and each division was subdivided into a number of classes. This particular steamer, the *Swift*, came under division D, class 3, as a steamer not certified to carry passengers and employed solely in the coasting trade, and that rule provides, in the plainest possible terms, that such vessels shall carry life-belts so that there may be one for each person on board the ship. In this case it is admitted that there were twenty-seven people on board this ship beyond the crew, which consisted of seven. It is not sensible, in my opinion, to say that they were not on board this ship. If they were not on board the ship where were they? They were on board the ship, and it is useless to try to explain that away. By sect. 428 it is provided that the master of the ship is to see that his ship is provided in accordance with the rules with life-saving appliances. He did not, in this case, see that his ship was so provided, as is required by division D, class 3. There is only one other point taken—namely, that this vessel did not "proceed on any voyage or excursion," within the meaning of sect. 430, and therefore does not come within the provisions made by the Act of Parliament. Counsel for the respondent was quite unable to tell us on what she did proceed if she did not proceed on a voyage within the meaning of the section. Therefore I think the magistrates were wrong in this case.

WALTON, J.—It is not contended that the rule or regulation contained in division D, class 3, is *ultra vires*. It is admitted that it is a perfectly good rule or regulation under the statute, and, that being so, the only question is what is the meaning of the words "each person on board the ship." My opinion is that "each person on board the ship" means each person who is on board the ship. I cannot deal with it in any other way. The other point is whether this ship proceeded on a voyage or excursion. Whether it ought to be

called a voyage or excursion I do not know, but if it was not one it certainly was the other. I think this appeal should be allowed.

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

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

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

Feb. 17, 18, *and* 19, 1909.

(Before Bray, J.)

Rosin and Turpentine Import Company Limited *v.* B. Jacob and Sons Limited. (*a*)

Lightermen—Contract—"Reasonable precautions"—Exemption for "any loss or damage, including negligence, which can be covered by insurance"—Negligence and liability of lightermen.

The defendants agreed to lighter goods on the terms of the following clause printed on their invoices and memoranda: "The rates charged by B. Jacob and Sons Limited are for conveyance only, and every reasonable precaution is taken for the safety of the goods whilst in craft; they will not be liable for any loss or damage, including negligence, which can be covered by insurance, and the shipper in taking out the policy should effect same 'without recourse to lighterman,' as B. Jacob and Sons Limited do not accept responsibility for insurable risks."

The learned judge found that portions of the goods were damaged through the absence of reasonable precautions on the part of the defendants to prevent negligence which occasioned the damage.

Held, that as the terms upon which the goods were lightered were ambiguous, and might reasonably be read by shippers as an express promise that every reasonable precaution would be taken, they did not exempt the defendants from liability.

Commercial list.

Action tried before Bray, J. sitting without a jury.

The plaintiffs' claim was for damages for defendants' breach of contract or breach of duty as lightermen.

In June 1907 the plaintiffs were the owners of 1000 barrels of rosin on board the steamship *Æolus*, at West Woolwich Buoys. The defendants, who were lightermen, agreed to tranship the cargo from the *Æolus* to a steamer bound for Newcastle. The plaintiffs placed 565 barrels in a lighter which was moored at some buoys off Deptford, and while at her moorings the lighter was sunk at night by collision with a steamer, and the barrels in question were either lost or damaged.

The plaintiffs, by their statement of claim, alleged that the defendants were lightermen and common carriers, and that it was their duty to deliver the goods in the like order and condition in which they had received them.

The defendants pleaded that they lightered goods on the terms of the following clause, which was printed on their invoices and memoranda:

The rates charged by B. Jacob and Sons Limited are for conveyance only, and every reasonable precaution is taken for the safety of goods whilst in craft; they will not be liable for any loss or damage, including negligence, which can be covered by insurance, and the shipper in taking out policy should effect same "without recourse to lighterman," as B. Jacob and Sons Limited do not accept responsibility for insurable risks.

The plaintiffs replied that if the goods were carried on the terms alleged the damage and loss were caused by the defendants or their servants negligently and in breach of the contract failing to take reasonable precautions for the safety of the goods whilst in craft, as the craft was improperly and in breach of art. 30 of the Thames By-laws 1898, left moored at night at moorings other than the usual barge moorings and without the proper lights and appliances. They further alleged that in these circumstances the barge was unseaworthy, and that by reason of mooring where she did she had deviated from her voyage, and the defendants were therefore not entitled to rely on the exceptions in the contract.

Scrutton, K.C. and *Dawson Miller* for the plaintiffs.—The defendants had been guilty of negligence, and the clause upon which they relied did not exempt them from liability for negligence:

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

Bailhache, K.C. and *Leck* for the defendants.—The exceptions in their clause afforded the defendants protection. In *Price* v. *Union Lighterage Company* (*sup.*) it was held that although negligence was a loss commonly covered by insurance, as it was not expressly mentioned, the carrier was liable. There was no negligence on the part of the defendants by leaving the barge unattended:

Thomas v. *Brown*, 4 Comm. Cas. 186.

The two portions of the protecting clause are not inconsistent. The first part states that they would take all reasonable precautions, and the second that they would not be liable for loss or damage, including negligence, which could be covered by insurance. The words "including negligence" distinguish the present case from *Price* v. *Union Lighterage Company* (*sup.*).

Scrutton, K.C. in reply.—A shipowner was under a duty to provide a seaworthy ship and to exercise reasonable care. If he wished to exempt himself from these duties he must do so in clear and unambiguous terms. If words are used which may be misleading, or are inconsistent or even ambiguous, as in this case, the defendants are not protected:

Elderslie Steamship Company v. *Borthwick*, 10 Asp. Mar. Law Cas. 24; 92 L. T. Rep. 274; (1905) A. C. 93;

Nelson Line Limited v. *James Nelson and Sons*, 10 Asp. Mar. Law Cas. 581; 97 L. T. Rep. 812; (1908) A. C. 16.

Bray, J., after holding that there had been negligence on the part of the defendants which caused the damage, said:—That brings me to the question of the true reading of the clause in the defendants' invoice upon which they rely. It is a most difficult question. It has been clearly laid

(*a*) Reported by Leonard C. Thomas, Esq., Barrister-at-Law.

down that in these matters, if the clause is ambiguous, it is no protection. I have to see therefore whether this clause is ambiguous or not. The language of the clause is the language of the defendants, and the question is how would a shipper construe it. The defendants put in the first branch of the clause words which otherwise would have been implied, "and every reasonable precaution is taken for the safety of goods whilst in craft." That amounts to an express promise that reasonable precaution is to be taken for the safety of the goods. Then the clause continues, not saying "but notwithstanding this," but saying that the defendants "will not be liable for any loss or damage," &c. It has been contended that these words take away or limit the construction of the words that "every reasonable precaution is taken for the safety of the goods whilst in craft." It seems to me, on the other hand, that the second part of the clause destroys the first part, because it is conceded that every negligence of the owners and every one else can be covered by insurance. How am I to deal with this clause when I find express words, which are not usual, inserted, followed by the words "they will not be liable for any loss or damage, including negligence," &c.? There are two inconsistent parts of the clause. One possible construction is that the clause must be read as if it said "Every reasonable precaution is taken for the safety of the goods whilst in craft, but notwithstanding this they will not be liable for any loss or damage, including negligence, which can be covered by insurance." That involves, however, putting words in. If the words "but notwithstanding" had in fact been inserted between the two parts of the clause, I should have been in favour of the defendants, but, as, I have said, those words do not occur. Another possible reading is that the first part of the clause is to be taken as meaning that every reasonable precaution will be taken by the defendants, and that the second part of the clause exempts them from the negligence of any one except themselves. I feel myself in the same position as the House of Lords was in in the two cases that have been cited. I can come to no other conclusion but that this is an ambiguous document which might quite reasonably be read by shippers as an express promise that every reasonable precaution will be taken and that the defendants will be liable if such precautions are not taken. I therefore come to the conclusion that the defendants are responsible. They have themselves to blame; they deliberately put these words in, and they must take the consequences. There will be judgment for the plaintiffs.

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

Solicitors for the defendants, *Ballantyne, McNair, and Clifford.*

Feb. 19 *and March* 5, 1909.

(Before Bray, J.)

Rederiaktieselskabet "Superior" *v.* Dewar and Webb. (*a*)

Charter-party—Lien—Dead Freight—Demurrage—Charges.

A charter-party provided 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 all freight, demurrage, and all other charges whatsoever," and that demurrage at a certain rate should be paid "day by day as falling due."

Held, that the first clause could not be construed as conferring a lien for dead freight, and that the charter-party gave a lien for demurrage at the port of loading.

Semble, *that "charges" means sums paid in connection with the performance of duties which the ship has to perform in loading the cargo, and not necessarily charges specifically mentioned in the charter-party.*

Gardner *v.* Trechmann (1884, 15 *Q. B. Div.* 154; 5 *Asp. Mar. Law Cas.* 558; 53 *L. T. Rep. O. S.* 267) *and* Pederson *v.* Lotinga (1857, 28 *L. T. Rep. O. S.* 267) *distinguished.*

Commercial list.

Action tried before Bray, J. sitting without a jury.

The plaintiffs were the owners of the steamship *Superior*, and the defendants were bill of lading holders.

The plaintiffs claimed a declaration that they were entitled to a lien for certain sums in respect of dead freight, demurrage, charges, and payment therefor, under a charter-party dated the 27th Feb. 1907 by which the vessel was chartered to Messrs. Willenz and Co. The material parts of the charter-party were as follows:

Clause 1 provided that the *Superior* was to proceed to a safe loading-place in the port of Buenos Ayres and there load a full and complete cargo of wheat and (or) linseed in bags, and deliver the cargo at a safe port in the United Kingdom or Continent between Bordeaux and Hamburg, as per bills of lading, on being paid freight as follows: Clause 2. 15*s.* 6*d.* per ton of 2240lb. English gross weight delivered. Clause 4. Should the vessel be ordered to a direct port within the limits on signing bills of lading freight to be reduced by 1s. per ton. Clause 5. The freight shall be paid as follows—viz., sufficient cash for ship's use (if required by the master) to be supplied on account of freight at port of loading not exceeding one-third part subject to 7½ per cent. commission to cover all charges, and the balance of freight on the right and true delivery of the cargo in cash without discount. Clause 9. Charterers have the option of shipping other lawful merchandise, in which case freight to be paid on the vessel's dead weight capacity for wheat or maize in bags on this voyage at the rates above agreed on for heavy grain; but ship not to earn more freight than she would if loaded with a full cargo of wheat and (or) maize in bags. All extra expenses for loading such merchandise over heavy grain to be paid by the charterers. Clause 12. Thirty-five running days (Sundays and holidays, strikes excepted) to be allowed the said charterers (if the ship be not sooner dispatched) for loading and the discharge to be affected according to the custom of the port. Lay days to commence the day after the master has given written notice that his vessel is discharged and ready to

(*a*) Reported by Leonard C. Thomas, Esq., Barrister-at-Law.

receive or discharge the cargo. Clause 13. Should the vessel be detained by charterers or their agents over and above the said laying days demurrage shall be paid to said master at the rate of fourpence per net register ton for each and every day's detention afterwards, to be paid day by day as falling due. Clause 16. Wharfage dues, if any, for loading to be for account of the charterers. Clause 19. 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 all freight, demurrage, and all other charges whatsoever. Clause 23. Five per cent. brokerage is due by the ship on the above freight, dead freight, and demurrage ship lost or not lost, cancelled or not cancelled, on signing this charter-party. . . .

By their statement of claim the plaintiffs alleged that written notice to the effect that the vessel was ready to load was given on the 23rd April 1907, and that, making an allowance for Sundays and holidays, the lay days expired on the 7th June; that the vessel was not dispatched by the charterers from Buenos Ayres until the 15th July, being thirty-eight days on demurrage, for which the plaintiffs claimed 791*l.* 19*s.* 8*d.* They also alleged that on the 6th July, when only 617 tons had been loaded, leaving space for 1263 tons, the master proceeded to sea in accordance with the request of the charterers; and that in these circumstances freight was payable on the dead-weight capacity of the vessel, on which, after crediting for the bill of lading freight already paid, they were still entitled to 915*l.* 13*s.* 6*d.*, or alternatively that they were entitled to the same amount as dead freight or the amount of the expense of acting upon the request of the charterers. They also claimed 255*l.* 12*s.* in respect of wharfage dues, towage, pilotage, &c., which they alleged they had paid for and at the request of the charterers. The *Superior* arrived in London on the 9th Sept., when the plaintiffs exercised their lien on the cargo for the above-mentioned sums, but the cargo was released on the defendants undertaking to be responsible for any sum not exceeding 1963*l.* 5*s.* 2*d.*, for which they might establish a right to exercise a lien.

The defendants denied that the vessel was on demurrage, and pleaded that if there was any delay in loading it was occasioned by strikes. (But the judge found as a fact there was no strike.) They further denied that they were liable in any sum for demurrage, dead freight, or charges, or to any lien for them. They also pleaded that they were not charterers or agents of the charterers, but were merely indorsees of the bills of lading to whom the property in the goods had passed.

Scrutton, K.C. (*Leck* with him) for the defendants.—The charter-party gives no lien for dead freight, which is not specifically mentioned in clause 19. There cannot be a lien for demurrage which is contracted to be paid day by day:

Gardner v. *Trechmann* (*sup.*);
Pederson v. *Lotinga* (*sup.*).

"All charges" must mean charges specifically mentioned in the charter-party.

Bailhache, K.C. (*Adair Roche* with him) for the plaintiffs.—A lien for dead freight is conferred by the words "all charges whatsoever." The word "charges" has a very broad general meaning. Sect. 494 of the Merchant Shipping Act 1894 refers to goods "subject to a lien for freight or other charges," which words clearly cover both demurrage and dead freight, and when found in a charter-party they are subject to the same construction. There may be a lien for demurrage which is payable day by day. The effect of *Gardner* v. *Trechmann* (*sup.*) is correctly expressed in sect. 668 of Carver's Carriage by Sea. In that case the freight in the bill of lading was different from that in the charter-party. In *Pederson* v. *Lotinga* the question was the distinction between demurrage at port of loading and port of discharge, but in the present case the demurrage relates to the port of loading. The word "charges" does not apply merely to charges specifically mentioned in the charter-party.

Cur. adv. vult.

BRAY, J. read the following judgment:—In this case the plaintiffs, the owners of the ship *Superior*, claimed against the defendants, the holders of the bill of lading, payment of certain sums for dead freight, demurrage, and charges for which they alleged they had a lien. When the claim was made the goods were released on the defendants giving a bank guarantee, and the question I have to determine is whether the plaintiffs had a lien, and, if so, for what sums in respect of any of the three matters. The charter-party is dated the 27th Feb. 1907, and Messrs. Willenz were the charterers. The bill of lading was dated the 14th June 1907, and admittedly contained words sufficiently wide to incorporate the provisions of the charter-party with reference to lien. I have, therefore, to look to the charter-party to see what those provisions were. No question arises as to freight. That has been paid. The first claim is for dead freight. It is admitted that the ship was not fully loaded at the port of loading, and that the plaintiffs have a good claim against the charterers for a large sum for damages in this respect. The defendants contended that no lien was given by the charter-party for dead freight at all. This depends on the true construction of Clause 19: "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 all freight, demurrage, and all other charges whatsoever." It is to be observed that dead freight is not mentioned in this clause, a very notable fact, especially having regard to the fact that it is expressly mentioned in Clause 23 of this charter But it is said that it is included under "all charges whatsoever." Now, the omission of the words "dead freight," in my opinion, raises a very strong presumption that it was not intended that there should be a lien for that, and I ought not to read "charges" as including dead freight, at all events unless that would be the ordinary and natural meaning of the word "charges." I do not think it is the ordinary meaning. The word "charges" does not, in my opinion, in its ordinary signification mean a claim for damages for breach of contract. Primarily I think it means sums which the master or the ship has had to pay; it does not mean sums which the ship is entitled to receive. Primarily, also, I think it means liquidated and not unliquidated sums. The word "charges" appears in Clause 5, and it certainly does not there mean damages which the ship would be entitled to receive from the

charterer. It is unnecessary to say what the word "charges" may mean in the Merchant Shipping Act. Used where it is in this charter-party I am clearly of opinion that it does not include dead freight. The plaintiffs' claim for dead freight therefore fails.

The next claim is for demurrage at the port of loading. That depends again on the true construction of Clause 19, and I will consider the question first apart from any authorities. That a lien is intended to be given for some demurrage is clear. Clause 13 provides for the payment of demurrage. If that provides for demurrage at the port of loading only I should be compelled to come to the conclusion that a lien was given for that, but I think it provides for payment of demurrage at the port of discharge as well. It refers to detention over and above "the said laying days" and I think clause 12 provides for lay days at the port of discharge as well as lay days at the port of loading. Demurrage therefore in clause 13 means demurrage at either or both ports. There is no separate clause for demurrage at the port of discharge and another for demurrage at the port of loading. Now, clause 19 says "all freight, demurrage," that is "all demurrage," and therefore *primâ facie* I think it includes demurrage at either port. Is there anything to show that demurrage at the port of loading is not included? It is said that there is, because it has to be paid to the master "day by day as falling due." This, it is to be observed, refers to demurrage at each port. The argument, as I understand it, is that as it has to be paid to the captain day by day it can be sued for at the port of loading, and therefore no lien is necessary, but in practice it is most unusual for it to be paid before the ship sails, and there seems no good reason why the ship should not have the security of a lien in the event of its not being paid at the port of loading. It seems to me that the intention being as expressed in clause 19 that the ship should have a lien for all demurrage and no distinction being made in the charter-party between demurrage at the port of loading and demurrage at the port of discharge, I have no right to limit the lien or to give the words "all demurrage" anything else than their ordinary signification. But two cases were cited which it was said obliged me to confine the lien for demurrage to demurrage at the port of discharge, and as they required consideration I reserved my judgment. The first of them is *Pederson* v. *Lotinga* (*sup.*). In that case one of the questions was whether the cesser of liability clause applied to demurrage at the port of loading which had accrued before the ship was loaded. It was held that the liability of the agent having attached for that demurrage he was not absolved by the clause which meant that the future liability only of the agent should cease. It is impossible to say that that case is an authority which binds me in the present case, where there is no cessor of liability clause at all. But it is said that one of the learned judges, Crompton, J., expressed an opinion which governs the present case. Now, the charter-party is not set out in full, but there are two separate clauses relating to demurrage, one with reference to loading in the Tyne, the other with reference to the unloading at Copenhagen, and Crompton, J., after reading the former, which provided for demurrage being payable day by day, says: "That is a very different clause from the demurrage clause at the port of discharge. It may be that the captain being detained in the Tyne wants his demurrage day by day. If it is to be done day by day in the Tyne, the captain has no lien on anything. The protecting clause applies only to the lien for the demurrage out."

But that, in my opinion, is not intended as a statement of any general rule of law. It is merely a statement of the particular meaning of the clause, which was in these words: "The charter-party being concluded by N. S. Lotinga, on behalf of another party, it is agreed that all liability of the former shall cease as soon as he has shipped the cargo, the owners and master agreeing to rest solely on their lien on the cargo for freight and demurrage." I can quite understand that in that case as soon as the court had held that liability meant future liability only, it might be reasonable to say that the lien should be confined to the demurrage for which the consignee would become liable in the future only. It is to be observed that none of the other three learned judges give any opinion as to what demurrage was covered by the lien. It would be most dangerous to treat an expression of opinion with reference to the construction of a particular clause in a particular charter-party as laying down a proposition of law applicable to all charter-parties where the demurrage was payable day by day, particularly when it is more than likely that the report is only a condensed report of the judgment given. Of course at most it would be only a dictum of one judge. The other case is *Gardner* v. *Trechmann* (*sup.*). In that case Lindley, L.J. in his judgment on p. 159 says: "I am also of opinion that there can be no lien for what is contracted to be paid in advance." This is relied on as stating a general proposition of law that there can be no lien for that which has to be paid in advance. When that case is carefully looked at I do not think Lindley, L.J. meant to lay down any general proposition of law. Lord Esher had decided the case on two grounds, one that as between the charterer and the shipowner there was no lien for the excess freight, and the other that if it were otherwise that provision could not be read into the bill of lading. Lindley, L.J. in the earlier part of his judgment decides the case upon the ground that the bill of lading having expressly named the rate of freight, a clause making the holder responsible for the whole charter-party freight would be inconsistent, and that only three conditions were incorporated in the bill of lading which were consistent with the contract contained in it. He then proceeds to add the words which I have quoted. I think he merely meant by that that he agreed with Lord Esher on the other point also. Looking, then, at Lord Esher's judgment, is he laying down a general proposition of law, or merely construing that particular charter-party? In my opinion he was only construing that particular charter-party.

That being so, the terms of it being quite different from those of the present case, it is no authority at all on the point which I have to decide. I have searched to see whether there is any authority for the proposition that you cannot

have a lien for a sum payable in advance or due before the time when the lien is to attach. I can find none. It is clear that under a general lien a carrier can have a lien not only in respect of freight not then earned, but for freight which has been earned and is overdue. A general lien can be given by agreement. Therefore by agreement you can have a lien for moneys overdue. It is only a question whether the particular agreement gives it or not, and I have expressed the opinion that in this case the words are wide enough to give a lien for demurrage at the port of loading, although it was payable day by day there. There was a dispute as to the amount of demurrage. First, it was said that a strike existed from the 25th April to the 13th May. Now, it is clear that that was not the cause of the charterers providing no cargo during that period. No cargo at all was provided till the 18th June, a month later. The cause was that the charterers had not got any cargo to put on board. Further, they were actually loading another ship, the *Mecca*, at the time, notwithstanding the strike. It is not easy to construe the words "strikes excepted," coming where they do, but I think it must mean strikes which in fact prevented the loading. If so, there clearly was no such strike. But was there a strike at all? The defendants have to prove that there was. So far as their own evidence was concerned, it consisted of the answer of the port master to a question put to him. The answer was: "The strike of the labourers and stevedores at the Port of Buenos Ayres commenced on the 25th April last and ended on the 13th May last of the current year. It was partial. As regards the railway strike——" and so on. He says that there was a partial strike, that is as distinguished from a general strike, and it might be merely the strike of a few men. That evidence is quite insufficient. Then the defendants rely on the letters of the captain of the 2nd May and the 11th May. No doubt they afford some evidence, but the captain was called, and said the strike only affected the labourers who were discharging, and in his remarks in his log-book there appears an entry, probably not made till later, in these words: "The strike commenced among the discharging labourers." Bearing in mind that during this period there certainly were other vessels loading, and that the charterers themselves were loading the *Mecca*, and that if there were really a strike the defendants could have obtained much stronger evidence, I cannot find that the defendants have proved that any strike existed within the meaning of the word as used in the charter-party. The defendants, however, also contended that I ought to disallow all days after the 8th, when the charterers stated that they would provide no further cargo. Up to the 10th, however, the crew were employed shifting the cargo, which was clearly a necessary work. Then the clearance had to be obtained. Apparently a more than usual time was occupied in doing this. The captain stated that he left this matter in the hands of his agents, and did not admit that there was any undue delay. The correspondence from the defendants' agents shows no complaint of delay, and there was no reason why the captain should not have got away as soon as he could. I think, therefore, I must include all days up to the 14th. I cannot include the 15th, the day she sailed. I allow thirty-seven days. The last claim was for charges. It is not necessary for me to give an exhaustive definition of the word "charges." I think they must be sums paid in connection with the performance of duties which the ship had to perform in loading the cargo, and at the same time that they are not necessarily confined to charges specifically mentioned in the charter-party. I do not think they include claims for damages. I think I must allow the first four items, also the sixth, amounting to twenty dollars, and the parties have agreed that I should allow fifty dollars out of the 100 dollars. I must disallow the rest. The amount can be calculated, and there must be judgment for that amount.

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

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

Thursday, March 25, 1909.

(Before PICKFORD, J.)

MUDIE AND CO. *v.* STRICK. (*a*)

Charter-party — "Strikes, lock-outs, civil commotions, or any other causes or accidents"— Plague—Shortage of labour—Ejusdem generis *principle.*

A charter-party contained the following clause: "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."

When the steamer arrived at the port her discharge was delayed on account of shortage of labour in consequence of an outbreak of plague followed by certain sanitary precautions. The shipowners who were plaintiffs claimed demurrage.

Held, that the delay was not occasioned by a cause or accident ejusdem generis *with strikes, lock-outs, or civil commotions, and that the shipowners were entitled to demurrage.*

Tillmanns *v.* Knutsford, 11 Asp. Mar. Law Cas. 105; 99 L. T. Rep. 399; (1908) 2 *K. B.* 385) *followed.*

COMMERCIAL LIST.

Action tried by Pickford, J. sitting without a jury.

The plaintiffs were the owners of the steamship *Matin*, and the defendants were the charterers of the vessel.

The plaintiffs' claim was for demurrage incurred on the said vessel whilst at Marmagao in India.

The material clause in the charter-party was as follows:

> 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.

At, or soon after, the arrival of the steamer at Marmagao, there was a shortage of labour caused by the fact that a considerable number of the coolies upon whom devolved the duty of discharging the ship had left the port and proceeded inland to Vasco da Gama on account of an outbreak of plague, the sanitary authorities having

(*a*) Reported by LEONARD C. THOMAS, Esq., Barrister-at-Law.

burned a good many of their houses as a matter of sanitary precaution. Delay was also caused by the fact that one of the steamers in port had discharged cargo on to the quay, which, owing to the shortage of labour, had not been cleared away. The consequence was that the *Matin* occupied twenty-two days in discharging, instead of eleven, and the plaintiffs claimed demurrage in respect of the extra eleven days.

Scrutton, K.C. (*Raeburn* with him) for the plaintiffs.—Shortage of labour has nothing to do with exceptions relating to the discharging of the ship. What happens some distance away from the port does not apply to operations connected with loading or discharging at the port. The departure of labourers on account of plague is not a "cause or accident" *ejusdem generis* with strikes, lock-outs, and civil commotions:

Stephens v. *Harris*, 6 Asp. Mar. Law Cas. 192 (1887); 57 L. T. Rep. 618;
Tillmanns v. *Knutsford*, 11 Asp. Mar. Law Cas. 105; 99 L. T. Rep. 399; (1908) 2 K. B. 385;
Fenwick v. *Schmalz*, 3 Mar. Law Cas. O. S. 64 (1868); 18 L. T. Rep. 27; L. Rep. 3 C. P. 313;
Re Richardsons and Samuel, 8 Asp. Mar. Law Cas. 330 (1897); 77 L. T. Rep. 479; (1898) 1 Q. B. 261.

The genus in this case is human instrumentality affecting labour supply. A plague is an act of the forces of nature.

Bailhache, K.C. and *Adair Roche* for the defendants.—*Stephens* v. *Harris* (*sup.*) is distinguishable, because that was a loading case in which the charterer's obligation was to have the cargo ready at the port of shipment. Here it is not a question of having the cargo ready, but discharging in a certain time. Running waggons between the two places was all part of the operation of discharging. General words cannot be construed in the mere document itself as words *ejusdem generis*. An entirely new exception is introduced by the word "accident." "Strike, lock-out, or civil commotion" could not be an accident. The *ejusdem generis* principle does not apply, but, if it does, then what happened is within it. As to whether general words are not intended to be general, very little will turn the scale:

Baerselman v. *Bailey*, 8 Asp. Mar. Law Cas. 4 (1895); 72 L. T. Rep. 677; (1895) 2 Q. B. 301, at p. 303;
Thames and Mersey Marine Insurance Company v. *Hamilton and Co.*, 6 Asp. Mar. Law Cas. 200 (1887); 57 L. T. Rep. 695; 12 App. Cas. 484, at pp. 501, 502;
Larsen v. *Sylvester*, reported in the House of Lords, 11 Asp. Mar. Law Cas. 78 (1908); (1908) A. C. 295.

They also referred to

Smith v. *Rosario Nitrate Company*, 7 Asp. Mar. Law Cas. 417; 70 L. T. Rep. 68; (1894) 1 Q. B. 174;
Hudson v. *Ede*, 18 L. T. Rep. 764;
Coverdale v. *Grant*, 4 Asp. Mar. Law Cas. 528 (1882); 51 L. T. Rep. 472; 9 App. Cas. 470.

Scrutton, K.C. in reply.—The inclusion of the word "accident" does not introduce a different genus, because it has been decided that a strike is an accident:

The Torbryan, 9 Asp. Mar. Law Cas. 358, 450; 89 L. T. Rep. 265; (1903) P. 194.

Nothing the consignee does with the cargo, except taking it out of the ship, is relevant. The shipowner is not concerned with the disposal of the cargo. This is not a "reasonable time," but a "fixed time" charter.

PICKFORD, J.—The question in this case arises on a charter of the steamship *Matin*, which was chartered to proceed to Marmagoa, and there to discharge coal. It was provided by the charter-party that the cargo was to be taken from alongside by the consignees, free of expense, but "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." When the steamer got to Marmagoa she had to deliver to the Madras and Southern Mahratta Railway Company, and they took the cargo up to Vasco da gama, which is two miles or so further up inland. During the first two days there was no objection taken as to her discharge, but it unfortunately happened that there was an outbreak of plague at Vasco da gama which was in existence at the time the vessel arrived. One of the results was that, as a matter of sanitary precaution, the sanitary officer, among other measures, burned a good many of the houses belonging to the coolies at Marmagoa, and a good many of these coolies were those who would have to discharge the vessel, with the result that there was a shortage of labour. The vessel would ordinarily discharge into trucks which would be sent up from Vasco da gama, but in consequence of the plague the coolies ran away, and there was not sufficient labour either to discharge the ship or unload the waggons so that they might be sent back again. There were also several ships unloading, and some congestion was caused by the fact that one of them unloaded on to the quay when there were no waggons to remove the cargo. The consequence was that the *Matin* took twenty-two days to discharge, instead of eleven. Now, it being a charter to discharge in what is in effect made a fixed number of days, the defendants have no defence unless they can bring themselves within the clause which I have already read, and they say they can because they are covered by the joint words "strikes, lock-outs, civil commotions, or any other causes or accidents beyond the control of the consignees." They say these words are to be taken generally in their ordinary sense, and they are not to be read in accordance with the doctrine of *ejusdem generis*, and they further say, if they are to be so read, that what happened in fact was *ejusdem generis*. The question of *ejusdem generis* is difficult because the judgments on the point are difficult to reconcile. I ought, perhaps, to have mentioned that in the charter-party there are general words followed by particular words, and as I understand the last judgment on this point of the charter-party—viz., *Tillmanns* v. *Knutsford* (*sup.*)—you have to see whether you can constitute a genus of the particular words, and, if you can, then unless there is some indication to the contrary, you must construe the general words as having relation to that genus. If you cannot do this, then, so far as I understand the judgment, you must read all the particular words separately, and take the general words separately also. The Court of Appeal in this case disapproved of what was said by Lord Esher in the

previous case of *Anderson* v. *Anderson* (1895) 1 Q. B. 749), in which he said the words were to have a general meaning, and, in order to deprive them of that general meaning, you must have something to show that the parties meant to restrict them. I think the Court of Appeal disapproved of this theory, and approved of the doctrine laid down by Maxwell on the Interpretation of Statutes, that you must approach it in the other way, and that, when you find specific words followed by general words, you must *primâ facie* refer the general words to the specific words unless you find some reason for not doing so. In this case there seems to be a genus, and it is a wide one which will include strikes, &c., and it is very similar to the one the Court of Appeal discovered in *Tillmanns* v. *Knutsford* (*sup.*). I think that is suggested by Vaughan Williams, L.J. on p. 395, where he says: "Of course, there may be a fairly wide definition of the genus if it is defined as comprising cases which present such features that the master may deem the port unsafe in consequence of actions of others making it physically unsafe to enter or discharge, whether arising in respect of war or in respect of civil disturbance; that is what I understand to have been suggested on behalf of the plaintiffs. On the other hand, it is suggested that the genus may be wider still, that it covers everything which could reasonably be considered as a cause of insecurity or presence of danger in the case of entry at the port of discharge. The objection to the latter is that in such a case the words 'or any other cause' do not appear to be wanted."

I think the genus here includes those cases where the supply of labour is restricted in consequence of the action of other persons, either because of labour troubles, which include strikes, or lock-outs or civil commotions which are very similar to riots. Now, if there be a genus of that kind, then the general words are to be referred to unless there is something to the contrary. Mr. Bailhache says they ought not, because the words "or accidents" show that they are meant to refer to something else. I think the parties were speaking of accidents as including the previous specific case mentioned, as the parties were held to be in the *Torbryan* case (*sup.*); but, as Mr. Scrutton points out, if that is not so, the defendants are in another difficulty, because in the case of strikes, lock-outs, civil commotions, or any other cause or other accidents beyond the control of the owners, the charterers are to be excused. The difficulty of that for the defendants is that this is not an accident according to the case of *Fenwick* v. *Schmalz* (*sup.*), and that leaves the words "other causes" still to be referred to the previous particular words, so that if those words are to be read in accordance with the decision in the *Torbryan* case they are accidents, and if they are not to be read in that way the shortage of labour from plague was not an accident. The only thing that is left for me to decide is whether, in construing as I did the general words as being *ejusdem generis* with strikes, lock-outs, civil commotions, or any other causes, the shortage of labour in this case was *ejusdem generis* with those three things. I do not think it was. It was not a strike or lock-out, and I do not think it was *ejusdem generis* with civil commotions. The sanitary measures no doubt contributed to the alarm, but the substantial and real cause was the plague, and the sanitary measures must be connected with the plague, and I do not think the fact that those persons were frightened constitutes anything arising *ejusdem generis* with civil commotions. On these grounds I think the plaintiffs are entitled to recover, and there will be judgment for the amount claimed with costs.

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

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

Monday, March 29, 1909.

(Before Lord Alverstone, C.J.)

Sailing Ship Lyderhorn Company Limited *v.* Duncan, Fox, and Co. (*a*)

Charter-party—Cancellation—Right to cancel if ship not ready to receive cargo on certain date—Ship ready to receive cargo as stiffening—Charterer's right to cancel.

Shipowners chartered their ship to charterers to load a cargo of nitrate of soda. By clause 4 *certain lay days were to be allowed the charterers for loading, to be reckoned from the day after the master gave notice to the charterers that the ship was ready to receive cargo, and were not to commence before the* 1*st Jan.* 1908, *and stiffening of nitrate was to be supplied as required, but not before the* 10*th Dec., on receipt of forty-eight hours' notice from the captain of his readiness to receive the same, or lay days to count; and by clause* 13, *if the vessel were not ready for loading cargo on or before the* 31*st Jan.* 1908, *the charterers were to have the option of cancelling the charter.*

On the 27*th Jan.* 1908 *the captain gave the charterers notice that he required* 700 *tons of nitrate for stiffening. The ship was then down to stiffening point, and the charterers had notice of it. The charterers refused to supply nitrate for stiffening, except at the ship's expense, and without prejudice to the charter being cancelled. The cargo then remaining on board could not have been discharged by the* 31*st Jan., and on that day the charterers under their option cancelled the charter. In an action by the shipowners against the charterers for breach of the charter-party:*

Held, on the construction of the charter-party, that the vessel was not ready on the 31*st Jan. to load within the meaning of clause* 13, *inasmuch as she was not then ready to receive cargo other than stiffening, and that the charterers were therefore justified in cancelling the charter.*

Action tried by Lord Alverstone, C.J., without a jury, at Liverpool Assizes.

The action was brought by shipowners for breach of a charter-party, dated the 15th Nov. 1907.

The statement of claim alleged as follows:

By a charter-party dated the 15th Nov. 1907, made between the plaintiffs as owners of the sailing ship *Lyderhorn* and the defendants as charterers, it was agreed that the ship should proceed to Iquique and Caleta Buena, and there receive from the defendants a full cargo of nitrate of soda. Twenty-five working lay days, to be reckoned from the day after the master should give notice in writing of readiness to load, were

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

to be allowed the defendants for loading and stiffening of nitrate was to be supplied as required at Iquique, on receipt of forty-eight hours' notice from the captain of his readiness to receive same. The charter-party also provided that in the event of the ship being detained by the defendants or their agents beyond the time specified for loading the cargo, demurrage was to be paid at the rate of 4*d.* per register ton per day. Such detention was not to exceed ten running days, and should the vessel be unnecessarily detained at any other period of the voyage such detention was to be paid for by the party delinquent at the above-named rate of demurrage. It was further provided that if the vessel should not have arrived at her loading port and be ready for loading (in accordance with the charter) on or before noon of the 31st Jan. 1908, charterers were to have the option of cancelling the charter. The *Lyderhorn* arrived at Iquique on the 13th Dec. 1907, and on the 27th Jan. 1908 the master gave to the defendants' agents written notice of his readiness to receive stiffening, and required that 700 tons of stiffening should be supplied, but the defendants, in breach of their contract, neglected and failed to supply any stiffening. The defendants also in breach of their contract refused to supply any nitrate, and on the 31st Jan. 1908 purported to cancel the charter-party. By reason of the defendants' breaches of contract the plaintiffs had suffered damage, and they claimed the sum of 1042*l.* 4*s.*, made up as follows: To difference in freight under the charter-party and a fresh charter entered into on the 6th Feb. 1908, at 3*s.* per ton on 4261 tons, the quantity delivered, 639*l.* 3*s.* To damages for detention of the vessel between the 30th Jan. and the 7th Feb. 1908, both inclusive—namely, nine days, at 4*d.* per ton per day on 2687 tons—403*l.* 1*s.* Total, 1042*l.* 4*s.*

The defendants in their defence said (*inter alia*) that it was an implied condition of the charter-party that notice of readiness to receive stiffening should be given at such a time as to make it possible that the ship should be ready to receive cargo on or before noon of the 31st Jan. 1908, or, alternatively, if such notice was not so given the defendants as charterers were entitled at their option to refuse to comply therewith. At the time when the master's written notice was given it was, in fact, impossible that the ship should be ready to receive cargo on or before noon of the 31st Jan. 1908. At noon of the 31st Jan. 1908 the ship was not ready to receive cargo, whereupon the defendants by a written notice of that date to the master exercised their option to cancel the charter-party in accordance with the terms thereof.

The facts and arguments are sufficiently stated in the judgment.

Horridge, K.C. and *G. D. Keogh* for the plaintiffs.

Sanderson, K.C. and *Leslie Scott* for the defendants.

Cur. adv. vult.

March 29.—Lord Alverstone, C.J. read the following judgment:—In this action the plaintiffs, the owners of the ship *Lyderhorn*, claimed damages from the defendants, Duncan, Fox, and Co., in respect of alleged breaches of a charter-party. The facts are not in dispute. The sailing ship *Lyderhorn* then being at Caleta Buena discharging a cargo of coal and intending to complete her discharge at Iquique, distant some forty miles, the plaintiffs entered into a charter-party, dated the 15th Nov. 1907, whereby the vessel was chartered to load at Iquique and Caleta a full and complete cargo of nitrate of soda. She arrived at Iquique on the 13th Dec. 1907, having then on board rather more than half her cargo—some 2800 tons. At Iquique vessels discharge in the roads. By the 27th Jan. 1908 she had discharged as much of her coal as could safely be unladen unless some stiffening in the way of ballast or sufficient cargo was put on board. The captain thereupon gave notice under the charter-party that he required 700 tons of nitrate for stiffening. The agents of the defendants on the 27th Jan. refused to supply nitrate for stiffening except at the ship's risk and expense, and without prejudice to the charter being cancelled. The captain on the same day replied that his vessel was ready to receive 700 tons of stiffening as per charter-party, and again demanded it, but the agents on the 29th refused to give the stiffening unless the captain would agree to redeliver it if the charter-party was cancelled. Demurrage notes were then delivered by the captain to the defendants' agents, and on the 31st the defendants' agents cancelled the charter-party, purporting to exercise their option contained in clause 13 of the charter. Freights having fallen, the vessel was, on the 6th Feb., rechartered by the defendants on a charter-party which contained similar terms, but at a rate of 13*s.* per ton instead of 16*s.*, the rate in the charter of the 15th Nov. The clauses of the charter-party which are material are the following:—Clause 1: "That the said ship shall, with all convenient speed, load at Iquique and Caleta Buena, or as near thereunto as she may safely get, and there being tight, staunch, and strong, and in every way fitted for the voyage, receive from the factors or agents of the said merchants a full and complete cargo of nitrate of soda in bags, not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, and furniture." Clause 4: "Twenty-five working lay days, the word 'working' to exclude surf days, Sundays, and all other holidays, whether ecclesiastical or civil, are to be allowed the said merchants for loading the said ship and for waiting orders abroad. Lay days shall be allowed to be reckoned from the day after the master gives notice in writing to charterers' agents that the vessel (being clear of all inward cargo or ballast, and well cleaned) is ready to receive cargo and not to commence before the 1st Jan. 1908 at the respective ports, and to cease when they give him notice in writing that he is at liberty to proceed to sea. Stiffening of nitrate to be supplied as required at Iquique but not before the 10th Dec. on receipt of forty-eight hours' notice from captain of his readiness to receive same or lay days to count. . . . In case of any dispute regarding the number of working lay days employed in loading cargo, or which could have been so employed, it shall be decided by reference to the captain of the port of loading, whose certificate shall be binding on charterers and on the captain. Time occupied in discharging ballast or in shifting ports not to count as lay days. If charterers supply cargo free alongside ship at the rate of 250 tons per working day (which quantity the master is obliged to receive) the rate of freight is to be reduced 1*s.* per ton." Clause 5: "And should the said vessel be detained by the said charterers or by their agents beyond the time before specified for loading or discharging the said

cargo in the aforesaid port, demurrage shall be paid daily to the said master, or his order, as same shall become due, at the rate of 4*d.* British sterling per register ton per day for each and every day's detention afterwards, such detention not to exceed ten running days. And should the vessel be unnecessarily detained by the master beyond the time herein specified, demurrage shall be paid by him at the same rate and in the same manner to charterers or to their agents. Should the vessel be unnecessarily detained at any other period of the voyage such detention to be paid for by the party delinquent to the party observant at the above-named rate of demurrage. Sufficient cargo to be supplied at Iquique to enable vessel to shift to Caleta Buena in safety." Clause 13: "Should the vessel not have arrived at her loading port and be ready for loading cargo (in accordance with this charter) on or before noon of the 31st Jan. 1908, charterers to have the option of cancelling or maintaining this charter, such option to be declared twenty-four hours (Sundays and holidays excepted) after notice of readiness has been received by charterers or their agents."

The point which has to be decided is whether, upon the 27th Jan., when the captain gave notice that his vessel required the stiffening, she was ready to load within the meaning of clause 13 of the charter. For the purposes of the action the solicitors for the plaintiffs and the defendants admitted that on the 27th Jan. the *Lyderhorn* was down to stiffening point, and that the defendants, or their agents, had notice of it on that day, and the plaintiffs admitted that between the time the stiffening notice had expired on the 29th Jan. 1908 and noon on the 31st Jan. the coal remaining on board at the expiration of the stiffening notice on the 29th, could not have been discharged by noon on the 31st Jan., the date and time by which the ship was to be ready to load or the charterer might cancel under clause 13. It was contended by the plaintiffs that, inasmuch as by the terms of clause 4 stiffening of nitrate was to be supplied as required at Iquique, on receipt of forty-eight hours' notice from the captain of his readiness to receive the same, and further, that time occupied in discharging ballast was not to count as lay days, the ship was ready to load in accordance with the charter when the captain gave notice on the 27th Jan. that he was ready for stiffening. It was further contended by the plaintiffs that inasmuch as both parties knew that the vessel was discharging cargo at Iquique, and would require stiffening, the ship was for the purpose of the mutual rights and obligations of the parties, ready to load when she could receive cargo, whether for stiffening or other purposes; and also that nitrate, put upon board for stiffening, was loading the vessel, the only difference being that the time occupied in loading the stiffening was not to count as lay days. It was contended by the defendants that the effect of clauses 4 and 13, taken together, was that the charterers were bound to supply stiffening at any time after the 10th Dec., but that under no circumstances were lay days to commence running until the 1st Jan., and that if the vessel was not ready to receive cargo other than stiffening, by the 31st Jan., she was not ready for loading in accordance with the charter, and that the charterers were therefore justified in cancelling the charter. The point is one of considerable difficulty. I do not think it can be successfully contended that the nitrate put upon board was not a part of loading of the ship. It was agreed that it would be discharged at the end of the voyage and that freight would be paid upon it.

On the other hand, it was contended by the defendants that under ordinary circumstances a charterer is entitled to the full reach of the holds, and of the carrying capacity of the vessel, before he can be called upon to put cargo upon board, and that therefore the supply of nitrate as stiffening, in order to enable the vessel to remain in the roads, was a provision inserted for the benefit of the shipowner, and did not deprive the charterer of his right to cancel, if the vessel was not entirely free of the outward cargo by noon on the 31st Jan. In my opinion the defendants are right, and this vessel was not ready to load within the meaning of clause 13. The charter party, by clause 4, clearly contemplates that the stiffening may be demanded as early as the 10th Dec., but that even though it be supplied demurrage days are not to commence until the 1st Jan. 1908, or, in other words, notice cannot be given that the ship is ready to receive cargo before the 1st Jan. The time occupied in discharging the part of the cargo still on board might be very uncertain; in this case it was proved that by the 20th Jan. she still had 1200 tons on board, and was not down to her stiffening point until the 27th. There is undoubtedly an obligation on the defendants to supply nitrate to take the place of stiffening afforded by the last part of her outward cargo, and the shipowner was not, under this charter, obliged to find ballast to keep his ship in a condition of safety, but it seems to me that this privilege, which might necessitate nitrate being supplied for several days while the remainder of the coal is being discharged, cannot be used to increase the burden upon the charterers, or to alter the other terms of the contract so far as they were concerned. Unquestionably while the cargo was being discharged the charterers could not have the full and free use of the ship's winches and other tackle, for the purpose of putting nitrate on board, and the nitrate must have been supplied to the ship under circumstances quite different to those which would exist when the vessel was being loaded in the ordinary course, all her cargo having been discharged. Moreover, it is to be observed that the supply of stiffening on the request of the master might be an intermittent operation. The captain might demand stiffening, if required, any day after the 10th Dec., and might wait some days until he required more, as the charterers were bound to supply nitrate for stiffening as required. The contention of the plaintiffs that the only effect of this clause was to enable the charterers to exclude from the lay days time occupied in discharging ballast, does not seem to me correct. I doubt whether under the circumstances of this case the words "time occupied in discharging ballast" have any application. That which had to be discharged was not ballast, but was outward cargo necessary for stiffening, the place of which for the purpose of stiffening was to be taken by the nitrate. Further, it seems to me that clause 4 rightly

construed, enabling the shipowner to demand stiffening on the 10th Dec., preventing his giving notice that his ship was ready before the 1st Jan. and giving him until the 31st Jan. to give the notice that the ship was ready to receive cargo, all support the view I take, that the supplying of nitrate for stiffening was not supplying cargo in the ordinary sense of the word, and that the ship being ready to receive stiffening is not the same thing as being ready for loading within the meaning of clause 13. Two authorities were cited before me; the first, the case of *Vaughan* v. *Campbell, Heatley, and Co.* (2 Times L. Rep. 33), which was relied upon by the plaintiffs as deciding that a vessel might be ready to load although she had 300 tons of ballast on board. The report is very meagre, as the terms of the charter-party are not stated, but, in my judgment, having regard to the conditions of the charter-party in this case, there is nothing in that decision which compels me to hold that in this case the supply of nitrate for stiffening is, of necessity, the commencement of the loading of the ship. The other was the case of *Groves, Maclean, and Co.* v. *Volkart Brothers* (C. & E. 309), but, in my opinion, this case only recognises the general principle, which was not disputed, that, in the absence of express stipulation, a ship to be ready to load must be completely ready in all her holds, so that the charterer may have the disposal of the whole vessel. I do not consider that these authorities can be said to lay down any principle which conflicts with the view which I have expressed. I have carefully considered the judgment in a German decision, which was cited by Mr. Horridge: it seems to me that the terms of the charter were very different, and I decide this case substantially on the construction which I put upon the charter. The words at the end of clause 5, "sufficient cargo to be supplied at Iquique to enable the vessel to shift to Caleta Buena in safety," do not seem to me to materially assist the plaintiffs, because it might well be that a vessel would require more cargo to go in safety to Caleta than would be necessary as stiffening for her safety as long as she remained in the roads at Iquique. For the above reasons I am of opinion that the vessel was not ready to load within the meaning of clause 13, and that judgment must be given for the defendants, with costs.

Judgment for the defendants.

Solicitors for the plaintiffs, *Weightman, Pedder,* and *Co.*, Liverpool.

Solicitors for the defendants, *Batesons, Warr,* and *Wimshurst*, Liverpool.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Jan. 27 *and* 28, 1909.

(Before Bargrave Deane, J. and Elder Brethren.)

The Boucau. (*a*).

Collision between ship and pier — Negligence — Onus of proof—Compulsory pilotage—Proof of negligence of pilot—Inevitable accident.

A vessel entering Workington Harbour in charge of a compulsory pilot took a sheer and collided with a jetty between the river Derwent and the harbour. The pilot, when he noticed the sheer, ordered the engines full speed astern and the order was at once obeyed, but the construction of the engines was such that it took twenty seconds to get the engines astern. There was in fact less water under the vessel than the pilot expected, as the tide did not reach the height stated in the tide table. In an action by the owners of the jetty to recover damages for injury done by the negligent navigation of the steamship:

Held, that the owners of the steamship were not liable, for they had not been guilty of negligence, and the accident was due to force majeure.

Damage action.

The plaintiffs were the Workington Harbour and Dock Board; the defendants were the owners of the ship *Boucau*.

The case made by the plaintiffs was that they were the harbour authority of Workington and the owners of a jetty named the Merchants' Quay situate at the junction of and between the river Derwent and the harbour.

On the 17th May 1908, about 11.30 a.m., the weather being fine and clear, the tide nearly high water and nearly slack, and the wind south, a strong breeze, the steamship *Boucau*, whilst making for Cammell's Wharf on the side of the harbour opposite the Merchants' Quay, negligently ran into the wooden jetty at the seaward end of the Merchants' Quay and caused damage.

The case made by the defendants was that the *Boucau*, a French steamship of 1150 tons gross and 703 tons net register, while on a voyage from Castro to Workington with a cargo of iron ore was entering Workington Harbour in charge of a duly licensed pilot. The weather was fine, there was a fresh to strong breeze, and the current was running down the river at the rate of about two to three knots. A good look-out was being kept on board the *Boucau*, and all proper assistance was being given by her master and crew to the said pilot. In these circumstances, as the *Boucau* was being navigated to pass between the Merchants' Quay Jetty and the quay on the opposite side of the harbour entrance she was canted to port towards the jetty by the current on her port quarter and the wind on her starboard side. Under the orders of the pilot the engines of the *Boucau* were at once put full speed astern, but, before the way could be taken off the *Boucau*, her stem caught the end of the jetty, doing it some damage.

The defendants denied that they ran into the jetty by reason of any negligence on the part of

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

those on the *Boucau*. In the alternative they alleged that if the collision between the *Boucau* and the jetty was caused by any negligence in the navigation of the *Boucau*, it was caused solely by the negligence of the duly licensed pilot acting in charge of the *Boucau* within a district in which the employment of the pilot was compulsory by law.

The plaintiffs by their reply alleged that if the pilot was negligent, which they did not admit, the collision was caused or contributed to by the negligence of the defendants' servants in that the order to put the engines full speed astern was not obeyed with due promptitude or the engines were incapable of being reversed with reasonable quickness, and that no anchor was let go by the crew, or that the ground tackle was not capable of being let go with reasonable quickness or was not in readiness to let go; that the *Boucau* was a bad steerer; and that the master of the *Boucau* gave the pilot no assistance or advice or warning as to the character of the *Boucau* or her engines or ground tackle.

The material evidence is set out in the judgment.

Aspinall, K.C. and *Leslie Scott* for the plaintiffs.—There was a possibility that the head of the *Boucau* might be canted to port when entering the harbour. The defendants admit delay when the engines were reversed; even if the delay was short, it caused the collision. The engines were faulty; the order to go astern could not be carried out immediately, and that was the real cause of the collision. The jetty is in the same position as a ship at anchor. When a vessel is at anchor and can be seen, there is *primâ facie* evidence of negligence of another vessel if she runs into her, and the onus is on the moving vessel to rebut the presumption of liability by showing that they were guilty of no negligence, and that the collision was caused by inevitable accident or by the negligence of a compulsory pilot:

The Indus, 56 L. T. Rep. 376; 6 Asp. Mar. Law Cas. 105 (1886); 12 P. Div. 46.

The presumption of fault in such a case will not be rebutted by proof that the colliding vessel was in charge of a compulsory pilot; it must be proved that the pilot was in fault:

Mann and MacNeal Company v. *Ellerman Line Limited*, 7 Ct. of Sessions Cases (5th series), 213.

The defendants must prove that it is the fault of the pilot alone:

Clyde Shipping Company Limited v. *Miller*, 1907, S. C. 1145; 44 S. L. R. 921.

The ship in this case was in charge of a competent Trinity House pilot whose conduct is not impeached—indeed, the master of the *Boucau* approved of it. What caused the accident? The fact is the engines were not properly handled; there was plenty of time to avoid the collision if the engines had been efficient and had been properly handled. This shows the accident was not inevitable, for it might have been avoided by ordinary skill and care:

The Woodford, *Shipping Gazette*, March 9, 1906.

Laing, K.C. and *Stubbs* for the defendants.—The owners of the vessel are not responsible for the collision; they were guilty of no negligence. If there was any negligence on the *Boucau*, it was the negligence of the pilot. "If the defendants prove that the pilot gave orders and that they were obeyed, they make out a *primâ facie* case of negligence on the part of the pilot. But if they only prove that the pilot gave orders, without also proving that they were obeyed, they do not even make out a *primâ facie* case that the collision was solely the fault of the pilot": (Lord Esher in *The Indus*, *ubi sup.*). In this case the defendants have proved that the orders given by the pilot were promptly obeyed; that exonerates the defendants. The entrance to the harbour is difficult to navigate, and the depth of water under the vessel makes a great difference in the ease with which she can be navigated. The pilot did not know the state of the tide; it was his duty to ask, and he failed in his duty. The sheer which took place did not surprise the pilot, as the wind was fresh on the starboard side and the tide was running on the port side. The pilot gave the order to go full speed astern; that was done promptly; it took twenty seconds to do it. Is that time so long as to be negligence? The pilot found no fault. If it is true that old-fashioned engines of this type take that time to reverse, no negligence has been proved on the part of the defendants.

Leslie Scott in reply.—If the defendants are to succeed here, they must prove what really caused the collision; if the matter is left in doubt the plaintiffs are entitled to judgment.

BARGRAVE DEANE, J.—This is an action brought by the Workington Harbour and Dock Board against the French steamship *Boucau* for damage done by the *Boucau* to a wooden jetty near the entrance to the harbour of Workington. The case raises some curious points. First of all there is the question of onus of proof. Undoubtedly this French steamer ran into this jetty and damaged it, and the jetty being a stationary object, incapable of getting out of the way or doing anything at all, the steamer is, *primâ facie*, liable for running into it. She pleads, however, that it was no fault of hers—that she was under compulsory pilotage. The other side say: "Whether you were under compulsory pilotage or not you are liable. First of all we say that the pilot was not guilty of any negligence himself, and therefore your compulsory pilotage plea fails; secondly, we say that in any event we will show you were guilty of negligence; and we show it in this way, that the conduct of your crew was such that although an order was given to execute a certain manœuvre they were not prepared to do so, and did not at once obey the order, and that was the real cause of this collision." Now, it seems to me that the law as to this state of things is clear. *Primâ facie* the defendants are liable. The defendants, however, say: "We were under compulsory pilotage, and if there was any negligence in the conduct of our ship it was done under the orders of the pilot, all of whose orders were obeyed, and we are not responsible." Thereupon the harbour board call the pilot, who says he did everything necessary, and that the real cause of the accident was that, although he gave an order to put the engines full speed astern, there was delay in obeying his order. Therefore he not only protects himself but hits as hard as he can at the defendants; and I think, having put forward the plea of compulsory pilotage, the defendants, by law, have cast upon them the onus

of discharging themselves of the responsibility. Now, I think there is only one charge preferred by the plaintiffs against the defendants, and that is as to the carrying out of the order to the engines. What is the truth about that? We have a most unsatisfactory state of things. I do not want to say anything which will hurt anybody's feelings, but it is extremely odd to find that the harbour-master makes a report at once, and says, "I saw the whole thing, and no blame attaches to anyone." The pilot also makes a statement at once, and he says, "All my orders were promptly carried out, and I have no fault to find with the ship or anyone on board." Those are statements made at the time by the pilot and the harbour-master. Now, by the side of the harbour-master was standing the deputy harbour-master, and also Captain Spicer, of the ship *Lancashire*, which was in the harbour. Those two gentlemen made no statements at the time about it. The deputy harbour-master was first spoken to about this matter, he says, two months ago, which I notice was just about the date of the writ. Captain Spicer was spoken to about two weeks ago, which I find is the date of the reply. Now we find that the harbour-master and the pilot have turned right round, and say, "not only do we impute blame to you, but we say the orders were not properly carried out." I think it is a very unsatisfactory state of things. It looks very much as if the harbour people had persuaded some of these witnesses to eat their own words at a later date. Now, that does not conclude the whole case, because unless the defendants satisfy me that there was no fault on their part, then I am bound in fact to find that the onus is not discharged. Now, what happened? I find these facts. I find that on that particular day the pilot boarded this ship out in the roadstead somewhere about half-past ten. He was on board outside the harbour for something about an hour, waiting for the flag to be hoisted to show that the vessel could come in. The pilot says the vessel is known in the harbour and that they knew her draught. The pilot says that when the flag was hoisted it was an indication that there was water for her to come in. The pilot says he had no opportunity, coming in as he did, to see whether the water was at its proper height. We have it now stated as a fact that instead of there being 18ft. 9in. of water in the harbour there was only 17ft. 8in., and this vessel was drawing 15ft. 4in. Therefore there was only a little over 2ft. of water under her, and so far as I can judge that fact was not known at the time to anybody, and it looks very much as if those in the harbour had not taken sufficient notice of the actual height of the water, but were going by the tide table. However, that does not affect my judgment, because I am not going to find the harbour authorities liable or responsible for that default. I am not sure there was default, but we do know there was less depth of water than the tide table showed.

What happened? The vessel came in by the invitation of the harbour authority. We are told that there was a freshet in the river, and although it was not quite high water, there was a current against the vessel coming up of two knots an hour, and the vessel was going round at about three knots through the water. She came up close to this point where she had to go round under port helm to enter the harbour. There was a strong wind from the west, put at force 5, and we are told by the pilot that the vessel had come up at full speed because of the state of the weather. Before she got to the place where she had to turn she had to stop her engines, and she was going about a knot. When she turned round she would get the full force of the current on her port quarter and the full effect of the wind on her starboard bow; and the result was that, instead of continuing her course to starboard, disregarding her port helm and disregarding the fact that she had a right-handed screw, in the captain's words she made a sheer bodily to port. This vessel had got her bows about in a line between the two ends of the harbour. The evidence is that she had the jetty she ran into on her port bow, and that then she sheered with her bow towards it; and I think that the swing of the vessel with her sheer and the pressure of the current against her port quarter would very likely give her a tendency to go forward as well as make this spin round to port. The pilot says: "Upon seeing that, I at once gave an order to go full speed astern," and his evidence is that for the purpose of enforcing that order, and to show it was urgent, he repeated it immediately. He says that as far as he was concerned that order was given as promptly as possible. It turns out that this vessel is of such a construction, although she is of normal type, that she is equipped with old-fashioned engines, which are not capable of being reversed very quickly. Instead of being reversed very quickly, it takes twenty to twenty-five seconds to do so. That is a defect, but it is not a defect of which the court will take notice, because it is in evidence that she is of normal type and it is in evidence that it was known in that part of the world what type of vessel she was. They knew all there was to be known about her, and the pilot, as I have pointed out, did not make any complaint about her at the time. Why was it this vessel took this sheer? In my opinion, and in the opinion of the Elder Brethren, who are more competent than I am to form an opinion, it was due to the cause, primarily, that there was less water in the river than was supposed, and instead of this vessel having three feet under her she had only two. The result was that when she presented a very much larger surface to the current she had less water under her, and there was an extremely strong wind from the west blowing, as I have said, on her starboard bow. In my opinion that extreme cant, which is described by the pilot himself as an extraordinary one, was the real cause of this trouble. It seems to me that the defence to this case is this: "You have accused me of not obeying orders promptly. I discharge that attack by means of your own witnesses, who say that I did obey the orders promptly and that nobody is to blame. Out of the mouths of your own witnesses I take my defence." Now, if they have in that sense discharged the onus which the law imposes upon them, then the defendants have absolved themselves from blame; but I go one step further, and, using the words of the late Lord Esher in *The Indus* (*ubi sup.*), I think this was a case of *force majeure*, and that the whole cause of the disaster had nothing to do with the ship itself, but was the result of extraordinary conditions which prevailed at the particular moment at that

particular spot. My judgment is that this is a case of *force majeure*, and that the defendants are not liable for this damage, first, because they have not been guilty of any negligence, and, secondly, because I think that it was brought about by the conditions of the current and of the wind on that particular day in that particular part of the harbour at Workington. Therefore there will be judgment for the defendants.

Solicitors for the plaintiffs, *Ledgard* and *Smith*, agents for *Milburn, Son*, and *Sewell*, of Workington.

Solicitors for the defendants, *Stokes* and *Stokes*.

March 2, 3, *and* 4, 1909.

(Before BARGRAVE DEANE, J. and Elder Brethren.)

THE GERE. (*a*)

Collision—River Thames—Overtaken vessel—Duty to keep course—Overtaking vessel—Duty to keep clear—Duty of vessels going down river to keep to the south of mid-stream.

Two steamships, both proceeding down the Thames, collided in Galleons Reach somewhere between mid-river and the n orthern bank. Both vessels were held to blame, the overtaking vessel for not keeping clear of th e overtaken vessel and the overtaken vessel for not keeping her course.

Semble: *Vessels going down river should keep to the south of mid-stream.*

DAMAGE ACTION.

The plaintiffs were the owners of the steamship *Brenda*, the defendants and counter-claimants were the owners of the steamship *Gere*.

The case made by the plaintiffs was that shortly before 6.30 a.m. on the 15th Nov. 1908 the *Brenda*, a screw steamship of 1152 tons gross and 710 tons net register, manned by a crew of sixteen hands all told, left Stanton's Wharf, River Thames, in the course of a voyage to Goole. The wind was a moderate northerly breeze, the weather was dull and overcast, and the tide ebb, of a force of from one and a half to two knots. The *Brenda*, in charge of a duly licensed Trinity House pilot, was steering a down-river course with engines working at various speeds as required. The regulation masthead and side lights and a stern light were being duly exhibited and were burning brightly, and a good look-out was being kept on board her.

In these circumstances the steamship *Gere* was seen to leave Fresh Wharf and proceed down the river ahead of the *Brenda*. When the vessels arrived at the upper part of Galleons Reach, the *Gere*, which was then on the starboard side of the *Brenda* was seen to be starboarding, as if attempting to pass to the northward of a dredger which bore fine on the starboard bow of the *Brenda*. The engines of the *Brenda*, which had shortly before been put full speed ahead, were kept so as the only means of avoiding a collision, but the *Gere* came on, and with her port bow struck the *Brenda* on the starboard side abaft amidships doing damage and forcing her head to starboard into collision with the dredger, and another steamship the *Milwaukee*.

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

Those on board the *Brenda* charged those on the *Gere* with not keeping a good look-out; with improperly starboarding; with failing to keep their course and speed; with not easing, stopping, or reversing their engines in due time; and with not navigating with proper and seamanlike care.

The case made by the defendants and counter-claimants was that shortly before 6.30 a.m. on the 15th Nov. 1908, the *Gere*, a steel screw steamship of 754 tons gross and 420 tons net register, while on a voyage from Nicholson's Wharf, London, to Penarth Dock in water ballast, was proceeding down the upper part of Galleons Reach, river Thames, manned by a crew of fifteen hands all told, and in charge of a duly licensed Trinity House pilot, and was making about seven knots. The weather was fine and clear, the wind was north north-east light, and the tide was the first of the ebb and of the force of about one knot. The *Gere* carried the regulation lights for a steamship under way and a stern light, which were being duly exhibited and were burning brightly, and a good look-out was being kept on board of her.

Under these circumstances the *Brenda*, which had been first seen on the south side of the river when the *Gere* was passing through the Tower Bridge was observed to be coming up rapidly on the port quarter of the *Gere*, showing her masthead and green lights. The *Gere* kept her course, which led to the northward of a dredger on her starboard bow at anchor off the Albert Dock entrance, and also kept her speed; and, when the *Brenda*, drawing up on the port quarter of the *Gere*, was seen to be attempting to pass the *Gere* dangerously close, she was loudly hailed; but the *Brenda* continued to come on fast and drew the head of the *Gere* to port against her helm and, although the helm of the *Gere* was put hard-a-port while at the same time her engines were reversed full speed astern, the port bow of the *Gere* was drawn into contact with the starboard side of the *Brenda* abaft of amidships and sustained damage. The head of the *Brenda* in consequence of the contact fell to starboard and she struck the head of the dredger and then falling more athwart her stern came in contact with the starboard bow of the *Gere*, doing her further damage. The *Brenda* then, without materially stopping her way, ran into the port bow of the steamship *Milwaukee* which was towing down the river on the south side of the channel.

Those on the *Gere* charged those on the *Brenda* with not keeping a good look-out; with improperly failing to keep out of the way; with attempting to pass the *Gere* too close and at too great a speed; and with neglecting to ease, stop, or reverse their engines in due time.

The following Thames By-laws 1898 were relied on in support of the cases made by the plaintiffs and defendants:

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.

52. Every vessel overtaking another vessel shall keep out of the way of the overtaken vessel, which latter shall keep her course. . . .

53. Where by the above by-laws one of two vessels is to keep out of the way the other shall keep her course and speed.

There is no by-law in the Thames rules which directs vessels to keep to their starboard hand side of the river.

Aspinall, K.C. and *Dunlop* for the plaintiffs.

Laing, K.C. and *A. Adair Roche* for the defendants.

BARGRAVE DEANE, J.—This is a case of a somewhat serious character, because of the consequence which will follow the decision I am about to give. It is true it is only a case in which a collision between two ships is actually before the court, but there are other consequences which evidently will result, and which therefore give one considerable anxiety. The particular collision is between two small vessels, the *Brenda* and the *Gere*. Both vessels left wharves just below London Bridge, somewhere about the same time, on the morning of the 15th Nov. 1908. The *Gere* left a little before the *Brenda*, and, starting from different sides of the river, they followed each other down until they got somewhere down to Woolwich Reach. At that time the *Brenda* apparently was astern of the *Gere*, and therefore we must take it that she was in the position of an overtaking ship. The *Gere* has told her story of how she came down, but the court does not believe the story of the *Gere* with respect to that matter. The *Gere* says she came down on the north side of the river all the way. The court, upon the evidence, is of opinion that that is not a true story, because there was an abundance of independent evidence to show that the *Gere*, in fact, until very shortly before the collision, was following pretty well in the wake of a large steamer, the *Milwaukee*, which was being towed down to the southward of mid-channel. There is also the evidence from a vessel immediately astern of the *Gere*, a vessel called the *Ruby*, to the effect that the *Gere* was ahead of her and between her and the *Milwaukee*. Of course, it is a very awkward position to find oneself in—namely, that one cannot believe the evidence of the *Gere* on a material point. The facts, as I believe them, are as follows, and I agree with counsel for the plaintiffs that the question before the court is almost entirely one of fact. There is one question which I have asked the Elder Brethren, because it is a matter which they are more competent to give me advice upon than I am to act upon my own judgment, though I entirely agree with them —but apart from that the question is one of fact. The *Brenda* admittedly came down on the north side of the river to Woolwich Reach. The *Gere*, in my opinion, came down on the south side of mid-channel, in the wake of the *Milwaukee*. When these two vessels got somewhere about the Free Ferry in Woolwich Reach the *Gere* starboarded her helm, to come out from under the stern of the *Milwaukee*, for the purpose of passing her. The *Gere* was going six or seven knots, and the *Milwaukee* about five knots, and, according to the evidence of the pilot of the *Milwaukee*, he first noticed her when she had got out on the port side. He says that at that time, when they were approaching a dredger, which was moored, according to the evidence, somewhere about mid-stream, he noticed that the *Gere* had the dredger on her port bow. Now, that is a material piece of evidence. It is corroborated by a man on a sailing barge which was below the place of the collision, who says that before the collision, of which he was a witness, he saw both lights of the *Gere*. Now, there is evidence that at that time the *Milwaukee* was making to pass somewhere about 100ft. to the southward of the dredger, and, according to the evidence of the plaintiffs, the *Gere* was observed to be making as though she would pass also to the southward of the dredger. Now, it is said by those on the dredger that they perceived that the *Gere* had altered her course; that instead of passing to the southward she was seen to be making to pass to the northward. The man on the barge below says that at about that time he suddenly lost the red light of the *Gere*, which indicated to him that she was starboarding. Now, those two vessels approached to the north side of the dredger. As I have said, the *Brenda* was the overtaking ship. The pilot of the *Gere* says that he did not change his mind. He says, "I never intended to pass to the southward of the dredger. I always intended to pass to the north side of the dredger. I was always on the north side of the channel." If one disbelieves his story as to being always on the north side, one hesitates to believe his story that he never intended to pass on the south side of the dredger. One doubts the whole of his story. If he was to the south side then he must have intended to get across to the north side, and therefore there must have been an intention to get to the north. I am of opinion that he had an intention to get to the north, and that he did go to the north; but that does not bring about the collision. I believe that this vessel, the *Gere*, did intend to pass to the southward of the dredger, between the dredger and the *Milwaukee*, but that the person in charge of her had to change his mind for the very good reason—as I believe, and as the Elder Brethren advise me—that it was very doubtful whether there was room for the *Gere* to pass between the dredger and the *Milwaukee*. The dredger, as I have said, was about in mid-stream, and, according to the chart, there is about 600 to 700 feet between the dredger and the north shore. There were barges on the north side of the dredger, not close to her but between her and the north shore, and therefore the distance to the north of the dredger available for navigation purposes was somewhat less than the full distance between the dredger and the shore. Now, I believe the *Brenda* thought that the *Gere* had changed her mind and was intending to pass to the north side of the dredger. I do not quite follow from the evidence what distance there was —I rather think the *Brenda* says there was about 100 feet between her and the dredger at the point at which she intended to pass her. It is difficult in the early morning to gauge distances accurately, but putting it at something under 100 feet, then she saw this other vessel, the *Gere*, making towards her. In my opinion there was room for these two vessels to pass, both of them, to the north side of the dredger, but not too much room, and it was rather a hazardous proceeding for them both to do so; and the first finding of fact at which I arrive is that, in my opinion, as soon as the *Brenda* saw the *Gere* was intending to come across to the north of the dredger she should at once have stopped her engines.

She was an overtaking ship, and she had no business to press on and run the risk of not getting through. It was her duty to stop at once. On the other hand, I have to deal with the *Gere*,

and to ask myself what really brought about this collision. If the *Brenda* had not pressed on there would have been no collision, but if the *Gere* had kept her course still there might have been no collision. In my opinion the *Gere* has not told the true story—I mean her officer and pilot—as to what happened on board her. I believe, upon the evidence given, that the *Gere* starboarded at the time when those on the *Brenda* say they saw she was starboarding. The evidence to my mind is conclusive upon that point. First of all it is sworn to by those on the *Brenda*, who saw it. Secondly, there is the man Hinton, who says that a few days afterwards he happened to meet the man Clarke, who had been at the helm of the *Gere*, and he says Clarke told him he had starboarded, and that he was surprised to get the order from the pilot of the *Gere*: but that he did get the order, and he obeyed it and starboarded. I have already referred to the evidence of the man on the sailing barge, who says he saw by the alteration of her lights that the *Gere* was starboarding. There is further the evidence of the pilot of the *Milwaukee*, who says that the original course of the *Gere* was to pass to the south of the dredger. Then there is the evidence of Clarke, who steered the *Gere*. Now, he is a man who undoubtedly has not told the truth in the witness-box. Counsel for the defendants says: "I see that is so, and I ask the court to disregard his evidence altogether." I agree with them that he is not trustworthy, but still he has been in the witness-box, he has told his story, he has been cross-examined, and he has answered questions I put to him, and I take his evidence as I believe it to be true and not as I believe it to be false, and I look to see in what respect there is outside evidence to lead me to a conclusion as to what part of his evidence is true and what part is false. In chief he said: "My helm was amidships. The order I got was, 'Easy helm, hard-a-port.'" It at once struck me that "easy helm" must have meant ease it from something. You do not ease it from amidships. He stuck to it, but eventually he admitted that he had got an order to starboard, and that his helm was hard-a-starboard, and when he got an order to ease it and hard-a-port he understood it to mean steady your helm from hard-a-starboard and put it hard-a-port. That I believe to be true. I believe it to be perfectly accurate that this vessel, at the time which is deposed to by the man on the barge and those on the *Brenda*, did starboard her helm. Why the pilot did it I can only conjecture, but it may very well be that having altered his course he thought there was very little room, and in order to give more room to clear the dredger he starboarded. I am of opinion that the *Gere*, being an overtaken vessel, had no right to starboard her helm at that time in order to change her course, and for that reason I think the *Gere* is also to blame. I think that this is a case in which the two vessels were making to pass to the northward of this dredger at a very dangerous place, and that one is to blame; the overtaking vessel, for not stopping her engines at once, and the other, the overtaken vessel, is to blame for starboarding. They were both responsible partly for this collision. It would not be right for me to leave this case without making a few more remarks. One has reference to the question I have put to the Elder Brethren. Witnesses have been called to say that they saw the *Gere* was sucked in towards the *Brenda*. This collision took place about half-past six in the morning, and the sun did not rise till 7.20, and although they may be perfectly honest witnesses the opinion of the court and of the Elder Brethren is that it is ridiculous to suppose that these people could have witnessed any such fact. Whatever they may have thought about it is one matter, but as evidence it is worthless. The Elder Brethren also have a strong opinion that these vessels were both very much, not to blame in a legal sense, but in fault for attempting to pass to the north of that dredger. There is an understanding that vessels in the river should keep to the starboard side, and that vessels coming up should keep on the north, and vessels going down should keep to the southward. Here they were, before sunrise, getting over to that side of the river on which they might expect other vessels to be coming up, and they would have found themselves in an awkward position if they had found a steamer coming up. This collision would not have happened if they had both waited until they got below the dredger before they attempted to pass.

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

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

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Feb. 2, 3, *and March* 31, 1909.

(Present: The Right Hons. Lords MACNAGHTEN, ATKINSON, and COLLINS, and Sir ARTHUR WILSON.)

CHARTERED BANK OF INDIA, AUSTRALIA, AND CHINA *v.* BRITISH INDIA STEAM NAVIGATION COMPANY. (*a*)

ON APPEAL FROM THE SUPREME COURT OF THE STRAITS SETTLEMENTS.

Bill of lading—Cesser of liability—Delivery.

Goods were shipped on board the respondent's ship under a bill of lading which contained the following clause: "In all cases and under all circumstances the liability of the company shall absolutely cease when the goods are free of the ship's tackle, and thereupon the goods shall be at the risk for all purposes and in every respect of the shipper or consignee." In accordance with the custom of the port of destination, the goods were delivered over the ship's side into the lighters of a "landing agent" appointed by the shipowners, who conveyed them to the shore and stored them in a building of which he was the lessee. While so stored the goods were fraudulently disposed of by a servant of the landing agent, and were lost to the appellants, who were the holders of the bill of lading. Held (affirming the judgment of the court below), that by the express terms of the bill of lading the respondents' liability ceased on the delivery of the goods to the landing agent in accordance with the custom of the port.

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

APPEAL by the appellants (plaintiffs below) from the judgment of the Court of Appeal of the Supreme Court of the Straits Settlements at Penang, which affirmed the judgment of Thornton, J. in favour of the respondents (defendants below).

The action was brought by the appellants under two bills of lading, dated respectively the 1st and 2nd Aug. 1905, of 195 bags and 1000 bags of ground nut kernels shipped on the respondents' steamship *Teesta* at Cuddalore and Pondicherry for Penang, and was for damages for non-delivery or conversion of the said goods. The appellants sued as holders of the bills of lading or alternatively as assignees of the rights of the shippers.

The writ was issued on the 11th May 1906, the statement of claim delivered on the 17th May 1906, the defence on the 5th July 1906, the reply on the 11th Aug. 1906, and the rejoinder on the 6th Sept. 1906.

The action was heard by Thornton, J. It was agreed that only the question of liability should be tried and that the question of damages should be reserved. Certain facts were admitted before and at the trial. Evidence was called by the appellants and by the respondents and a number of documents were put in. The material facts so proved or admitted were as follows:

The goods in question were shipped on the 1st and 2nd Aug. 1905 by K. Govindasamy Chetty and S. Annamalai Chetty. By each of the bills of lading the goods were expressed to be shipped for carriage to Penang and to be delivered at the port of Penang, and each contained the following clause:

> The company is to have the option of delivering these goods or any part thereof into receiving ship or landing them at the risk and expense of the shipper or consignee as per scale of charges to be seen at the agent's office, and is also to be at liberty until delivery to store the goods or any part thereof in receiving ship, godown, or upon any wharf, the usual charges thereof being payable by the shipper or consignee. The company shall have a lien upon all or any part of the goods against expense incurred on the whole or any part of the shipment. In all cases and under all circumstances the liability of the company shall absolutely cease when the goods are free of the ship's tackle, and thereupon the goods shall be at the risk for all purposes and in every respect of the shipper or consignee. Fire insurance will be covered by the company's agents on application.

Each bill of lading also contained an exception of loss or damage from any act, neglect, or default whatsoever of the pilot, master, or mariners or other servants of the company.

The shippers drew bills against the goods on S. Fareeth and Co., of Penang, in favour of the appellants, to whom the bills of lading were handed as security. The bills on S. Fareeth and Co. were accepted and were held with the bills of lading by the appellants until the 6th Sept. 1905, on which day the bills were dishonoured by S. Fareeth and Co. In the meantime the *Teesta* had on the 10th Aug. 1905 arrived at Penang and the goods in question had been delivered overside into the lighters of P. Bob, a landing agent at Penang, by whom they were conveyed to the shore and stored in a jetty shed of which P. Bob was the lessee from the Government. On the 6th Sept., upon the dishonour by S. Fareeth and Co. of the bills accepted by them, the bills of lading were presented by the appellants to Messrs. Huttenbach, Liebert, and Co., the respondents' agents at Penang, and having been by them indorsed "Please deliver" were presented by the appellants to P. Bob, and delivery of the goods in question demanded. It was then discovered that while in the jetty shed the goods had been delivered to S. Fareeth and Co. without production of the bills of lading by the fraud, for which they were subsequently prosecuted to conviction, of Kader Mydin, the delivery clerk of P. Bob, and of Vangoor Pakir, manager of S. Fareeth and Co. The appellants never received the goods, and it was for this loss that the action was brought.

It was established in evidence and admitted that according to the custom of the Port of Penang goods arriving for delivery at Penang are discharged over the ship's side into the lighters of certain recognised firms of lightermen who act as landing and shipping agents, and that such agents land and store and thereafter distribute and deliver the goods so received amongst the different consignees and receive payment in respect of all such services from the consignees. After delivery overside the shipowner has nothing further to do with the goods, except that his release for freight is required before the landing agent will deliver the goods to the consignee.

P. Bob, who received from the *Teesta* and landed and stored the goods in question, had for many years carried on business as landing and shipping agent, and been in the habit of receiving goods from the respondents' steamships, and dealing with them in accordance with the custom above described.

It was not suggested that there was any negligence by the respondents in the custody of the goods while in the jetty shed. The sole question was whether the respondents were liable for the loss of the goods by the criminal act of the servant of P. Bob, the landing agent.

It was contended for the appellants that the responsibility of the respondents as carriers continued until the delivery of the goods to the consignees out of the jetty shed.

It was contended for the respondents that by the custom of the port and by the terms of the bill of lading the delivery to the landing agent was a complete delivery to the consignees, and that the respondents' liability as carriers or otherwise ceased upon delivery overside, and that in any case the goods were by the terms of the bill of lading at the risk of the consignees after delivery overside, and, further, that even if the respondents were under any duty in respect of the goods while in the jetty shed, if such duty was as carriers, they were protected by the exception of "act or default of their servants," or if such duty was as warehousemen, it was a duty to use reasonable care, and the goods were not lost by any want of reasonable care.

On the 24th Jan. 1907 Thornton, J. gave judgment in favour of the respondents, with costs.

The appellants gave notice of appeal, and the appeal was heard before the Court of Appeal of the Straits Settlements, consisting of Sir William H. H. Jones, C.J., Fisher and Braddell, JJ. On the 24th Sept. 1907 the Court of Appeal (Fisher, J. dissenting) gave judgment affirming

the judgment of Thornton, J. and dismissing the appeal with costs.

J. A. Hamilton, K.C. and *T. T. Paine*, for the appellants, contended that the landing agent was the agent of the shipowner and not of the consignee, and no usage of the port was proved by which discharge from the ship to the landing agent amounted to delivery to the consignee. The cesser of liability clause in the bill of lading is ambiguous and does not avail to protect the shipowner. They referred to

Steinman and Co. v. *Angier Line*, 7 Asp. Mar. Law. Cas. 46; 64 L. T. Rep. 613; (1891) 1 Q. B. 619;
Elderslie Steamship Company v. *Borthwick*, 10 Asp. Mar. Law. Cas. 24; 92 L. T. Rep. 274; (1905) A. C. 93;
Nelson Line v. *James Nelson and Sons*, 10 Asp. Mar. Law. Cas. 581; 97 L. T. Rep. 812; (1908) A. C. 16;
Chapman v. *Great Western Railway Company*, 42 L. T. Rep. 252; 5 Q. B. Div. 278.

Scrutton, K.C. and *Maurice Hill*, for the respondents, maintained that the whole current of authority was in favour of the respondents' contention that by the express terms of the bill of lading their liability ceased absolutely after discharge over the side of the ship. See the case of *P. Caringee Moosa* v. *British India Steam Navigation Company* (not reported), referred to in the judgment of the court below, in which the Supreme Court of Ceylon gave judgment for the present respondents, upon the construction of a clause in a bill of lading identical with that in question in this case, in 1905. The case of *Petrococchino* v. *Bott* (2 Asp. Mar. Law. Cas. 310; (30 L. T. Rep. 841; L. Rep. 9 C. P. 355) is really identical with this case. See also

Baxter's Leather Company v. *Royal Mail Steam Packet Company*, 11 Asp. Mar. Law. Cas. 98 (1909); 99 L. T. Rep. 286; (1908) 2 K. B. 626.

Blackburn, J. summarises the authorities before 1860 in

Peek v. *North Staffordshire Railway Company*, 8 L. T. Rep. 768; 10 H. L. Cas. 473.

See also

Manchester, Sheffield, and Lincolnshire Railway Company v. *Brown*, 50 L. T. Rep. 281; 8 App. Cas. 703;
Peninsular and Oriental Company v. *Shand*, 12 L. T. Rep. 808; 3 Moo. P. C. N. S. 272;
Wilton v. *Royal Atlantic Mail Steam Navigation Company*, 4 L. T. Rep. 706; 30 L. J. 369, C. P.;
Taubman v. *Pacific Steam Navigation Company*, 26 L. T. Rep. 704; 1 Asp. Mar. Law. Cas. 336 (1872);
Thompson v. *Royal Mail Steam Packet Company*, 5 Asp. Mar. Law. Cas. 190n. (1875);
Allan v. *James*, 3 Com. Cas. 10;
Wade v. *Cockerline*, 10 Com. Cas. 47; affirmed on appeal, *Ib.* 115.

A carrier's lien may exist after delivery, see

Great Eastern Railway Company v. *Lord's Trustees*, 100 L. T. Rep. 130; (1909) A. C. 109.

There is nothing inconsistent with the contract of carriage in a provision that the ship's liability should cease on the goods being landed, and if the liability still continued it was as warehousemen, and they were protected if the loss of the goods was not caused by want of reasonable care.

J. A. Hamilton, K.C. in reply.—There is no finding that there was such a delay in taking delivery as to convert the carrier into a warehouseman. The case of *Petrococchino* v. *Bott* (*sup.*) and *Baxter's Leather Company* v. *Royal Mail Steam Packet Company* (*sup.*) are distinguishable.

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

March 31.—Their Lordships' judgment was delivered by

Lord MACNAGHTEN. — The appellants, the Chartered Bank of India, Australia, and China, were holders for value of bills of exchange drawn against bills of lading under which goods were to be carried to Penang and delivered there to order or assigns. The carrying vessel was the steamship *Teesta*, one of a line of steamers belonging to the respondent company. The bills of exchange, which were drawn upon S. Fareeth and Co., of Penang, had been discounted by the bank, and the bills of lading indorsed in blank were held by the bank as security for their advance. The *Teesta* arrived at Penang on the 10th Aug. 1905. On her arrival the cargo intended for Penang was delivered overside into lighters and taken to the wharf. It is the practice for the owners of steamers calling at Penang to appoint landing agents at that port. The business of the landing agents is to send lighters to meet an incoming vessel belonging to their employers on being furnished with a copy of the ship's manifest. The goods are discharged from the ship's tackle into the lighters. The landing agents give the master a clean receipt, if they are received in good order. The goods are then carried to jetty sheds, held under lease from Government, landed there, and assorted by the landing agents ready for delivery to the consignees on production of the bill of lading indorsed by the ship's agents with a delivery order. If the consignees apply for their goods within ninety-six hours they get them free of store rent; if not, the goods are either kept in the jetty sheds or removed to godowns. The landing agents make out their account of the landing charges and storage rent, if any, according to a scale of charges exhibited in the offices of the ship's agents. They receive payment direct from the consignees. The indorsement of the bill of lading by the ship's agents is required as a release of the ship's lien for freight and expenses incurred on the shipment. Without such indorsement the landing agents are not at liberty to deliver goods to consignees. This practice, which is obviously for the convenience of all parties concerned, appears to be at present the subject of much controversy in Penang. The shipowners contend that the landing agents are the agents of the merchants. The merchants insist that they are not their agents, but the agents of the shipowners. Neither view perhaps is quite accurate. These landing agents rather seem to be in the position of intermediaries owing duties to both parties—agents for the shipowners as long as the contract of affreightment remains unexhausted, agents for the consignees as soon as the bill of lading is produced with delivery order indorsed. The point, however, is not material for the determination of the question

now at issue, and their Lordships therefore do not propose to discuss it further or to define the exact position of landing agents at the different stages of their employment.

The bills of exchange in the hands of the bank were duly accepted by S. Fareeth and Co. on the arrival of the *Teesta*. On presentation for payment they were dishonoured. Application was then made to P. Bob and Co., the landing agents of the respondent company. The appellants produced the bills of lading, with delivery order indorsed, and claimed the goods. The goods were not forthcoming. They had been taken away without the production of a bill of lading or a delivery order by the representative of S. Fareeth and Co., acting in collusion with the representative of P. Bob and Co., and they had been already disposed of, in fraud of the persons entitled. Having thus lost both their money and the goods which had been pledged to them as security, the bank preferred their claim against the respondents. The claim resulted in the present action. This appeal has been brought from the order of the Supreme Court, affirming the judgment of the court of first instance, which dismissed the action with costs. Both here and in the courts below the respondent company disclaimed all liability, relying on conditions subject to which the bills of lading were expressed to be issued. They are printed at the foot of the bill of lading, and attention is called to them in the body of the bill. The only conditions material in the present case are those intended to be applicable on the arrival of the carrying vessel at the port of destination. They are contained in the following clause:

> The company is to have the option of delivering these goods or any part thereof into receiving ship or landing them at the risk and expense of the shipper or consignee as per scale of charges to be seen at the agent's office and is also to be at liberty until delivery to store the goods or any part thereof in receiving ship, godown, or upon any wharf, the usual charges therefor being payable by the shipper or consignee. The company shall have a lien on all or any part of the goods against expenses incurred on the whole or any part of the shipment. In all cases and under all circumstances the liability of the company shall absolutely cease when the goods are free of the ship's tackle, and thereupon the goods shall be at the risk for all purposes and in every respect of the shipper or consignee.

On behalf of the respondents the contention was that the obligations which they undertook were fulfilled by delivering the goods to the landing agents, and that at any rate their liability ceased when the goods were once "free of the ship's tackle." On the other hand, it was said on behalf of the bank that the landing agents were neither the assigns nor the agents of the shippers or consignees, and that the goods had never been delivered in accordance with the bills of lading. As regards the provision for cesser of liability, the suggestion was that it applied only to the interval between the removal of the goods from the ship and their being landed on the quay. In addition to the arguments relied on in the courts below, the learned counsel on behalf of the bank prayed in aid two recent decisions of the House of Lords—*Elderslie Steamship Company Limited* v. *Borthwick* (*sup.*) and *Nelson Line* (*Liverpool*) *Limited* v. *James Nelson and Sons Limited* (*sup.*)—in which the House had occasion to reaffirm and apply the wholesome rule that, if a shipowner wishes to relieve himself from liability to the shipper in case his vessel should be found to have been unseaworthy, he must say so plainly. That is an old rule. It has never been questioned or doubted. But their Lordships do not recognise any very close analogy between a case where it is sought to get rid of a legal obligation, which is presumed to be the basis of every contract of carriage by sea, and a case like this, where the parties are perfectly free to make any stipulation they please, unembarrassed by any implied condition, or any original underlying obligation. In order to lay a foundation for their arguments the learned counsel for the appellants examined the bills of lading and the conditions attached to them, casting about everywhere for some contradiction or some ambiguity. They put cases suggested as occurring at other stages of the voyage in which the clause providing for cesser of liability could not apply. They found fault with the position of the provision in the particular clause where it occurs. They even took exception to its language. Liability was to cease when a certain thing was done; it was to cease "thereupon"; the word, they said, would have been "thereafter," not "thereupon," if the immunity stipulated for had been meant to be lasting. So minute and searching was the criticism. Now, it may be conceded that the goods in question were not delivered according to the exigency of the bills of lading by being placed in the hands of the landing agents, and it may be admitted that bills of lading cannot be said to be spent or exhausted until the goods covered by them are placed under the absolute dominion and control of the consignees. But their Lordships cannot think that there is any ambiguity in the clause providing for cesser of liability. It seems to be perfectly clear. There is no reason why it should not be held operative and effectual in the present case. They agree with the learned Chief Justice that it affords complete protection to the respondent company. Their Lordships therefore will humbly advise His Majesty that the appeal should be dismissed. The appellants will pay the costs of the appeal.

Solicitors for the appellants, *Linklater, Addison,* and *Brown.*

Solicitors for the respondents, *Rawle, Johnstone,* and *Co.*

Feb. 4 *and May* 11, 1909.

(Present: The Right Hons. Lords MACNAGHTEN, ATKINSON, and COLLINS, and Sir ARTHUR WILSON.)

OWNERS OF THE MAORI KING *v.* WARREN. (*a*)

ON APPEAL FROM THE SUPREME COURT FOR CHINA AND COREA.

Forfeiture — Jurisdiction of court — Merchant Shipping Act 1894 (57 *&* 58 *Vict. c.* 60), *s.* 76 *—Court in His Majesty's Dominions.*

By the Merchant Shipping Act 1894, *s.* 76, *if a ship has become subject to forfeiture under the Act she may be brought for adjudication "before the High Court in England or Ireland, or before the Court of Session in Scotland, and elsewhere*

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

before any Colonial Court of Admiralty or Vice Admiralty Court in His Majesty's Dominions and the court may thereupon adjudge the ship . . . to be forfeited to His Majesty."

Held, that the section conferred authority upon no court excepting those within the dominions of the Crown, and that a court established by treaty in a place not within British territory has no jurisdiction to adjudge a ship forfeited under the said Act.

Judgment of the court below reversed.

APPEAL from a judgment dated the 23rd April 1908 of the judge of the Supreme Court for China and Corea (Sir Havilland de Sausmarez) adjudging that the steamship *Maori King* with her tackle, apparel, and furniture should be forfeited to His Majesty, and that the appellants should pay the costs of the proceedings.

The decree of forfeiture was made on two petitions. In the first petition it was alleged that no satisfactory evidence of the title of the ship to be registered as a British ship had been given in response to a requisition under sect. 51 of the Merchant Shipping Act 1906, and in the second petition it was alleged that the persons on board and in control of the ship had during a voyage therein referred to—namely, from Vladivostock to Guaymas (in Mexico)—used the British flag and assumed the British national character on board the ship, contrary to the provisions of sect. 69 of the Merchant Shipping Act 1894. In both petitions it was alleged that by reason of the premises the ship had become subject to forfeiture under the provisions of sect. 76 (1) of the Merchant Shipping Act 1894, and the court was prayed to decree such forfeiture.

The only questions raised by this appeal were: First, whether the learned judge had under the said provisions a discretion to refuse to decree the forfeiture of the ship; and, secondly, whether in the circumstances of this case, if he had such discretion, he ought to have exercised it in favour of the appellants and refused to decree the said forfeiture; and, thirdly, whether the court at Shanghai, being a court established by treaty outside His Majesty's Dominions, had jurisdiction to decide the forfeiture.

The material sections of the Merchant Shipping Acts are as follows:—

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

69 (1). If a person uses the British flag and assumes the British national character on board a ship owned in whole or in part by any person not qualified to own a British ship, for the purpose of making the ship appear to be a British ship, the ship shall be subject to forfeiture under this Act, unless the assumption has been made for the purpose of escaping capture by an enemy or by a foreign ship of war in the exercise of some belligerent right. (2) In any proceedings for enforcing any such forfeiture the burden of proving a title to use the British flag and assume the British national character shall lie upon the person using and assuming the same.

76 (1). Where any ship has either wholly or as to any share therein become subject to forfeiture under this part of this Act, (*a*) any commissioned officer on full pay in the military or naval service of Her Majesty; (*b*) any officer of customs in Her Majesty's Dominions; or (*c*) any British consular officer, may seize and detain the ship, and bring her for adjudication before the High Court in England or Ireland, or before the Court of Session in Scotland, and elsewhere before any Colonial Court of Admiralty or Vice-Admiralty Court in Her Majesty's Dominions, and the court may thereupon adjudge the ship with her tackle, apparel, and furniture to be forfeited to Her Majesty, and make such order in the case as to the court seems just, and may award to the officer bringing in the ship for adjudication such portion of the proceeds of the sale of the ship or any share therein, as the court think fit. (2) Any such officer as in this section mentioned shall not be responsible either civilly or criminally to any person whomsoever in respect of any such seizure or detention as aforesaid, notwithstanding that the ship has not been brought in for adjudication, or if so brought in is declared not liable to forfeiture, if it is shown to the satisfaction of the court before whom any trial relating to such ship or such seizure or detention is held that there were reasonable grounds for such seizure or detention; but if no such grounds are shown the court may award costs and damages to any party aggrieved, and make such other order in the premises as the court thinks just.

Merchant Shipping Act 1906 (6 Edw. 7, c. 48):

51 (1). Where it appears to the Commissioners of Customs that there is any doubt as to the title of any ship registered as a British ship to be so registered, they may direct the registrar of the port of registry of the ship to require evidence to be given to his satisfaction that the ship is entitled to be registered as a British ship. (2) If within such time, not less than thirty days, as the commissioners fix, satisfactory evidence of the title of the ship to be registered is not so given, the ship shall be subject to forfeiture under part 1 of the principal Act. (3) In the application of this section to a port in a British possession, the governor of the British possession, and, in the application of this section to foreign ports of registry, the Board of Trade shall be substituted for the Commissioners of Customs.

The following facts were proved at the trial. The ship was purchased by the appellants, who were a Russian firm with their offices at St. Petersburg in 1904. At the time of the purchase she was a British ship, but was shortly afterwards transferred to the French flag under the name of the *Esperance*.

In March 1906 she was chartered by certain charterers named Sleigh and Co., who insisted that she should sail under the British flag, and on the 28th March 1906 she was registered in the name of James Markham Dow under the name of the *Maori King*.

James Markham Dow did not enter an appearance to the petition, nor was he called to give evidence, although it was admitted that he was in the employment of the appellants at the date when the ship was registered in his name, and was still in their employment.

It was proved or admitted that the registration of the ship had been carried out by Dow on instructions received from the appellants' head office at St. Petersburg, and that for the purpose of effecting the same Dow attended before the officer in charge of the shipping office and stated that he was a British subject, gave his place of birth, and stated that he had not sworn allegiance to a foreign Power; that he produced a bill of sale purporting to show that one Collett had in consideration of the sum of 16,000*l.* transferred the whole of the shares in the ship to him; and that he duly subscribed a declaration of ownership in which he declared that he was entitled to be registered as owner of sixty-four

sixty-fourth shares of the ship, and that to the best of his knowledge and belief "no person or body of persons other than such persons or body of persons as are by the Merchant Shipping Act 1894 qualified to be owners of British ships is entitled as owner to any interest whatever either legal or beneficial in the said ship."

With regard to the voyage between Vladivostock and Guaymas referred to in the second of the petitions, it was proved that the ship was on the 22nd March 1907 chartered by the appellants under a time charter-party to an American firm, Messrs. Zimmermann, and put into Shanghai for the purpose of being repaired and fitted up in accordance with their requirements. She was then taken to Vladivostock, and from there sailed to Guaymas with 921 Chinese coolies and 217 Russians on board. During the voyage disturbances arose among the Chinese owing to the fact that, as they alleged, they had been got on board on the false pretence that they were to go to work at Hong Kong or Canton. The learned judge expressed his finding on this part of the case as follows: "There can be little doubt that the British flag was used to cover the transportation of kidnapped coolies without sanitary or other precautions, and in circumstances of great hardship if not illegality."

On the 3rd June 1907 Mr. Morducovitch, the appellants' manager at Shanghai, wrote to the charterers offering to renew the charter in accordance with the terms of the charter-party without making any protest against the use to which the ship was being put. In reviewing his position the learned judge stated: "I cannot feel satisfied of his ignorance of the purpose to which the ship was to be put by the charterers, and there is no doubt whatever that when he did know he acquiesced in her trade."

It was admitted by the appellants that the ship was registered in the name of James Markham Dow, who was a clerk in their employment, and that Dow had no interest whatever in the vessel, but it was contended that the court had a discretion as to whether it would adjudge the vessel to be forfeited, and certain equitable defences were raised with a view to induce the court to exercise its discretion in the appellants' favour. The allegation made in the first petition that a requisition for evidence that the ship was entitled to be registered as a British ship had been duly made under sect. 51 of the Merchant Shipping Act 1906 was admitted, and it was not suggested that any such evidence was or could be furnished.

The defences were in effect, as to both petitions, that the object of the registration in Dow's name was to comply with the requirements of the charterers, Sleigh and Co., who had insisted on the vessel flying the British flag as a condition of their chartering of her; that the appellants were a Russian firm and ignorant of the illegality of such registration and of the effect of such illegality, and that they ought to have been warned by the officials of the registry. The appellants further set up by way of defence to the first petition that they were misled by what they alleged to be the fact— namely, that such methods of registration were of frequent occurrence, and that during the fifty years in which vessels had been liable to forfeiture under these circumstances no case had occurred either in the British or Shanghai courts in which such forfeiture had been adjudged.

They further alleged in answer to both petitions that in July 1906 the officer in charge of the registry at Shanghai was definitely informed of the appellants' interest in the vessel, and that they, the appellants, were neither then nor subsequently given any warning that they were acting wrongly. After hearing the evidence on this point, however, the learned judge held that it was not proved that such information was in fact ever given.

After considering carefully the whole of the facts of the case the learned judge held that he had no discretion in the matter, and he further held that if he had had a discretion he would not have exercised it in favour of the appellants.

Sir *R. Finlay*, K.C., *Scrutton*, K.C., and *H. Cowell* appeared for the appellants, and argued that the court had no jurisdiction to make the decree appealed against. They referred to

Meenakshir Naidoo v. *Subramaniga*, L. Rep. 14 Ind. App. 160;

Japanese Government v. *Peninsular and Oriental Company*, 72 L. T. Rep. 881; (1895) A. C. 644.

The *Attorney-General* (Sir William Robson, K.C.), the *Solicitor-General* (Sir S. Evans, K.C.), and *Rowlatt* supported the judgment of the court below.

Sir *R. Finlay*, K.C. was heard in reply.

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

May 11.—Their Lordships' judgment was delivered by

Sir ARTHUR WILSON.—This is an appeal from a judgment and decree of His Majesty's Supreme Court for China and Corea at Shanghai, which declared the steamship *Maori King* to be forfeited for improperly carrying British colours. Several grounds of objection to that judgment and decree were urged upon the argument of the appeal. The principal ground of objection went to the jurisdiction of the court; and as, in the opinion of their Lordships, that objection is sufficient to dispose of the appeal, they deem it unnecessary to consider the other points argued. The facts, so far as they are material for the present purpose, can be briefly stated: The *Maori King* was purchased in March 1906 in the name of one Dow, and registered at Shanghai in Dow's name; but he executed a declaration of trust in favour of a Russian firm, Ginsburg and Co., who have been found to be the real owners. On the 24th Jan. 1908 the respondent, His Majesty's Consul-General at Shanghai, filed two petitions, founded on two writs, dated respectively the 4th and 6th Jan. 1906, which he had caused to be issued against the appellants. Of these petitions the second is the more material. It was based upon sects. 69 and 76 of the Merchant Shipping Act 1894. It stated that the plaintiff, as consular officer within the meaning of sect. 76, had seized and detained the ship, as liable to forfeiture under sect. 69, for having used the British flag without authority to do so; and the petition asked (amongst other things) for a declaration and judgment that the ship had become forfeited to His Majesty. Certain defences were raised which it is not necessary to

examine on the present occasion. On the 23rd April 1908 a decree was passed declaring the forfeiture of the ship as prayed. That is the decree appealed against. The sections which it is important to notice for the present purpose are as follows: [His Lordship read the sections of the Acts as set out above.] The question of jurisdiction which has been raised is this: The jurisdiction to entertain and deal with the petitions before the Supreme Court, if it possesses that jurisdiction, depends upon sect. 76 just cited. It is contended, however, for the present appellants that that section confers authority upon no court excepting those within the dominions of the Crown, whereas the court at Shanghai is not within British territory. That contention on the part of the appellants, in their Lordships' opinion, must prevail, for the language of the section is express, and there appears to their Lordships to be no other statutory authority extending the jurisdiction under this section to the Shanghai court. For the foregoing reasons their Lordships are of opinion that the appeal should prevail. They will humbly advise His Majesty that the decree of the 23rd April 1908 should be set aside, and the respondent's petitions dismissed without costs. There will be no order as to the costs of the appeal.

Solicitors for the appellants, *Parker, Garrett, Holman,* and *Howden.*

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

Supreme Court of Judicature.

COURT OF APPEAL.

Friday, March 26, 1909.

(Before COZENS-HARDY, M.R., MOULTON and FARWELL, L.JJ.)

MARSHALL *v.* OWNERS OF STEAMSHIP WILD ROSE. (*a*)

APPEAL UNDER THE WORKMEN'S COMPENSATION ACT 1906.

Employer and workman—Death—Compensation—"Accident arising out of and in the course of the employment"—Disappearance of seaman from ship—Unexplained drowning—Inference—Workmen's Compensation Act 1906 (6 *Edw.* 7, *c.* 58), *s.* 1.

The fact of a seaman's disappearance from his vessel and his unexplained drowning does not raise a prima facie *inference that he met with an accident arising out of as well as in the course of his employment.*

A sailor having gone on deck from his cabin in the course of his employment on a hot night for the purpose of getting some fresh air disappeared, and the next day his body was found in the tidal basin close to the ship.

Held, that the particular accident did not arise out of as well as in the course of his employment, and his employers were not liable.

McDonald *v.* Owners of Steamship Banana (99 *L. T. Rep.* 671; (1908) 2 *K. B.* 926) *and* Bender *v.* Owners of Steamship Zent (100 *L. T. Rep.* 639; (1909) 2 *K. B.* 41) *followed.*

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

APPEAL from an award by the County Court judge at the North Shields County Court, sitting as arbitrator under the Workmen's Compensation Act 1906.

The deceased man, Marshall, was second engineer on board the *Wild Rose,* which last May was lying at a wharf in a tidal basin in Aberdeen harbour. From the evidence of the first engineer it appeared that he and the deceased had been on shore that evening, and had returned about ten o'clock. Steam was to be got up by midnight. They went down to their berths, and Marshall took his clothes off, except his trousers, shirt, and socks. It was a very hot night, and Marshall got up and said he would go for a breath of fresh air. He went on deck. When the first engineer went on deck about twelve o'clock Marshall was missing, and the next day his body was found in the water close to the ship and just under the place where the men usually sat.

The widow claimed compensation under the Workmen's Compensation Act 1906. The learned County Court judge was of opinion that the proper inference to be drawn from the facts was that the deceased was drowned by accident arising out of and in the course of his employment, and therefore made an award in her favour.

The employers appealed.

Atkin, K.C. and *Mundahl* for the appellants, referred to

McDonald v. *Owners of Steamship Banana,* 99 L. T. Rep. 671; (1908) 2 K. B. 926;
Moore v. *Manchester Liners,* 100 L. T. Rep. 164; (1909) 1 K. B. 417.

[COZENS-HARDY, M.R. referred to *Bender* v. *Owners of Steamship Zent, ante,* at p. 41 of (1909) 2 K. B. 41].

Lowenthal (*Scott Fox,* K.C. with him) for the respondent.—Those cases are distinguishable on the facts.

COZENS-HARDY, M.R.—I cannot help feeling a good deal of sympathy with the applicant in a case like this; but we must administer this Act according to what we believe to be its fair meaning, and having regard to the decisions which have been arrived at by this court in similar cases. The facts in this case are very meagre. The deceased was the second engineer on a ship which had arrived at Aberdeen. He and the first engineer went ashore in the evening. They returned later in the evening, according to the evidence of the first enginner, about ten. Steam had to be got up by midnight. The deceased went below and took off his coat and boots, and the first engineer says: "It was a very hot night. He subsequently came out of his berth, and as he passed me he said he thought he would go on deck for fresh air." That is all we know beyond this, that he was never seen again on that ship. The ship was in a tidal basin. His body was found by divers practically under or just at the side of the vessel. Under these circumstances is there legitimate ground for drawing the inference that this accident arose not merely in the course of but out of his employment. I am bound to say with some regret I do not think there is. I will indicate in a moment a further

point, but this court has held in *McDonald* v. *Owners of Steamship Banana* (*ubi sup.*), not I think for the first time, that the mere fact that a sailor is in the immediate neighbourhood of his ship and is drowned is not a ground for saying that the accident arose out of as well as in the course of the employment. We applied that principle a few days ago in *Bender* v. *Owners of Steamship Zent* (*ubi sup.*), where a ship's cook or baker on a perfectly calm day in mid-Atlantic went on deck about five o'clock in the morning, it being then daylight, and was last seen looking over the rail. His absence from the ship was discovered half an hour later, and nothing more was known of him. We held that the burden had not been discharged by the applicant in that case. The facts were not sufficient to raise even a presumption that the accident arose out of his employment, though undoubtedly it arose in the course of his employment. What distinction can be possibly drawn between that case and this? Counsel for the applicant has said everything that could be urged for his client, but the only additional fact is this. The first engineer, who said that the deceased spoke to him as he was going on deck and told him he was going for fresh air, goes on to say: "We always sat on the starboard quarter against the fishboard," and then he says that the body was found practically below the starboard quarter where the fishboard was. We are asked to infer from that these two propositions: first, that the man went on deck not merely to take fresh air, as he was entitled to do, but in order to enable him to discharge better the duty to get up steam, which was then imminent; and, secondly, that it was in the performance of that duty that he sat on the starboard quarter, leaned against the board, and fell over backwards. With some regret I am unable to think that such an inference can be justified, and I am driven to hold in this case that there was no justification for the conclusion which the learned County Court judge arrived at, and that this appeal must be allowed.

MOULTON, L.J.—I am of the same opinion. I cannot differentiate this case from the case which we decided two days ago, but the point is a very important one, and I hope it will go to the highest tribunal so that we may have direction upon it. It may be expressed in a very few words. Is the unexplained drowning of a sailor by falling from his ship a sufficient *primâ facie* case for compensation. We have decided that it is not, because we think that the dependants have not discharged the onus which is upon them of showing that the accident arose out of the employment. That it arose in the course of the employment there is no doubt. Seamen in their employment are necessarily on board continuously, by which I mean that not only are they employed in active work about the ship, but in the intervals between their active employment they must be about the ship. Therefore I have no doubt that the leisure of a sailor on board the vessel is as much in the course of his employment as active work. The point arises in deciding whether the accident arose out of his employment. Now, it may be that a higher court may say that because a seaman's employment puts him in a dangerous position—that is to say, on board a ship surrounded by water as opposed to being on land—that is a sufficient *primâ facie* case for saying that his death by drowning arose out of his employment. We have come to the conclusion that those bare facts are not sufficient, and we must administer justice according to the best opinion we can form. I do not think that we ought to administer uncertain justice, and having once decided that point I think that we must adhere to our decision, and if the point came up again I should decide it in that way because it represents upon the whole my view. I do not think that we are justified in drawing the inference we are asked to draw by the applicant. I can quite understand that a higher court may say that the facts to which I have referred justify the inference, and I shall be very glad personally to administer that justice because I feel that otherwise in the case of a large number of sailors whose death, if all the facts were known, would justify compensation being given to their dependants, the dependants will fail to get the relief intended by the Act simply because the circumstances of their death are unknown, and whether those circumstances would not be sufficient to support compensation remains for ever a mystery. Therefore I agree that this appeal must be allowed, and that the facts here amount to nothing more than the unexplained drowning of the seaman.

FARWELL, L.J.—I am of the same opinion. We are bound by our own decision, and I cannot see any ground for distinguishing this case from *Bender* v. *Owners of Steamship Zent* (*ubi sup.*). Far be it from me to suggest any limitation as to what the House of Lords may do, but my poor intelligence does not enable me to see how we can come to any other conclusion. It is perfectly plain, from the decisions of the House of Lords as well as of this court, that the onus is on the claimant to make out his case. He has to prove affirmatively that he brings himself within the Act. The Act of Parliament has thought fit to add to "in the course of the employment" the words "arising out of the employment," showing that two things are necessary. I cannot see myself how it is possible to infer from the mere fact that a man disappears in the course of his employment—that is, in the course of the voyage on his ship, if he is employed as a sailor—without more, that he disappeared in consequence of an accident arising out of his employment. Perhaps it is dangerous to give illustrations, but to illustrate my meaning I may add this: If an ordinary sailor is a member of the watch and is on duty during the night and disappears, I should think the inference would be irresistible that he died from an accident arising out of his employment. But if, on the other hand, he was not a member of the watch, and was down below, and came up on deck when he was not required for the purpose of any duty to be performed on deck and disappeared without our knowing anything else, it seems to me that there is absolutely nothing from which any court would draw the inference that he died from an accident arising out of his employment. I fail to understand why the Legislature in this Act has repeated the words "arising out of the employment" unless it intended those words to mean what they say. One can see that the burden on employers will be much greater if they are made to insure the men's lives against

accidents however occurring. If it is intended so to increase their liability the Legislature ought to say so in plain terms. I do not see how the judgment of the County Court judge can possibly stand, and I think that this appeal must be allowed.

Solicitors: *Williamson, Hill,* and *Co.*, for *R.* and *R. F. Kidd*, North Shields; *Maples, Teesdale,* and *Co.*, for *G. W. Chapman*, North Shields.

March 4 and April 6, 1909.

(Before Lord ALVERSTONE, C.J., FARWELL and KENNEDY, L.JJ., sitting with Nautical Assessors.)

THE ROANOKE. (*a*)

Collision—Act done in course of navigation—Course and speed—Collision Regulations 1897, *art.* 21.

The obligation to keep "course and speed" contained in art. 21 *of the Collision Regulations is not absolute and binding in all circumstances; and hence a steamship which in the ordinary course of navigation reduced speed and stopped her engines to pick up a pilot was held not to have infringed art.* 21.

DAMAGE ACTION.

Appeal from a decision of Bucknill, J. holding both the steamships *Windsor* and *Roanoke* to blame for a collision which occurred between the two vessels off Dungeness about 9 p.m. on the 3rd Oct. 1907.

The appellants, defendants and counter-claimants in the court below, were the owners of the steamship *Roanoke*; the respondents, plaintiffs in the court below, were the owners of the steamship *Windsor*.

The case made by the appellants in the court below was that shortly before 9 p.m. on the 3rd Oct. the *Roanoke*, a steel screw steamship of 3709 tons gross and 2418 tons net register manned by a crew of thirty-one hands, was in the English Channel off Dungeness in the course of a voyage from Baltimore to Rotterdam with a general cargo.

The *Roanoke*, on a course of N.E. by E. ½ E. magnetic, having sighted a Rotterdam pilot cutter right ahead, was bearing down upon her making about eleven knots over the ground. The regulation lights for a steamship under way and two vertical white lights as a signal to the pilot cutter were being duly exhibited and were burning brightly, and a good look-out was being kept on board her.

In these circumstances the masthead and green lights of the *Windsor* were seen broad on the port bow of the *Roanoke* and about one and a half to two miles off. The *Roanoke* was kept on her course, and shortly afterwards when the pilot cutter put her small boat into the water the engines were put at half speed and soon afterwards stopped, but the *Windsor* instead of keeping clear as she could and ought to have done continued on, and when it was seen that she was attempting to cross the bows of the *Roanoke* the whistle of the *Roanoke* was blown three short blasts and her engines put full speed astern, but the *Windsor* replied with two short blasts and continued on attempting to cross ahead of the *Roanoke*, and with her starboard side aft struck the port bow and stem of the *Roanoke* doing damage.

Those on the *Roanoke* charged those on the *Windsor* with not keeping a good look-out; with not easing, stopping, or reversing their engines; with improperly attempting to cross ahead of the *Roanoke*; with failing to keep clear; with improperly porting; and with improperly starboarding just before the collision.

The case made by the respondents was that shortly before 9.5 p.m. on the 3rd Oct. the *Windsor*, a steel screw steamship of 4074 tons gross and 2642 tons net register, manned by a crew of twenty-seven hands, while on a voyage from Odessa to Rotterdam with a cargo of grain in bulk, was in the English Channel three miles or thereabouts to the eastwards of Dungeness. The *Windsor*, which had shortly before sighted the Rotterdam pilot cutter, for which she had been making for some time previously the appropriate signal of four long blasts on the whistle and four flares, was lying with engines stopped and heading about E.S.E., and with little or no way, while a boat from the pilot cutter on her starboard bow was pulling towards her carrying the pilot. The *Windsor* carried the regulation masthead lights and sidelights and and a stern light, which were being duly exhibited and were burning brightly, and a good look-out was being kept on board her.

In these circumstances the *Roanoke*, also bound for Rotterdam, which had previously been seen between one and two miles off on the starboard quarter of the *Windsor* when the latter was on a course of E. by N. ¾ N., was noticed to be gradually overtaking her, still showing her masthead and red lights, and four blasts of the whistle were twice sounded on the whistle of the *Windsor* as a signal that she was taking her Rotterdam pilot, but the *Roanoke* suddenly opened her green light close on the starboard quarter of the *Windsor*, as if under a starboard helm and approached at considerable speed causing imminent danger of collision. As the only chance of avoiding a collision, the *Windsor's* engines were put full speed ahead and her helm hard a starboard, and two short blasts were sounded on her whistle, but before there was time for these measures to have any material effect the *Roanoke*, though loudly hailed, continued to come on at considerable speed, and with her stem struck the starboard quarter of the *Windsor*, causing her heavy damage. Just before the actual contact three short blasts were sounded on the whistle of the *Roanoke*.

Those on the *Windsor* charged those on the *Roanoke* with not keeping a good look-out; with failing to keep clear of the *Windsor*; with improperly starboarding; and with not easing, stopping, or reversing their engines.

The following collision regulations 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.

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

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.

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.

24. Notwithstanding anything contained in these rules, every vessel overtaking any other shall keep out of the way of the overtaken vessel.

28. 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"; three short blasts to mean, "My engines are going full speed astern."

Laing, K.C. and *A. A. Roche* for the plaintiffs.

Aspinall, K.C. and *Lewis Noad* for the defendants.

The case was heard on the 27th, 28th, and 29th Nov., and judgment was given on the 2nd Dec. 1907, both vessels being held to blame.

BUCKNILL, J.—This is a case of collision between the screw steamship *Windsor*, the property of the plaintiffs, and the *Roanoke*, the property of the Chesapeake and Ohio Steamship Company Limited, which took place in the English Channel on the 3rd Oct. 1907, about 9 p.m. There is only a difference of five minutes between the times stated by either party in the preliminary acts, which is not unimportant when one comes to consider the facts. Both ships were bound up Channel, the *Windsor* was going to Rotterdam from Odessa, and the *Roanoke* was bound to Rotterdam from Baltimore. They were both laden ships. Dungeness is the important place for consideration, in arriving at a conclusion as to the position of these ships at the moment of collision, because the first point is to find where it was the collision happened. If the courses given by the witnesses from the plaintiffs' ship, from the *Royal Sovereign*, and from Dungeness are correct, the collision could not have taken place anywhere near where I find, as a fact, it did take place, but it must have taken place very much more out in the Channel. I have had an opportunity of observing the witnesses, and I say, without hesitation, that, on this part of the case, I accept the story of the *Roanoke*. I find as a fact that the *Roanoke* did pass Dungeness when it was about a mile distant and abeam, and I accept the course given by the master of the *Roanoke* as steered after Dungeness was abeam, and I find from that—we have very carefully worked it out on the chart this morning—that it would be about E. by N. of Dungeness three and a half miles, taking as a starting point that which is described by the *Roanoke*—that is to say, a mile distant from Dungeness, bearing about E. by N. and then steering N.E. by E. ½ E. up to the point of collision. Now, that is the place of collision. Having fixed that, one is enabled to say that the story told by the *Windsor* as to the place of collision, and as to the distance which she passed from Dungeness, cannot be true, unless she had very much starboarded her helm, and gone into the bay, and if you mark off the course given by those on board the *Windsor* from the *Royal Sovereign* abeam, and from Dungeness two and a half to three miles distant, and prolong that course, which the witnesses from the *Windsor* say that she was going, you cannot get the place of collision anywhere near where I find as a fact it did happen, unless, after passing Dungeness, the *Windsor* went into the bay to look for that which she desired—namely, a Rotterdam pilot. Now, whether she did that or not, she admits that she was looking for a pilot, and that she had seen two pilot boats; but not the pilot boat she wanted. Then her story is, that she ported her helm until she had come round about three points, when she was heading south-east or east south-east (it does not matter a bit which for the purposes of this judgment), and that she was lying practically stopped, having discerned the Rotterdam pilot cutter, which was not in the bay where she might have expected to have found it, but somewhere outside the bay, where, in point of fact, it was. As to the veracity and truthfulness of the story of the *Windsor*, one has had considerable difficulty. As I have said before, and I say it again, one must not be in a hurry to find that witnesses are not telling the truth, and if one can find an independent witness who will give you assistance, it affords a very strong help to the court in coming to a conclusion. Unfortunately, the witness about whom I am going to speak I have not had the pleasure of seeing. He was examined and cross-examined at Rotterdam. He was the pilot who was subsequently engaged by the *Roanoke*. He had turned in, and one must take his evidence as one reads it, and he was told that he was wanted, and he got up and got into his boat, and was in his boat ten minutes—of course ten minutes does not necessarily mean ten minutes, but something like ten minutes—a few minutes—it would be very unjust to bind a man down to the exact time. Then he is asked this question in chief: "Which vessel did you tell your men to pull towards?" "The one with the signal lights or the other one?"—A. The one with the signal lights. Q. When you got into your boat did you see two steamers?—A. Yes. Q. Had both these boats got signals for a Rotterdam pilot?—A. One of them. Q. What was that signal?—A. Two bright lights on the mizzen mast. Q. How was the steamer showing the two bright lamps heading when you first saw her?—A. About E.N.E. Q. Did you see how the other steamer was heading?—A. The other steamer was coming from the East Bay." That is the first time in his examination that the words East Bay had been used. "How do you think the steamer was heading?—A. S.E. by E." He was not very far wrong there, because that is the pleaded heading, or thereabouts. "Q. Are you quite sure that only one of these two vessels had two white lamps?—A. Yes; it was the *Roanoke* which had the two white lights up." Then he speaks about the lights he saw, and thinks they were about three-quarters of a mile off him, and both converging towards him. The truth is, that they were both going towards him in his boat, and I strongly suspect that, regardless of all rules of navigation, they wanted to get the pilot, and that is about the plain, common-sense view of the matter, because it is admitted that the *Roanoke* acted for the pilot cutter which had been

seen by the master for some time; and it is also admitted that those on board the *Windsor* had practically taken off all their way, in order that the pilot boat might row to them. I accept the statement of the pilot in the boat who said that he rowed out to them. He was in his boat for about ten minutes. They were both of them coming towards him, of course at different angles, showing different lights, one showing also the proper two vertical lights, and I find that at that time the *Windsor* was coming out of the East Bay. Now, that being so, what was the course of the other ship? I have said what it was, and I have found where the collision took place; and, that being so, I find, as a fact, that the *Roanoke* and the *Windsor* were so proceeding that the *Windsor* had the *Roanoke* on the starboard bow or side, and that they were proceeding so as to involve risk of collision at the material time before the collision happened. It follows, therefore, that I find that they were not overtaken and overtaking ships. At one moment, in a sense, they were. When they passed Dungeness, the *Windsor* had passed at 8.15 p.m. and the *Roanoke* had passed at 8.35 p.m., and if, as I suspect, what was nearer to the truth than as stated by the witnesses from the *Windsor*, the *Windsor* was very much nearer in than she says she was to Dungeness at that moment, it may be then that they were overtaken and overtaking ships; but that position, of course, was discontinued by those on board the *Windsor*, who deviated from their course and took their ship into the East Bay and came out again porting a sufficient number of points—four, I should think, at least—to bring her out from the bay until she was heading east south-east or south-east. I find as a fact that when these two boats were approaching the pilot boat, and when they were about three-quarters of a mile off it, each trying to get to it first probably, and each converging towards it, those on board the *Windsor* had the *Roanoke* on their starboard bow, or side, and the ships were then so proceeding as to involve risk of collision. That being so, the matter becomes comparatively easy. The *Windsor* must be assuredly found to blame. She did not take the proper steps, or any steps, to avoid the *Roanoke*. I think the learned counsel on behalf of the *Windsor* must have seen the difficulty his ship was put in as soon as the court found that they were crossing ships. It is only just for me to say that the log of the *Windsor* does not assist us. It is a badly kept log, but I am not going to find that it has been altered. I have not given the matter sufficient consideration to say whether those words were or not altered; but, even if they were not altered, the log is as equally badly kept as if they were. Because, to put course "E." or easterly at this place, in this crowded navigation, is highly improper. And so, with regard to the log of the other ship, it would have been impossible to have worked out any dead reckoning of either of the ships from the logs produced in court. I will not say any more. I will not say they were dishonestly kept, because I have not considered them sufficiently. Therefore the *Windsor* is to blame. Now, then, how about the *Roanoke*? What does the *Roanoke* say? Those on board the *Roanoke* admittedly eased, stopped, put their engines at half speed, and acted, not for the purpose of, or in connection with the other ship at all, which they must have seen, and, as I find, did see, at a material time before the collision, but for the purpose of getting to the pilot boat, and the master admitted it. I was struck with the manly sort of way in which the master gave his evidence. He did not fence with the question. He was not going to tell a falsehood about having acted for the pilot boat. He said, "I did," and it was difficult to make him understand in the box that he was not right in doing so. "Have you not read the last case on the subject?" said counsel, cross-examining. "I think I have seen it somewhere in the *Shipping Gazette*." Where, of course, all these things are reported. "Have you not studied it?" "No; I do not think that I have." Masters of ships are not expected to read the law reports. Each case must be determined on its own peculiar facts and circumstances. The master has said in this place, in a straightforward way, that his speed was altered and decreased for the purpose of picking up the pilot out of the boat. But that will not avail him, in my opinion, as a matter of law. He had the other ship in his eye. He saw her; he knew where she was. He had probably a keen suspicion what she was doing. I think we have not heard the whole truth in this case, and they both saw each other, and both saw the small pilot boat, and they acted, but not for each other. According to Lowrey, the mate of the *Roanoke*, and according to the master, the *Roanoke* could have passed the bows of the *Windsor* if her speed had been maintained. I find that, as a fact, and there is nothing more to say about it. It has taken a long time to try and some time to consider. I find, therefore, that both ships must be held to blame—the *Windsor* for not taking steps to keep out of the way of the *Roanoke*, which she had on her starboard bow, and the *Roanoke* must be held to blame for not taking proper steps to keep her course and speed when she was bound to keep them. The note to this particular rule does not apply in this case because, regardless of all rules, the master of the *Roanoke* chose to reduce his speed to get to the pilot boat. His excuse was that he might otherwise have run over the pilot boat. I have nothing to do with that. The pilot boat could take care of itself. There was no danger to the pilot boat; the danger was that both the vessels should come into collision in trying to get at the pilot boat in an improper and negligent manner, and therefore they are both to blame.

On the 16th Dec. 1907 the defendants, the owners of the *Roanoke*, delivered a notice of appeal asking that the judgment might be reversed or varied, and that the owners of the *Windsor* should be held alone to blame for the collision, and that the defendants' counter-claim should be pronounced for.

The appeal was heard on the 4th March.

Aspinall, K.C. and *Lewis Noad* for the appellants.—The learned judge has found that the crossing rules apply to these vessels, and that the rules as to overtaking and overtaken vessels do not apply; if that finding is accepted there is a duty on the *Windsor* to keep out of the way and a duty on the *Roanoke* to keep her course and speed. The question in this case is whether

the *Roanoke* did keep her course and speed within the meaning of the rule. Both these vessels were engaged in picking up pilots, and those on the *Windsor* knew or ought to have known that the *Roanoke* must stop to pick up the pilot, that manœuvre was an ordinary and proper manœuvre in the course of the *Roanoke's* navigation which might require an alteration in her course and must require an alteration in her speed, and those on the *Windsor* should have acted accordingly. Course does not mean actual compass course of the vessel at the time the other is sighted:

The Velocity, 3 Mar. Law Cas. O. S. 308; 21 L. T. Rep. 686; L. Rep. 3 P. C. 44.

Laing, K.C. and *Roche* for the respondents.—The case of the *Velocity* (*ubi sup.*) can be distinguished from this case. In that case a question as to the proper navigation of a vessel in a river was raised, in such a place vessels are bound to follow the bends of the stream. In this case the rules should be applied strictly, and the *Roanoke* committed a breach of art. 21:

The Ada and *The Sappho*, 28 L. T. Rep. 825; 2 Asp. Mar. Law Cas. 4;
The Albano, 96 L T. Rep. 335; 10 Asp. Mar. Law Cas. 365; (1907) A. C. 193.

Lord Alverstone, C.J.—This is an appeal in a collision case tried before Bucknill, J. A collision occurred between the steamship *Windsor* and the steamship *Roanoke*, a few miles to the eastward of Dungeness on the evening of the 3rd Oct. Bucknill, J. found both vessels to blame. The only point argued before us was whether that judgment should be reversed in so far as it found the *Roanoke* to blame. The material facts may be briefly stated. The two vessels being bound up Channel the *Windsor* had at some short time before the collision altered her course to the northward so as to go into Dungeness Bay in search of a pilot boat. Shortly before the collision the *Windsor* was coming out of the bay on a course of E.S.E. or S.E., heading towards a Rotterdam pilot schooner. At this time the *Roanoke*, bound up Channel, was steering about N.E. by E. ½ E. and heading towards the same pilot boat. The *Windsor* was inside, that is to say to the northward, of the *Roanoke*, and it is needless to say that upon this course the *Windsor* had the *Roanoke* on her starboard side, and it was the duty of the *Windsor* to keep out of the way of the *Roanoke*, and, if the circumstances of the case permitted, to avoid crossing ahead of her (art. 19 and 22). Under these circumstances it was the duty of the *Roanoke* to keep her course and speed (art. 21). As I have already said, it was not contended that the *Windsor* was not to blame. The learned judge has found that she took no proper steps, or any steps to avoid the *Roanoke*. He also found the *Roanoke* to blame on the ground that she did not keep her speed as provided by art. 21; and the question we have to decide is whether or not that judgment is correct. The case for the *Roanoke* was that having two vertical bright white lights exhibited as a signal for a pilot boat, a pilot boat was sighted ahead of her, and a small boat was seen to put out of the pilot schooner into the water, and row towards the *Roanoke*. Thereupon, at a distance of three-quarters of a mile, the engines of the *Roanoke* were put to half speed, and three minutes later were stopped, until it was seen that the *Windsor* was endeavouring to pass ahead, whereupon the engines were put full speed astern, and three short blasts were blown. The reason given by the master of the *Roanoke* for his manœuvres was that he was about to take a pilot, and that he had diminished his speed for the purpose of taking the pilot out of the boat. At the time of the collision the small boat, which was rowing towards the *Roanoke*, was at a distance of about 300 yards from them, right ahead, and the pilot schooner at a distance of 700 yards, also right ahead. Bucknill, J. has held that the fact that the *Roanoke* was about to take up a pilot, and was slackening her speed for that purpose affords no excuse, and that inasmuch as under art. 21 she was bound to keep her course and speed—and it was not disputed that if the *Roanoke's* engine speed had not been reduced she would have passed ahead of the *Windsor*—the *Roanoke* must be held also to blame.

The effect of this decision is of very great importance, because it amounts to a ruling that if two vessels are approaching so as to involve risk of collision, it being known to both of them that the one whose duty it is to keep her course and speed is about to pick up a pilot, and is manœuvring for that purpose, and although the vessel whose duty it is to keep out of the way ought to have seen exactly what was being done, the vessel which had reduced her speed in order to take the pilot on board must nevertheless be held to blame under art. 21, and that, as Bucknill, J. has put it, "the defence that the speed was altered or decreased for the purpose of taking up a pilot will, as a matter of law, not avail him." With very great deference to the opinion of my brother Bucknill I cannot think that this is the true view of the law, and it seems to me that such a construction would in many cases negative and neutralise the express provisions of the 27th and 29th articles. Dropping and picking up pilots are operations which regularly occur at known and recognised places, and these operations must be undertaken by vessels in the ordinary course of navigation. The East Bay of Dungeness is such a place. It was in evidence in this case that it is a place where pilot boats lie in readiness to put pilots on board ships. The *Windsor* herself had gone to the northward and gone into the bay with the expectation of finding a pilot boat, and had, in fact, seen two, which turned out not to be Rotterdam pilot boats; and, as already stated, having ported her helm she was coming out on a course stated by the learned judge to be from S.E. to E.S.E. heading towards the same pilot boat to which the *Roanoke* was also heading. Coming out on that course, she had in plain view on her starboard side a vessel showing two white lights, and thereby indicating clearly that she was in search of a pilot. I have already stated that if the vessels continue to approach so as to involve risk of collision it was the duty of the *Windsor* to go under the *Roanoke's* stern, and in my opinion she ought to have seen, and had she had a proper look-out would have seen, that this vessel showing the two bright white lights was signalling for a pilot, was approaching a pilot schooner, that a small boat had been put off, and that in the ordinary course the *Roanoke* must reduce her speed in order to take the pilot on board. The cases of *The Ada*

and *The Sappho* (*ubi sup.*) and the case of *The Albano* (*ubi sup.*) decided, as Bucknill, J. did in this case. that the crossing rules apply when two vessels are approaching a place where they propose to take up a pilot, and in my judgment to hold that a vessel was not entitled to reduce her speed in order to take a pilot on board, when that manœuvre was perfectly visible to the ship whose duty it was to keep out of the way, would impose a most dangerous and serious risk upon vessels navigating in the ordinary course. In my judgment, "course and speed" in art. 21 mean course and speed in following the nautical manœuvre in which, to the knowledge of the other vessel, the vessel is at the time engaged. It is not difficult to give many instances which support this view. The "course" certainly does not mean the actual compass direction of the heading of the vessel at the time the other is sighted—see *The Velocity* (*ubi sup.*). A vessel bound to keep her course and speed may be obliged to reduce her speed to avoid some danger of navigation, and the question must be in each case "Is the manœuvre in which the vessel is engaged an ordinary and proper manœuvre in the course of navigation which will require an alteration of course and speed; ought the other vessel to be aware of the manœuvre which is being attempted to be carried out?" I am further of opinion that the conduct of the *Roanoke* might, if necessary, be justified under arts. 27 and 29. She had signalled the pilot schooner. The pilot schooner had put out a small boat for her, and, in my judgment, she could not properly have continued her course at full speed without endangering those on board the small boat, if not the pilot schooner, and certainly could not have done so without abandoning her intention, which she had already indicated by signals, to take the pilot out of the small boat, then only 300 yards ahead of her. It must be observed that the case for the *Windsor* is that the *Roanoke* ought never to have reduced her speed at all, and she has not been found to blame for improperly manœuvring her engines, upon the assumption that she was entitled to take on board the pilot. For these reasons, in my opinion, the judgment, in so far as the *Roanoke* was found to blame, is erroneous and must be reversed.

Farwell, L.J.—The question in this case depends, in my judgment, on the true construction of arts. 19 and 21. The facts to which those articles have to be applied in the present case are clear and simple. Both vessels were making for a pilot—the pilot cutter was hove to about 700 yards nearly ahead of the *Roanoke* at the time of the collision and the pilot was in the cutter's dinghy rowing towards the *Roanoke* and about 300 yards from her, dead ahead. The *Windsor* was the vessel to which art. 19 applied (I will refer to her as the giving-way vessel) and the *Roanoke* had had signals for the pilot showing for at least half an hour before the collision, and the *Windsor* ought and must at any rate be taken to have seen such signals and to have known that the *Roanoke* was running for the pilot and must slacken speed and stop her engines and take up the pilot. Under these circumstances the question comes to this—was the *Windsor* bound to keep out of the way of the *Roanoke*, although the latter was, as the *Windsor* knew, slackening speed to pick up the pilot, or was the *Roanoke* bound to continue at full speed in order to keep out of the way of the *Windsor*, or, as the learned judge has held, were both vessels to blame, the *Windsor* for not keeping out of the way and the *Roanoke* for not continuing her speed? In my opinion the *Windsor* was bound to keep out of the way of the *Roanoke* and the *Roanoke* was in no way to blame. The two arts. 19 and 21 are correlative; the duty of keeping out of the way is put upon the giving-way vessel, and, in order to enable her to perform this duty, the other vessel is bound to keep her course and speed. But this latter obligation is not absolute and binding in all cases and under all circumstances; for instance, if the *Roanoke* were overtaking a third vessel at the time when under art. 19 she is bound to keep her course and speed, it is obvious that she must comply with art. 24 and must alter her course, and if necessary her speed; also, in order to keep out of the way of the overtaken ship; also that if the *Roanoke* were meeting a third ship end-on she must alter her heading under art. 18 and blow the appropriate number of blasts. It is clear that in both those cases the obligation to keep out of the way remains on the giving-way ship, although the other slacken her speed and change her course. In truth, art. 21 is intended to be a guide to the giving-way ship in the due performance of her duty, under art. 19—if there is nothing visible or audible to the giving-way ship she is entitled to assume that there will be no alteration in the course or speed of the vessel that she is crossing from the time when her duty arises—namely, as soon as the two vessels are crossing so as to involve risk of collision. *Primâ facie* the vessel bound to keep her course and speed must make no alteration in either after she has once got within the area of possibility of danger of collision—the area, that is, within which the duty of the giving-way ship commences. But it would be impossible to apply this as an inflexible rule in all cases and under all circumstances; it must at least be qualified by reading into it "so far as is consistent with compliance with the other articles and with the safety of other ships," and this is the effect of art. 27. But it is said that this may be so, and yet that the vessel bound by art. 21 cannot deviate from it, even to perform an ordinary nautical manœuvre, duly signalled, if it be merely for her own convenience; but this appears to me to transpose the duty of keeping out of the way from the giving-way vessel to the other vessel. To pick up a pilot is a legitimate and usual nautical manœuvre. The master of the giving-way vessel is bound to keep a proper watch on the other vessel and her signals and surroundings, and to apply his seamanship and common sense to the whole circumstances of the case. He must assume that the captain of the other vessel will keep his course and speed under art. 21 in such a manner as good seamanship and common sense dictate, under the surrounding circumstances. This is certainly so in the two cases that I have mentioned of overtaking, or meeting end-on, a third ship; and in the same way no seaman is justified in assuming that a vessel that has been, and still is, signalling for a pilot, and is bearing down on the pilot's dinghy, a short distance ahead of him, is going to run up to her at nine or ten knots, but ought to assume that she is going to slacken speed and

stop her engines in the manner in which a good seaman would act for such a purpose. I cannot bring myself to doubt that the captain of the *Windsor* would have taken this view if he had not himself been running for the pilot cutter, but this fact cannot affect his duty under art. 19, or enable him to call on the *Roanoke* to subordinate her wants to his. So to hold would be to shift the duty of keeping out of the way from the giving-way vessel to the other, and would make art. 21 read as if the latter vessel were bound to keep her course and speed "so as to keep out of the way of the giving-way vessel," instead of "so as to enable the giving-way vessel to keep out of her way," which is, in my opinion, the true construction. It follows that, so far from being to blame for continuing her speed in such manner as was necessary to enable her to pick up the pilot, the *Roanoke* would have been to blame if she had continued at nine knots, and the *Windsor* would have been entitled to accuse her of misleading her by signalling for and bearing down on the pilot boat and not slackening speed, to pick the pilot up.

I have so far dealt with the case without reference to authority, but in my opinion the case is covered by the reasoning of Sir Robert Phillimore and the Privy Council in *The Ada* and *The Sappho* (*ubi sup.*) It is said that the rule then required the vessel to keep her course only, and not her speed; but it was held that she was entitled to alter her course to pick up the pilot for which she and the giving-way vessel were racing, but I see no distinction in principle between course and speed in such a case. It is as unreasonable to forbid the vessel which is entitled to require the giving-way vessel to keep out of her way to slacken her speed in order to pick up a pilot, as it would be to forbid her to alter her course for the same purpose. There is nothing in *The Albano* (*ubi sup.*) to militate against this view, as I read the judgment of the Privy Council. It was held that the giving-way vessel was not entitled to rely on the contention that the other vessel was slackening to pick up a pilot, first because as a fact the former never observed the other vessel at all, and secondly because the place at which the slackening took place was not the appropriate place at which to pick up a pilot; but the judgment proceeds on the basis that she would have been right in assuming that the other vessel was slackening speed for a pilot if she had, in fact, been doing so at an appropriate place and duly signalled. I need hardly say that I differ from Bucknill, J., with great diffidence; but he does not appear to have directed his attention to the points with which I have dealt so much, as to the question of danger to the pilot cutter and dinghy. I do not rely on any question of danger either to the cutter or the dinghy. As our nautical assessors differ on that point, I am not satisfied that any such danger existed, but on the other grounds above stated I am of opinion that this appeal should be allowed.

KENNEDY, L.J., after stating that the learned judge in the court below had accepted the evidence from the *Roanoke* in all material particulars, and disbelieved the evidence from the *Windsor*, and that on the facts found the vessels were crossing ships, recapitulated the facts, and proceeded:—The navigation of the *Windsor* was improper, both in seamanship and as a violation of art. 19 of the Regulations for Preventing Collisions. Of that there can be no question, and the learned judge has so held. But it is not disputed that if the speed of the *Roanoke* had never been reduced the *Windsor* would, in fact, have passed astern of the *Roanoke*; and the owners of the *Windsor* succeeded at the trial in a contention that the reduction of speed on the part of the *Roanoke* ought to be held to constitute a violation of art. 21. Bucknill, J. has held, in accordance with this contention, that the *Roanoke* is also to blame for the collision. The owners of the *Roanoke* have appealed to this court against this latter part of the judgment. Undoubtedly the question is one of some nicety, but upon the whole I am of opinion that their appeal ought to be allowed. Art. 19 prescribes that 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, and art. 22 forbids her trying to do so by crossing her bows. Art. 21 prescribes that "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." Now it is my view that it is our duty to decide this case as it has been presented to the court below, and to us, by the arguments of the one side and of the other; but in passing I may say that I am by no means sure, having regard to the judgment of the Court of Appeal in *The Banshee* (57 L. T. Rep. 841; 6 Asp. Mar. Law Cas. 221 (1887) that at the important time, namely, at the time when the reduction of the speed of the *Roanoke* commenced by the alteration from full to half speed, the relation of the vessels to each other was such that these articles applied to their navigation. In the case of *The Banshee*, the *Banshee* was overtaking the steamship *Kildare*, and the *Kildare* ported her helm to avoid a sailing vessel ahead at a time when there was a distance of 800 yards between the *Banshee* and the *Kildare*. A collision occurred, and Butt, J. had held the *Kildare* to blame for porting, when, under art. 20 of the Regulations of 1884, she ought to have kept her course; but the Court of Appeal held that the article did not apply, because at so great a distance as 800 yards the *Banshee*, the overtaking ship, could by proper navigation have kept clear of the *Kildare*, and therefore at that time no risk of collision existed, and, until that point was reached, the *Kildare*, the ship which was being overtaken, might alter her course without violating the article in question. In the present case, when the *Roanoke* put her engines to half speed the *Windsor* was no less than three-quarters of a mile away on her port side, and those who were in charge of the *Windsor* could have found no real difficulty in avoiding the *Roanoke*. According, therefore, to the judgment of the Court of Appeal in *The Banshee*, the *Roanoke* did not violate art. 21 in slackening speed, because then no risk of collision between the crossing steamships was involved. The stopping of the engines three minutes later might reasonably be regarded only as a further step in the same gradual process of taking off the way of the *Roanoke* for the purpose of picking up the pilot. Putting, however, this line of reasoning entirely aside, and treating the relative position of the *Windsor* and the *Roanoke* when the latter altered

her speed, and the distance between them at that time as bringing arts. 19, 21, and 22 into operation, I am of opinion that the *Roanoke* ought not to be held to blame on account of the alteration.

I will deal in the first place with the construction of art. 21 in its application to the circumstances of the present case. *Primâ facie* the direction to keep course and speed appears rigidly to enjoin a maintenance of heading and speed, but it has been held in *The Velocity* that this is not a correct view so far as regards course, and I think that a corresponding qualification ought for similar reasons of practical good sense to be admitted in regard to speed. "Keeping her speed" ought, I think, to admit the interpretation of keeping that speed which, according to the criterion of good seamanship is the right speed to be kept in the performance of the nautical manœuvre in which the vessel is at the time engaged. It would be a strange thing if a vessel, in order successfully and in the ordinary and proper way to perform a proper nautical manœuvre, must alter her speed, but nevertheless must be held to infringe art. 21 by such alteration, if it takes place at a time when she is being approached by another vessel, which is either overtaking her within art. 24, or is a crossing steamship which has her on the starboard side within art. 19, although the manœuvre in which she is engaged, and the necessity of altering speed which the manœuvre involves, are perfectly obvious to the overtaking or crossing vessel, and although the alteration of speed in no way prevents such overtaking or crossing vessel, if properly navigated, from keeping out of her way. It seems to me that this cannot be the right interpretation of the injunction to keep her speed. It would introduce into navigation not infrequently a probable source of danger. A steamer approaching her landing place for goods or passengers, or drawing up to her anchorage, must often either reduce her speed or abandon her object; and yet if the interpretation of art. 21, for which counsel for the *Windsor* contend is correct, she is bound, under pain of liability, should a collision occur, for a breach of art. 21, to adopt the latter alternative, if she has in view either a crossing steamer, which has to give way under art. 19, or an overtaking vessel under art. 24. But surely the officer who is navigating the crossing or the overtaking vessel will, in manœuvring his own ship, which has to keep out of the way, count, and ought to be able to count, upon the vessel which he has to avoid being so handled, in regard to speed as well as to course, as the proper execution of the nautical manœuvre in which he is obviously and visibly engaged may dictate; and indeed he may be dangerously misled if he acts differently. We have, I think, some judicial support for the view of the application of art. 21, which I am led to prefer in regard to speed, in the judgment of the Privy Council in the case of *The Velocity* (*ubi sup.*). That was a decision on the corresponding article (No. 22) of the Regulations of 1884, which did not contain the words "and speed," but referred to "course" only. It was held by the Privy Council that the expression "keeping her course" did not mean following the direction in which the vessel's head happens to be turned at the time when she is seen and is acted for by the other vessel, which has to keep out of her way, but meant keeping that course which she would take naturally and independently of the presence of the other vessel, as the proper method of navigation at the particular place and time—*e.g.*, in manœuvring round a point in a winding river by porting or starboarding her helm. It appears to me that the reasoning which leads to the adoption of this view in regard to the meaning of the injunction as to course, is justly applicable to the interpretation of the injunction added in the existing art. 21 in regard to speed, and that the speed that is to be kept by a vessel in accordance with this article where the exigencies of a nautical manœuvre in which she is engaged are visible to the vessel which is bound under the regulations to keep out of her way, is that speed which a vessel engaged in such a manœuvre at that time and in that place would naturally keep, if navigated in a proper and seamanlike manner, in order successfully to perform the manœuvre. Of course the obligation of art. 29 must always be observed. If the pursuance of the manœuvre might otherwise, in the particular circumstances, embarrass the vessel whose duty it is to keep out of the way, or, again, if it is reasonably possible that those in charge of that vessel may not appreciate the nature of the manœuvre, the manœuvring vessel is bound under art. 29 to take all steps that good seamanship and reasonable carefulness would dictate promptly to apprise the vessel which has to keep out of her way of what she is about, and further, if it is obviously necessary in order to avoid a collision, even to desist from the manœuvre. In the present case, however, there is no suggestion in the judgment of Bucknill, J. or even in the evidence adduced on behalf of the *Windsor*, that those on board the *Windsor* did not properly appreciate, or at all events have ample opportunity to appreciate, the nautical manœuvre in which the *Roanoke* was engaged when the *Windsor* had to act as the crossing ship which had to keep out of the way of the other. The locality was one in which steamers bound for Rotterdam seek for Rotterdam pilots. The *Roanoke*, which those on board the *Windsor*, according to their pleadings, sighted when between one and two miles distant, was exhibiting on her mizenmast the two vertical white lights which constitute the recognised signal for a Rotterdam pilot; the *Windsor*, at three-quarters of a mile distant from the *Roanoke*, had in view the Rotterdam pilot schooner and the dinghy carrying a white light and being rowed from the pilot schooner towards and right ahead of the *Roanoke*; and those on board the *Windsor*, in my judgment, had then alike the duty and the right to assume that the course and speed which the *Roanoke* would keep would be such as to enable her safely and in a seamanlike way to approach the little boat and pick up the pilot from her. There was ample time for the *Windsor* to keep out of the way of the *Roanoke* if those on board of her had taken proper measures for the purpose. Further, and quite independently of the correctness of this construction of art. 21 as applicable to the facts in the present case, I think that arts. 27 and 29 operate in the circumstances of the case to absolve the *Roanake* from blame. Bucknill, J. in the course of his judgment, observes "the master has said in a straightforward way that his speed was altered and decreased for the purpose of picking up the pilot out of the boat. But that

will not avail him, in my opinion, as a matter of law." And again he says, referring to the *Roanoke's* reduction of speed, "his (*i.e.*, the master's) excuse was that he might otherwise have run over the pilot boat. I have nothing to do with that. The pilot boat could take care of itself." It appears to me that it is not right as a matter of law to eliminate the position of the pilot boat from the facts to be considered in judging of the propriety of the action of the *Roanoke* in reducing her speed as and when she did. It was, I conceive, the duty, alike from the lawyer's and the seaman's point of view, of those navigating the *Roanoke* to consider the safety of those on board that little boat, which quite legitimately was stopped right ahead of her, and was at the time of the collision only some 300 yards distant from her bows. It may be the fact, as my brother Bucknill states to be his opinion, that the boat could have taken care of itself—namely, it might possibly have escaped collision with the *Roanoke* even if she had continued her course without reduction of speed; and, as I understood their views, our assessors were divided in opinion upon this point, although they were agreed that there was nothing improper or unseamanlike in the navigation of the *Roanoke*. But it appears to me to be clear from the evidence that there was, if not a certainty, at least a real and substantial risk to the little boat, if the *Roanoke* held on at full speed. Even assuming that the little boat, if the *Roanoke* had not reduced her speed, might possibly have managed to get out of her way, I am still of opinion that there existed manifestly a real danger either of actual collision or of the boat being swamped, if a large steamer like the *Roanoke* came rushing past her at nine and a half knots speed—a danger for the avoidance of which the *Roanoke* was bound by the dictates alike of humanity and of seamanship to provide, and in providing for which, as she did, when she reduced her speed, she was protected from blame by arts. 27 and 29 of the Regulations for Preventing Collisions at Sea.

Solicitors for the appellants, *Downing, Handcock*, and *Co.*, for *Bolam, Middleton*, and *Co.*, Sunderland.

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

Tuesday, June 29, 1909.

(Before Cozens-Hardy, M.R., Farwell and Kennedy, L.JJ.)

Rosin and Turpentine Import Company Limited *v.* B. Jacob and Sons Limited. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Carriers—Lightermen—Contract for carriage of goods—Ambiguity—"Reasonable precaution"—Exemption from liability for "any loss or damage, including negligence, which can be covered by insurance"—Negligence—Common law liability of carriers.

The defendants agreed to lighter goods on the terms of the following clause printed on their invoices and memoranda: "The rates charged by B. Jacob and Sons Limited are for conveyance only, and every reasonable precaution is taken for the safety of the goods whilst in craft; they will not be liable for any loss or damage, including negligence, which can be covered by insurance, and the shipper in taking out policy should effect same 'without recourse to lighterman,' as B. Jacob and Sons Limited do not accept responsibility for insurable risks." The goods were damaged by the defendants' negligence.

Held (dissentiente *Cozens-Hardy, M.R.*), *that according to the fair meaning of the clause it only amounted to a recital of the general careful practice of the defendants, followed by a statement that as accidents did happen even with every care on the part of their firm they desired to guard themselves by the declaration that their firm were not liable for insurable risks, including negligence, thus expressly and without ambiguity exempting themselves from liability.*

Price and Co. *v.* Union Lighterage Company Limited (9 *Asp. Mar. Law Cas.* 396; 88 *L. T. Rep.* 428; (1903) 1 *K. B.* 750; *affirmed on appeal*, 89 *L. T. Rep.* 731; (1904) 1 *K. B.* 412) *distinguished.*

Decision of Bray, J. (11 *Asp. Mar. Law Cas.* 231; 100 *L. T. Rep.* 366) *reversed.*

In June 1907 the plaintiffs were the owners of a cargo of 1000 barrels of rosin laden on board the steamship *Aeolus*, then lying at West Woolwich Buoys. They had sold this cargo to a firm at Newcastle to arrive at 10*s.* per barrel.

On the 8th June the defendants, who were lightermen, orally agreed with the plaintiffs to tranship the cargo from the *Aeolus* to a steamer bound for Newcastle.

The lighter in which 565 of the barrels were placed by the defendants was moored at some buoys in the river Thames off Deptford, and while at her moorings the lighter was sunk through a steamer coming into collision with her at night.

The lighter was subsequently raised with 361 barrels of rosin in her. These barrels were delivered by the defendants in a damaged condition and had to be stacked and dried before they could be sold.

The plaintiffs accordingly brought this action against the defendants alleging by their statement of claim that the defendants were lightermen and common carriers, and that in consequence it became the duty of the defendants to deliver the goods in the like good order and condition in which they received them from the *Aeolus*; but that, in breach of their contract and their duty as common carriers, they failed to deliver 204 of the barrels and delivered 361 of the barrels in a damaged condition.

The plaintiffs claimed 424*l.* as damages for the 204 barrels of rosin lost, the damage done to the 361 barrels salved, and for the expenses of salvage.

By their defence the defendants denied that they were common carriers. They stated that they were lightermen who lightered goods, as the plaintiffs knew, upon the terms of the following clause printed upon their invoices and memoranda:

The rates charged by B. Jacob and Sons Limited are for conveyance only, and every reasonable precaution is taken for the safety of goods whilst in craft; they will not be liable for any loss or damage, including negligence, which can be covered by insurance, and the

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

shipper in taking out policy should effect same "without recourse to lighterman," as B. Jacob and Sons Limited do not accept responsibility for insurable risks.

The defendants denied that there had been any breach of contract, and they stated that the loss and damage alleged were within the terms of the above clause and that they were not responsible therefor.

The plaintiffs replied that if the goods were carried on the terms of the above clause the damage and loss were caused by the defendants or their servants negligently, and in breach of their contract, failing to take reasonable precautions for the safety of the goods whilst in craft, inasmuch as the lighter was improperly and in breach of art. 30 of the Thames By-laws 1898 left moored at night at moorings in the river Thames other than the usual barge moorings without any anchor light and without any proper appliances or fittings for carrying such light, and without a lighterman or anyone in attendance, whereby she was run down by a passing steamer and sunk. The plaintiffs further alleged that the barge was, under the circumstances, unseaworthy. They also alleged that at the time the barge was sunk she was not upon the voyage contemplated, but had deviated therefrom by reason of mooring at the place where she did, and that the defendants were therefore not entitled to rely on the exceptions contained in the contract.

In Feb. 1909 the action came on for trial before Bray, J., sitting without a jury in Middlesex, when his Lordship decided (11 Asp. Mar. Law Cas. 231; 100 L. T. Rep. 366) that portions of the goods were damaged through the absence of reasonable precautions on the part of the defendants to prevent negligence which occasioned the damage; and that the terms upon which the goods were lightered were ambiguous, and might reasonably be read by shippers as an express promise that every reasonable precaution would be taken; and that, therefore, they did not exempt the defendants from liability. His Lordship accordingly gave judgment for the plaintiffs for 393*l*.

From that decision the defendants now appealed.

Bailhache, K.C. and *Leck* for the appellants.—The clause in the contract for the lighterage of the plaintiffs' goods was held to contain ambiguous terms by Bray, J., and on the question of fact negligence was found by the learned judge. On the latter point the defendants do not appeal. But as to the clause in the contract we submit that it is sufficient to prevent the defendants from being liable to pay the plaintiffs any damages, negligence being an insurable risk of the kind referred to in the contract:

> *Price and Co.* v. *Union Lighterage Company Limited*, 9 Asp. Mar. Law Cas. 396; 88 L. T. Rep. 428; (1903) 1 K. B. 750; affirmed on appeal, 89 L. T. Rep. 731; not in Asp. on appeal; (1904) 1 K. B. 412.

In that case it was held that although negligence was a loss commonly covered by insurance, yet, as it was not expressly mentioned, the carrier was liable. But in the present case negligence is expressly mentioned in the clause, so that any argument based on that authority is rendered impossible. The two portions of the clause are not inconsistent. The first part states that the defendants will take every reasonable precaution, and the second that they will not be liable for loss or damage, including negligence, which can be covered by insurance. The words "including negligence" distinguish the present case from *Price and Co.* v. *Union Lighterage Company Limited* (*ubi sup.*). There is a common law obligation on carriers of goods to take every precaution in carrying goods, and in the present case it is not denied that every precaution was not taken, for the barge carrying the plaintiffs' goods was moored in a wrong position. It is admitted therefore that there was negligence, and were it not for the clause in question the defendants could not escape liability. But it is submitted that the exceptions in the clause afford the defendants complete protection. The sole question here is ambiguity or no ambiguity. It is true that a clause containing an ambiguous protection is no protection at all, as was said by Lord Macnaghten in

> *Elderslie Steamship Company* v. *Borthwick*, 10 Asp. Mar. Law. Cas. 24; 92 L. T. Rep. 274; (1905) A. C. 93, at p. 96.

But there is no difficulty whatever in comprehending this clause. It contains a perfectly plain statement as to what the defendants will do and as to what they will not do. They are to be liable for everything that cannot be covered by insurance. In respect of negligence which can be covered by insurance the shippers must protect themselves. We submit that any ordinary business man would when reading this clause come to one conclusion only, viz., that the defendants will not accept responsibility for insurable risks. Any man who wants his goods carried by the defendants cannot fail to understand when he reads this clause that the defendants will not pay damages for negligence. They are careful persons, but if negligence occurs they are not to be made liable in respect thereof. They will do their best, but the shippers must insure for the consequences of the defendants' negligence. They referred also to

> *Nelson Line Limited* v. *James Nelson and Sons Limited*, 10 Asp. Mar. Law Cas. 581; 97 L. T. Rep. 812; (1908) A. C. 16.

Scrutton, K.C. (with him *Dawson Miller*) for the respondents.—The principle upon which the learned judge in the court below considered himself bound to act appears from the authorities. See (*inter alia*) the observations of Collins, M.R. in

> *Owners of the Wool Cargo on Board the Steamship Waikato* v. *New Zealand Shipping Company Limited*, 8 Asp. Mar. Law Cas. 351, 442; 79 L. T. Rep. 326; (1899) 1 Q. B. 56.

Although contracting out of the common law liability which is imposed on carriers of goods is not permitted in several countries—*e.g.*, the United States of America, Australia, and the Cape—yet in this country it is permitted provided that clear language is used in order to exempt the carriers; otherwise the common law liability continues. See what was said by Lord Lindley as well as by Lord Macnaghten in

> *Elderslie Steamship Company* v. *Borthwick* (*ubi sup.*).

A shipowner is under a duty to provide a seaworthy ship and to exercise reasonable care. If he wishes to exempt himself from those duties he must do so in clear and unambiguous terms.

If words are used which may be misleading, or are inconsistent or even ambiguous, as in the present case, the shipowners are not protected. They referred also to

Chartered Bank of India, Australia, and China v. *India (British) Steam Navigation Company*, 11 Asp. Mar. Law Cas. 245; 100 L. T. Rep. 661; (1909) A. C. 369, at p. 375.

Leck replied.

Cozens-Hardy, M.R.—In this case there is no doubt as to the principle of law which ought to be applied. The defendants are liable unless they can, by clear and unambiguous language, exempt themselves from liability. The facts are very simple. There was no written contract here, it was an oral contract, and an oral contract upon the terms known to the parties as those upon which the defendants were dealing. Those terms are to be found in a red note at the head of their memoranda and invoices. And although the words are in the present tense they must, of course, be incorporated into the oral contract and put not in the present tense but in the future, as something relating to the particular contract undertaken by them. The contract was to carry certain goods in a lighter from one steamship to another in the river Thames. What has given rise to the action is that by reason of that which the learned judge in the court below has found to be negligence on the part of the defendants themselves, and not merely on the part of their servants, the barge was put in a place where it ought not to have been without a light, and was run down by a steamer, and the plaintiffs' goods were damaged. In these circumstances the question is: What is the effect of the clause which I will now read, which states the terms upon which, to the knowledge of both parties, this business was to be entered into? It runs thus: "The rates charged by B. Jacob and Sons Limited"—that is the defendants—"are for conveyance only, and every reasonable precaution is taken for the safety of goods whilst in craft; they will not be liable for any loss or damage, including negligence, which can be covered by insurance, and the shipper in taking out policy should effect same 'without recourse to lighterman,' as B. Jacob and Sons Limited do not accept responsibility for insurable risks." Then follows this provision: "B. Jacob and Sons Limited will in no case be responsible for strikes or other labour disturbances or any consequences arising therefrom." Now what does that mean as put in this contract? It seems to me that the defendants assume a risk less than that which would be implied by their position as common carriers. But they do contract, and they do undertake, that every reasonable precaution shall be taken for the safety of goods whilst in craft. Now that is an obligation which undoubtedly has not been fulfilled in the present case. That is quite plain according to the finding of the learned judge in the court below. Then it is said that in spite of that express obligation, an express obligation limiting the defendants' implied duty, no effect is to be given to it because of the subsequent words that the defendants "will not be liable for any loss or damage, including negligence, which can be covered by insurance." But it seems to me that the learned judge in the court below was right in the view which he took that there is an ambiguity here, that the obligation imposed by the language of those first words that "every reasonable precaution is taken for the safety of goods whilst in craft" is really inconsistent with the second and subsequent clause that the defendants "will not be liable for any loss or damage, including negligence, which can be covered by insurance." I take the view that Bray, J. did, that, applying undisputed principles of law to the present case, this is a case in which the language used by the defendants—and it is their own language—is not so clear, so unambiguous, as to leave no doubt in the mind of the shipper as to the extent of the advantage which he is to get by the contract. I am bound to say also that I attach considerable importance to the fact that, coupled with this positive contract by the defendants that "every reasonable precaution is taken for the safety of goods," there is a subsequent exception of "negligence," which may well be read as limited to negligence of the defendants' servants exclusive of negligence of the defendants themselves. In my view Bray, J. construed this contract rightly. But, as the other members of the court are taking a different view, the appeal will be allowed with costs.

Farwell, L.J.—I regret that for once I am unable to bring myself to agree with the Master of the Rolls. There is no doubt as to the general rule which is stated by Walton, J. in *Price and Co.* v. *Union Lighterage Company Limited* (9 Asp. Mar. Law Cas. 396, at p. 400; 88 L. T. Rep. 428; (1903) 1 K. B. 750): "If the carrier desires to relieve himself from the duty of using by himself and his servants reasonable skill and care in the carriage of goods, he must do so in plain language and explicitly and not by general words." In my opinion this is not a case of ambiguity, but repugnancy, if anything. There is no doubt to my mind that the lightermen would state that they will not be liable for any loss or damage, including negligence. That is as plain as can be. Then the question is really what is the meaning of the first part of the document? There is no doubt, I think, also, that if there be a contract, with an express proviso following that the contracting party is to be under no liability, that is repugnant to the law. You may limit the liability, but you cannot destroy it altogether. If this document is to be construed as first of all a contract to take every reasonable precaution; and secondly, with a proviso that the defendants are not to be liable for negligence, it appears to me that it is a case of repugnancy and not of ambiguity. To go back to Coke on Littleton: "It is a general rule, that whensoever the words of a deed, or of the parties without deed, may have a double intendment, and the one standeth with law and right, and the other is wrongful and against law, the intendment that standeth with law shall be taken" as is expressed in the maxim *In ambigua voce legis ea potius accipienda est significatio quae vitio caret.*" To my mind it is quite a fair reading of this document to read it as Mr. Bailhache suggests, as a recital of the desirable qualifications of the lightermen. It is to be observed that the words are not "every reasonable precaution will be taken," but are "every reasonable precaution is taken for the safety of goods whilst in craft." It is a

statement of the general practice of B. Jacob and Sons Limited. I read that simply as a recital that that is their ordinary practice. They do their best to take every reasonable precaution, but, inasmuch as they cannot be sure that there will not be negligence, they expressly say that they will not be liable for negligence. I confess that I am unable to bring myself to do what it has been said in other cases the court ought not to do—that is to say, to create an ambiguity for the purpose of applying a rule against ambiguity. Read with a desire to give validity to the document, I think that you can fairly read it as a recital followed by an express contract. Again, on the other point I find myself quite unable to read into the words "including negligence" the words "by servants" and not by the defendants themselves. I see no ground whatever for inserting any limitation at all. The words are quite clear, and on the whole—although I need hardly say with the greatest doubt as it is a question of construction, and as I am differing from the Master of the Rolls and my brother Bray—I cannot bring myself to any conclusion other than that this is a contract which can be construed in the way I have stated. Therefore I think that the appeal ought to be allowed.

Kennedy, L.J.—I agree with Farwell, L.J., and I will say this, that if it had not been that my brother Bray and the Master of the Rolls have found an ambiguity in this clause fatal to the case of the defendants, I should not have felt any difficulty at all. Of course their thinking that there is an ambiguity makes me very doubtful whether my opinion is right. But really if I had been asked, with such knowledge as lawyers have of business documents, to read this, I should not have felt the slightest difficulty. If I may say so, I think that you could not have a better illustration of the danger of what one may call being over precise in matters like this. In dealing with this as his Lordship the Master of the Rolls has done, he reads "is" to be "will be." If you have, in order to create the ambiguity, to alter the wording of part of the clause, or still more if you are to read the second as referring to servants only, but exclusive of a personal negligence, it seems to me that one may say without unfairness—speaking, of course, with the diffidence which one does where there is a difference of opinion—you are creating the ambiguity. What the clause means as it seems to me is this: "The clause says that the rates charged by B. Jacob and Sons Limited are for conveyance only, and every reasonable precaution is taken for the safety of the goods whilst in craft." That is put very much in the same way I suppose as one sees painted over a great many shops: "Every care is taken of customers' goods." Now that is not meant, nor is it read, as a contract in any sense. It is read, as it is intended to be, for the attraction of customers. The shipper may depend upon it that the defendants to the best of their ability will act carefully in the carriage of what they may be entrusted with. It is all the more necessary, and I think it is a reasonable thing, to put in as it is followed by the clause that: "They will not be liable for any loss or damage, including negligence, which can be covered by insurance, and the shipper in taking out policy should effect same 'without recourse to lighterman,' as B. Jacob and Sons Limited do not accept responsibility for insurable risks." It seems to me that those latter words, if anything, make that which is—speaking entirely for myself—reasonably clear, transparently so. The phrase: "Without recourse to lighterman" as there used means that the insurance company will have no right of subrogation as against the lighterman. There is in this particular case no recourse, because the lighterman has excluded himself from liability, even in the case of negligence, by the contract. Of course this document put forward by the lightermen must be read against them if anything, and in favour of the shipper, if there be any reasonable ambiguity. But there is a plain clause that the defendants will not be liable for any loss or damage, including negligence, which can be covered by insurance. And the only suggestion of ambiguity—or if it can be called so, repugnancy—is to be found in a clause which merely states that the defendants are persons who take every reasonable precaution for the safety of goods. They may say that, and say it truly or untruly, if by the subsequent words it is clear that even if they do not take reasonable precaution—in other words—if they are negligent—in any case the shipper must not sue them; and will have no right of action. I cannot find the ambiguity I confess, or the repugnancy. And my brother Bray says in his judgment: that if the thing were made a little more, one might call it, perfect in its langauge, it would mean that, and he would find no ambiguity. That is to say, assume words are added after that which is suggested to constitute a contract, so that the clause would then read thus: "Every reasonable precaution is taken for the safety of goods whilst in craft, but, notwithstanding, they will not be liable." He says if you could read the clause in that way it would give it a perfectly intelligible meaning. It seems to me the fact of the sentence being split into two instead of being separated by the disjunctive word "but" is certainly to put a meaning upon the language beyond that which the cases warrant in respect to contracts which should be treated by the courts as creating an ambiguity. With regard to the case of *Price and Co.* v. *Union Lighterage Company Limited* (*ubi sup.*), before my brother Walton and the Court of Appeal, the question there was a very simple one in many ways. The particular case was not so simple, but the actual point was clear. For many years it has been held that a carrier is *primâ facie* liable for negligence. If he exempts himself from risks as a carrier by his contract it must be taken subject to his liability remaining if those risks are occasioned by negligence. He has therefore to contract himself out specially, and he must so express it. There was a clause there which, to use the words of the Lord Chief Justice sitting in the Court of Appeal (at p. 416 of (1904) 1 K. B.), "can receive a contractual and businesslike construction and have effect without including in the exemption the consequences of the negligence of the carrier." As the contract of the lightermen in that case could have a contractual and businesslike construction apart from that which the carriers insisted upon, it was said that if they wanted to read into it exemption from liability for negligence, they ought to have inserted apt words into their contract. It was full of meaning and businesslike, without putting

into it that which, according to general principles of law, could not be treated as inserted unless it actually appeared. There is nothing of that kind in the present case, because here the words excluding liability for negligence are express and clear. Then there is the case which was referred to of *Elderslie Steamship Company Limited* v. *Borthwick* (*ubi sup.*). That was a case in which in one part of the same contract the carrier said that he would be exempt from liability for defects existing at the time of shipment absolutely; and in a later part of the same document he said that he would be exempt from liability for damage if he had taken reasonable means to provide against loss. Was it an unqualified exemption from liability or a qualified exemption for which he contracted? In the same document he said one thing in the earlier part and another in a later part. That was held by the House of Lords to be ambiguous; and I do not know that anyone could possibly say that you could otherwise construe the two parts of the contract. The only suggestion apparently—judging from the report of the argument of Mr. Carver and Lord Halsbury's judgment—was that the two parts constituted independent contracts in independent paragraphs. But we must remember that the contract was one contract. Directly you have got that fact that it was one contract, as the House of Lords held, you have a hopeless state of conflict. I do not know any case that goes to the length that my brother Bray has really gone, of saying that because the clauses are separately stated—though they immediately follow and are not connected by the words "but notwithstanding"—an ambiguity is created. The defendants in the present case have said that they are going to be careful, but in the next clause they say that careful or not they are not to be liable to an action. I confess that I see no inconsistency or repugnancy in that; and that the meaning is clear I think follows. I do not admit that it would become less clear if for "is" you substituted "will be" making it an express contract with the plaintiffs. But even so, it seems to me that the defendants were perfectly entitled to say, if they made their intentions clear, that they were going to be very careful about the plaintiffs' goods, but that the plaintiffs must understand that even if the defendants or their servants hurt the goods by negligence the plaintiffs must protect themselves against that by insurance and rely upon the remedy by action which they may have. The defendants want to make that quite plain, so that the plaintiffs in taking out policy it is to be "without recourse to lightermen." In other words, whatever else may be doubtful in this case, it is quite clear that the defendants are not to be liable for negligence. The action is brought for negligence, and it is a thing which could be covered by insurance. It seems to me upon the whole, as I say, that but for the doubt that has been created by the judgment of my brother Bray—and of course that of the Master of the Rolls—the other way, I should have thought this a fairly clear case.

Appeal allowed.

Solicitors for the appellants, *Ballantyne, McNair,* and *Clifford*; for the respondents, *William A. Crump* and *Son.*

June 28, 29, *and* 30, 1909.

(Before Vaughan Williams, Moulton, and Buckley, L.JJ., sitting with Nautical Assessors.)

The Corinthian. (*a*)

Collision—Steamships meeting end-on—Duty to port—Duty to sound whistle signals—Breach of collision regulations having no effect on collision—Collision Regulations 1897, *arts.* 18 *and* 28 *—Merchant Shipping Act* 1894 (56 *&* 57 *Vict. c.* 60), *s.* 419 (4).

Where one of two steamships, meeting practically end-on, ported, blew one short blast, then steadied, and later hard-a-ported, but did not blow another short blast, it was held that she was to be "deemed to be in fault" under the provisions of sect. 149 *of the Merchant Shipping Act* 1894, *although those in charge of the other steamship saw she was hard-a-porting.*

The rule laid down in The Fanny M. Carvill (32 *L. T. Rep.* 646; 2 *Asp. Mar. Law Cas.* 565 (1875); 13 *App. Cas.* 455), *as explained by* The Duke of Buccleuch (65 *L. T. Rep.* 422; 7 *Asp. Mar. Law Cas.* 68 (1892); (1891) *A. C.* 310), *is not modified or altered by* The Bellanoch (97 *L. T. Rep.* 315; 10 *Asp. Mar. Law Cas.* 483; (1907) *A. C.* 269).

Appeal from a decision of Bargrave Deane, J. (*The Corinthian,* 100 L. T. Rep. 411; 11 Asp. Mar. Law Cas. 208), by which he held the *Corinthian* alone to blame for a collision which occurred between the *Malin Head* and the *Corinthian* about 6.20 a.m. on the 13th Sept. 1908 in the river St. Lawrence South Channel, about two miles above the Margaret Tail Buoy, the wind at the time being west-south-west, a light breeze, the weather fine, with smoke and haze caused by forest fires, and the tide flood of the force of about two knots.

The facts are fully set out in the report of the case in the court below (*The Corinthian, ubi sup.*). The following is a summary of them.

The case made on behalf of the owners of the *Corinthian,* the appellants, the defendants in the court below, was that the *Corinthian* was steering east by north magnetic, and with engines working at half speed was making about eight knots through the water; that those on board her then saw the *Malin Head,* about one and a half miles off and about a point on the starboard bow, with her starboard side open, and shortly afterwards the helm of the *Corinthian* was starboarded and two short blasts were sounded on her whistle. Shortly after that, when the *Malin Head* was seen to be porting, the engines of the *Corinthian* were at once stopped and put full speed astern, the helm was steadied, and three short blasts were sounded. The *Malin Head* then sounded one short blast, and the *Corinthian* afterwards repeated the three short blast signal; but the collision occurred, the stem of the *Corinthian* striking the port side of the *Malin Head* abaft the mainmast.

The case made on behalf of the owners of the *Malin Head,* the respondents, plaintiffs below, was that she was on a course of west by south-half-south, making about eight to eight and a half knots, when those on board her saw the *Corinthian* about one and a half miles off bearing about

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

ahead, but slightly on the port bow. The helm of the *Malin Head* was ported a point and steadied, and one short blast was sounded on her whistle. When the *Corinthian* was seen to sheer towards the *Malin Head* the helm of the latter was put hard-a-port, and the engines were kept working full speed ahead as the only chance of avoiding a collision.

The learned judge of the Admiralty Court found that the *Corinthian* was alone to blame for the collision, and held that the vessels were meeting practically end-on.

On the 8th March 1909 the owners of the *Corinthian* served a notice of appeal on the owners of the *Malin Head*, praying that the judgment of the court below should be reversed or varied, and that the *Malin Head* should be found alone to blame for the collision or alternatively that both vessels should be held to blame.

The appeal was heard on the 28th, 29th, and 30th June 1909.

The following collision regulations were referred to during the course of the arguments:

Art. 18. When two steam vessels are meeting end on or nearly end on, so as to involve risk of collision, each shall alter her course to starboard, so that each may pass on the port side of the other.

Art. 28. 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 signal on her whistle, or siren—viz.: One short blast to mean, "I am directing my course to starboard."

The following section of the Merchant Shipping Act 1894 (56 & 57 Vict. c. 60) was also referred to:

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.

Aspinall, K.C. and *Dunlop* for the appellants, the owners of the *Corinthian*. — The learned judge should have held the *Malin Head* alone to blame. But, even if her story be accepted, she is to blame for not sounding a whistle signal in accordance with art. 28 when she hard-a-ported. To escape liability for that breach she must show that the breach could not by any possibility have contributed to the collision. [Moulton, L.J.—How can it be said a sound signal is necessarily immaterial? A man might hear who was not looking.] That is so; the decision in *The Anselm* (97 L. T. Rep. 16; 10 Asp. Mar. Law Cas. 438; (1907) P. 151) is in point. The facts in the case of *The Bellanoch* (*ubi sup.*) are distinguishable. In this case, after referring to *The Anselm* (*ubi sup.*), the learned judge says he is advised by the Elder Brethren, and he agrees with them, that in this particular case the failure to blow the port helm signal when the hard-a-porting took place had no effect on the collision, because those on the *Corinthian* admitted they saw the *Malin Head* hard-a-porting for some considerable time before the collision, and further says that the failure to blow the port helm signal when the vessel hard-a-ported, she having given a port helm signal when she ported just before, did not affect the collision. [Vaughan Williams, L.J.—I think the learned judge misdirected himself as to the question to be decided.]

Laing, K.C. and *A. A. Roche* for the respondents, the owners of the *Malin Head*.—The port helm signal was sounded once, and it is submitted there was no duty to sound it again. The steadying of the helm was really non-existent. The helm movement was continuous, for the ships were much closer when they first sighted one another than was pleaded. The *Malin Head* was already altering to starboard, and there was no duty to signal an accentuation of a course already taken. But even assuming there was an interval during which the *Malin Head* steadied on a new course before hard-a-porting and that she ought to have sounded a whistle signal, the question to be tried is, Could the breach by any possibility have contributed to the collision?

The Duke of Buccleuch (*ubi sup.*).

The learned judge may have used varying language, but the question he tried was whether this breach could by any possibility have contributed to the collision. In *The Bellanoch* (*ubi sup.*) the Chancellor (Lord Loreburn) indelivering judgment says there was in that case in fact no default, and further says the whistles could not have affected the collision or have affected the action of those on the other vessel because they saw what was happening. The same can be said in this case. [Buckley, L.J.—Does not that conflict with *The Fanny M. Carvill* (*ubi sup.*)?] It is submitted not. The object of the collision regulations is to inform the other ship of the manœuvre which is being performed. Those on the *Corinthian* in fact knew the *Malin Head* was porting. How could the breach have contributed to the collision? [Buckley, L.J.—How can you say the breach could not by any possibility have contributed? You cannot say what would have happened if you had sounded the whistle. The collision was not inevitable at the moment you hard-a-ported. Vaughan Williams, L.J.—Would you be deemed to be in fault if you committed a breach when the accident was inevitable?] It is submitted not, if at the time of the breach no manœuvre could have avoided the collision:

The Bywell Castle, 41 L. T. Rep. 747; 4 Asp. Mar. Law Cas. 207; 4 P. Div. 219.

Aspinall, K.C. in reply.—If art. 28 was broken it is impossible to say the breach could not by any possibility have contributed to the collision, for the evidence shows the *Malin Head* was hard-a-porting after steadying for three minutes. Whether the *Malin Head* was to blame for a breach of art. 28 or not, she was certainly to blame for keeping her speed up to the time of the collision.

Vaughan Williams, L.J.—This is an appeal from the decision of Bargrave Deane, J. He held that the *Corinthian* was solely to blame. So far as that decision is concerned it has not been seriously alleged that the *Corinthian* was not in fault, and so far as the *Corinthian* has been held to be to blame we cannot interfere with his decision, and it stands. The question then arises whether the *Malin Head* was to blame, and,

of course, so far as the decision of Bargrave Deane, J. is concerned, in holding the *Corinthian* solely to blame he exonerated the *Malin Head* from blame. We have heard an argument before us to show that the *Malin Head* was in the wrong quite irrespective of rule 28, but we have not, having regard to our view, to consider that question at all, because, although if we had exonerated the *Malin Head* from blame as far as the breach of the regulation contained in art. 28 was concerned we might have had to go on and consider whether on other grounds the *Malin Head* ought not to be held to blame, we have not got to do so the moment we arrive at the conclusion that the *Malin Head* was to blame in respect of having omitted to give the proper helm signal. Now, as has been said, if we come to the conclusion that the *Malin Head* was guilty of a breach of the regulations laid down in art. 28, it will follow that the decision of throwing the whole blame on the *Corinthian* cannot stand; both vessels would then be to blame. We have come to the conclusion that there was a breach of art. 28 by the omission of the *Malin Head* to give the proper helm signal in accordance with art. 28. The article runs thus: "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: 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 'My engines are going full speed astern.'" There have been discussions in earlier cases as to the meaning of "authorised," but no such question is raised here. Now, it is admitted that in point of fact the *Malin Head* did fail to give the short blast which is prescribed by this article. We have come to the conclusion that there was a breach by the *Malin Head*, because we have accepted to the full the rule which was laid down by the House of Lords in the case of *The Duke of Buccleuch* (*ubi sup.*). It is there laid down that in order to exonerate from blame under sect. 419 (4) a ship which has failed to give the proper signal prescribed by art. 28, it is necessary to prove that the failure to give the blast could not possibly have affected the collision, and that it is not sufficient—and, indeed, is not admissible—for the ship which has been guilty of this failure to give the proper blasts to say that the failure to give the blasts did not in fact affect the collision. As I understand, what is said on behalf of the *Malin Head* here is that the rule as laid down by the House of Lords in *The Duke of Buccleuch* (*ubi sup.*) is no longer in force, but has been modified or explained by the decision of the House of Lords in the case of *The Bellanoch* (*ubi sup.*), because it is suggested that since that decision it has been held that the rule laid down in *The Duke of Buccleuch* (*ubi sup.*) has been so far modified that the ship guilty of the omission can now be heard to say, for the purpose of exonerating herself from the penalty of sect. 419 of the Merchant Shipping Act 1894, that the omission to give the proper blast did not in fact affect the collision. We have come to the conclusion that that contention cannot be supported, and that the case of *The Bellanoch* (*ubi sup.*) in the House of Lords has not explained or modified the rules laid down by the House of Lords in 1891 in the case of *The Duke of Buccleuch* (*ubi sup.*), so as to render admissible evidence or proof that the failure to give the proper blast did not in fact affect the collision, the rule being in *The Duke of Buccleuch* (*ubi sup.*) that it was not admissible.

Now, I wish to say very little more beyond first reading something from the report of the case of *The Duke of Buccleuch* (*ubi sup.*), and then referring to the judgment of Lord Loreburn in *The Bellanoch* (*ubi sup.*). In the case of *The Duke of Buccleuch* (*ubi sup.*) the headnote is this: "The true construction of this section is that the infringement must be one having some possible connection with the collision; or, in other words, 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." The real argument before us in respect of this point has simply been that the result of the decision in *The Bellanoch* (*ubi sup.*) is that now proof that the infringement did not in fact contribute to the collision is not excluded, and that there has been a very strong modification of the ruling in *The Duke of Buccleuch* (*ubi sup.*). It is further said—although it is only expressing the same thing in other words—that the presumption of culpability can be got rid of now, not only by proof that the infringement could not by any possibility have contributed to the collision, but also by proof that the breach of the rule did not, in fact, contribute to the collision. Now, when I come to the case of *The Bellanoch* (*ubi sup.*) I ask myself this question. It is said that the House of Lords overruled or modified their previous decision, not because they said so in words, but because the conclusion arrived at by the House of Lords in *The Bellanoch* (*ubi sup.*) can only be justified upon the assumption that they did reverse the rule in *The Duke of Buccleuch* (*ubi sup.*), and did extend the exoneration from the presumption of culpability, so as to allow it now to rest upon a mere proof that the collision was not, in fact, contributed to by the omission to comply with art. 28. I can only say, speaking for myself, that I should find it very difficult to arrive at the conclusion that it was the intention of the House of Lords to reverse their previous decision, or so to modify it as to make it no longer of any force, unless the House of Lords in terms said so, and told us why they had come to the conclusion that it was necessary so to do. They have not done so. In these circumstances, although I agree that the words are such as rather to favour than otherwise the contention that the House of Lords did thus alter their decision of 1891, yet I cannot believe that they intended to do so, they not having expressed in words any such intention.

Moreover, when I come to look at the facts of the case of *The Bellanoch* (*ubi sup.*) I see that it is perfectly reasonable and possible that the House of Lords should have come to the conclusion they did in *The Bellanoch* (*ubi sup.*) without really in the slightest degree

departing from the ruling in *The Duke of Buccleuch* (*ubi sup.*). The reason I say this is that it is quite plain that art. 28 was only intended to apply to cases where vessels at sea came in sight of each other, and unless you find as a fact that the vessels whose culpability was being dealt with were at the moment of the breach in that relation to each other and under those conditions under which art. 28 was intended to apply, then the article does not apply. I do not propose to go in detail into the facts of the case of *The Bellanoch* (*ubi sup.*), but it is perfectly clear that at the moment of the failure to give the blast the *Bellanoch* was not making really a sea manœuvre at all, but, being imbedded more or less in the mud, was merely putting her engines astern for the purpose of freeing herself, and not for the purpose of any manœuvre in relation to the other vessel. Under these circumstances, I must say I do not regard the case of *The Bellanoch* (*ubi sup.*) as in any way having altered or modified the ruling in the case of *The Duke of Buccleuch* (*ubi sup.*).

If the *Malin Head* has failed to prove that it was impossible for the omission to have contributed in any way to the accident, she must be held to blame. Really it has not been contended before us that any such impossibility has been proved. This is not a case in which the *Malin Head* is able to say that at the moment when the breach occurred the collision was inevitable. I have not got to decide to-day whether, if that had been proved, it would have exonerated the *Malin Head* from responsibility. I have not got to decide it, because it is quite clear from the evidence that there was a considerable time during which the original manœuvre in respect of which the proper blast was given did not continue, that is to say, there was a steadying, and that there was a new manœuvre hard-a-port which fell within art. 28 in respect of which the blast ought to have been given. Under these circumstances I think that the appeal must be allowed to the extent that both vessels must be held to blame.

Moulton, L.J.—In this case the learned judge has held that the whole blame lay with the *Corinthian*. The owners of the *Corinthian* appeal, and the appeal raises two questions. In the first place they say that the evidence established that the *Malin Head* was alone to blame. Secondly, they contend that if they do not succeed in showing upon the evidence that the *Malin Head* was alone to blame, certainly she was also to blame and both vessels should be found to blame. We have not heard counsel for the respondents at all upon the first point, because we have come to the conclusion that the evidence is not such as to enable us to say that the learned judge was wrong in finding that the *Corinthian* was to blame. I must say that the argument addressed to us by both counsel on behalf of the *Corinthian* was a very powerful one, and worthy of very careful consideration, but I do not think either of them were able to bring their case to such a point that we ought to interfere with that part of the judgment of the learned judge. Therefore counsel for the respondents has not been heard at all upon that matter, and I say nothing about it except that the appeal fails to that extent. The second question, as to whether the *Malin Head* must be held also to blame raises points both of law and fact, and the only point on which I propose to base my judgment involves mainly a question of law, although, of course, I have to pay attention to the facts of this case to show that the case comes within the principles of law which I hold to be established by the decisions. In this case it is admitted that the *Malin Head*, when the *Corinthian* was approaching her, ported, sounding a proper signal, and then steadied, and went on, on a rectilinear course, for a time variously fixed at two minutes or something more, but certainly for an appreciable time, during which she was enabled to watch the behaviour of the *Corinthian* in the new circumstances, and finding that the *Corinthian* was still sheering towards her she then hard-a-ported her helm, but gave no corresponding sound signal to inform the *Corinthian* of what she had done. Now, those facts appear to me to be clear on the evidence, and the evidence called from the *Malin Head* admits the failure to sound the signal, and it is from the evidence of those who were called on behalf of the *Malin Head* that I extract the other facts that I have given. It appears to me, therefore, to be incontestable that there were three manœuvres by the *Malin Head*. The first was the porting and then the steadying, the second was the continuing on a rectilineal line after steadying, and the third was the hard-a-porting, and the proper sound signal was not given to that third manœuvre. Now, counsel for the *Corinthian* claim that that makes the *Malin Head* to blame under the statute, and he appealed to the well-known sect. 419, sub-sect. 4, of the Merchant Shipping Act, which says that where in the case of a collision it is proved that any of the regulations have been infringed, the ship by which the regulation has been infringed will be deemed to be in fault unless it is shown to the satisfaction of the court before which the case is tried that departure from the regulations was under the circumstances of the case necessary. Now, taking the words of that clause, the *Malin Head* is incontestably within it, because she did infringe one of the collision regulations—namely, art. 28, as to giving sound signals—and it has not even been attempted to be shown that the circumstances of the case made a departure from the regulations necessary. Nobody could say that it was necessary not to sound the signal; the consequence is if the Act stood alone this case would, in my opinion, be unarguable, but the question whether the words of the statute should be literally interpreted has come up in several cases, and for our purpose we must take the decision which binds us—namely, the decision of the House of Lords in *The Duke of Buccleuch* (*ubi sup.*).

That was a peculiar case, but the decision is one of great weight because all the members of the tribunal were clearly of one opinion with regard to the law, though they differed with regard to the facts so much that there were two on one side and two on the other, and the decision of the Court of Appeal was therefore supported on the principle of *semper praesumitur pro negante*. Each of their Lordships said they were agreed as to the law. They did not lay it down in fresh language because they said they were satisfied it was laid down correctly in a case decided in the Privy Council—*The Fanny M. Carvill* (*ubi sup.*)—and although some of their Lordships actually quoted

the paragraph of Sir James Colville's judgment in that case which they considered laid down the law and others did not, there is no question whatever as to what passages in that judgment all the members of the House considered to represent the law and specifically approved of. So that we have to turn to the case of *The Fanny M. Carvill* (*ubi sup.*) for an authoritative statement of the law, binding upon us as a decision of the House of Lords. The judgment of Sir James Colville is very clear and very well reasoned out, and it faces this difficulty—that if you took the mere words of the section of the statute, the consequences would be that any vessel that was not adequately equipped or in any other way was violating the regulations would, as he says, be a sort of outlaw of the seas, and would not have the right to recover, in any circumstances, more than half the damages to which by the general law maritime she might be entitled, and that quite independently of whether the defect was or was not known to the owners or had any effect or any possibility of effect under the circumstances upon the collision. The example which occurs to one is that of a collision in clear weather and broad daylight, where it is proved there was some defect in the foghorn, a thing which could by no possibility affect a collision in full daylight in clear weather. The Privy Council came to the conclusion that they were not bound to take any interpretation so harsh, although it was probably the natural interpretation of the mere words of the statute, and they therefore came to the conclusion that the statute did not include a case where the breach of the regulations was of such a nature that it could not by any possibility have contributed to the collision—and I have no doubt they had in their minds such a case as that to which I have referred—but they in the clearest language laid it down that mere proof that the infringement of the regulations did not in point of fact contribute to the collision is inadmissible; in other words, we have nothing to do with whether the breach did or did not contribute to the collision, for if by any possibility it could do so, the statute applies; and speaking for myself, although I accept the decision and think that undoubtedly it is binding upon us, and was probably a right decision, I cannot help thinking that the section carefully abstains from using any words which couple the breach with the collision as cause and effect. There is nothing whatever in the section which would lead one to suppose that it was necessary they should be so connected. The only exception that is made is where the breach was justified by the circumstances, and there is no indication whatever of a tenderness towards the party committing the breach on the ground that it probably did no harm. Now, the law as so laid down is expressly approved of in the House of Lords. Let me apply that to the present case. Here there was a third manœuvre — namely, the hard-a-porting — and there is certainly evidence that the two vessels were not so close but that a change of action on the part of the *Corinthian* might not have saved or modified the collision, if it had taken place at the time when the *Malin Head* hard-a-ported her helm. If she had obeyed the regulations directly she hard-a-ported her helm there would have been an unmistakable indication to those on the *Corinthian* that she had done so. As it was, in the absence of that indication the *Corinthian* had to trust to conclusions drawn from observations as to whether the *Malin Head* was hard-a-porting or not; and, quite apart from the question as to whether they might or might not make a mistake in drawing such a conclusion, some slight time must necessarily elapse before they could by observation tell what the *Malin Head* was doing. So that on that ground it is possible that the fault of the *Malin Head* may have contributed to the collision.

But there is another way in which it might have contributed. It would have been another appeal to the *Corinthian* to consider her course, because it would have been a direct indication, a direct statement to her, that the *Malin Head* was deliberately porting, and you cannot say that that additional intimation might not have had an effect upon the mind of the person who was regulating the course of the *Corinthian*, even though he had from his own observation drawn a conclusion that she was porting. I think that this last consideration is one which ought to prevail in most if not all cases. For my own part I doubt whether a ship is exonerated from the consequences of sect. 419 unless the breach of the regulations of which she is guilty is from its very nature a breach which by no possibility can contribute to the collision. I do not think it is legitimate for the courts to listen to arguments that the man knew it otherwise, and therefore it was of no importance to tell him so in the regular way. We have not got to speculate what would be the effect upon his mind of being informed in the way in which he has the right to expect to receive information. So soon as we come to the conclusion that the breach is not of such a nature that it could not by any possibility have contributed to the collision we have to shut our eyes as to whether it is probable that it did or did not, and even though we think that the collision would have occurred just the same if this breach had not occurred, that is not sufficient of itself to free the defendant vessel from the consequences of her fault. Now I should have said that that was the law laid down in the House of Lords and consistently followed by other courts, but an appeal has been made to the more recent decision of the House of Lords in *The Bellanoch* (*ubi sup.*). I want to say with regard to that case that there is nothing whatever in the judgment or opinions of the learned lords which indicates any intention whatever to vary the law as laid down by the decision in *The Duke of Buccleuch*, which was quoted to them in argument and must have been present to their minds as being the authoritative decision as to the law of the case. It is purely a decision upon fact, and when I see that Lord Macnaghten, who was a party to the decision in *The Duke of Buccleuch* (*ubi sup.*) was also a party to the decision in *The Bellanoch* (*ubi sup.*), and I can find no word anywhere indicating any intention to restate or vary the law as laid down by the previous case, I cannot but come to the conclusion that they thought they were only applying the same law as was applied in *The Duke of Buccleuch* (*ubi sup.*) It is therefore only a decision as to facts. The facts in *The Bellanoch* were very peculiar. It was very doubtful whether the ship was actually moving at all or whether it was only a question of clearing out mud from under the hull of the vessel in

order to get her out of the position in which she had stuck. As I say, the facts were very peculiar. It is quite immaterial whether any other body of persons would on the same facts have found the same conclusions as their Lordships. A decision like that in the case of *The Bellanoch* (*ubi sup.*) being a decision on fact would not have been binding on the House; a decision like that in the case of *The Duke of Buccleuch* (*ubi sup.*) is binding on the House, and therefore I come to the conclusion that it was an application of the same law, but based upon the view that their Lordships took of the facts of that special case. Under these circumstances I do not feel myself justified in in any way deviating from the law as specifically and intentionally laid down in the case of *The Duke of Buccleuch* (*ubi sup.*). For these reasons I think that the *Malin Head* was to blame in not sounding her whistle, and I come to the conclusion that it is not proved as a fact that this breach of the regulations could not by any possibility have contributed to the collision. There is, of course, another point—namely, that she may have been in fault by reason of her not reversing her engines. We have not heard counsel for the respondents on that, and therefore I do not pronounce any opinion upon it; but I think, in justice to counsel on both sides, I am bound to say I do not think that either party has abandoned before us any point which was open to them on this appeal.

BUCKLEY, L.J.—The *Corinthian* appeals from a judgment by which she has been held alone to blame. I propose to deal first with that part of the argument of the appellants which affirms that the *Malin Head* is to blame or also to blame. First, principally, having regard to the recent decision of the House of Lords in the case of *The Bellanoch* (*ubi sup.*), I want to state what, as I understand it, is the law that we have to apply. Art. 28 of the Collision Regulations provides that certain helm signals shall be given by sound, and sect. 419, sub-sect. 4, of the Merchant Shipping Act 1894 provides that where in the case of a collision it is proved that any of the regulations have been infringed, the ship by which the regulation has been infringed will be deemed to be in fault unless it is shown to the satisfaction of the court that a departure from the regulations was under the circumstances of the case necessary. That is an exception which is immaterial in the present case. In the case of *The Fanny M. Carvill* (*ubi sup.*) it was decided that the effect of that Act of Parliament is that it excludes all proof that the infringement, which might have contributed to the collision, did not, in fact, do so, and throws upon the party guilty of the infringement the burden of showing that it could not possibly have done so. The court found its way to remit, to relax the great harshness of the statute by allowing that exception—namely, that if the party guilty of an infringement could show that the omission to comply with a regulation could not possibly have contributed to the accident that that would be a good defence. If, therefore, the allegation is that the breach of the regulation might have contributed, but did not contribute, to the collision, no evidence is admissible. The statute has excluded it. But the allegation may be made and may be supported that the breach of the regulation could not possibly have contributed to the collision. Upon that latter contention, of course, certain evidence is admissible, as, for instance, evidence of the position of the parties, but no evidence is admissible on facts which are excluded by the first. For instance, in *The Fanny M. Carvill* (*ubi sup.*) evidence was admissible, of course, to show the relative position of the two vessels, so as to demonstrate that as a matter of fact the green light of the *Peru* never could have been seen by the *Fanny M. Carvill*. But, by way of contrast to that, evidence would not have been admissible for the purpose of showing that although the green light of the *Peru* was visible from the deck of the *Fanny M. Carvill*, yet those on board the *Fanny M. Carvill* were so ignorant of all maritime rules that they would not have known what a green light meant. Now, it is to the line drawn in that way that one has to apply one's mind. The law that is laid down in *The Fanny M. Carvill* (*ubi sup.*) was deliberately and emphatically adopted by the House of Lords in *The Duke of Buccleuch* (*ubi sup.*), and the point which has given me most concern is whether the recent decision in *The Bellanoch* (*ubi sup.*) has gone back in any way upon the decision in the previous case.

Now, in the first place, having regard to the fact that in *The Bellanoch* (*ubi sup.*) the case was argued for the appellants upon the citation of *The Duke of Buccleuch* (*ubi sup.*) and *The Fanny M. Carvill* (*ubi sup.*), and the respondents were not called upon at all, it seems almost impossible to suppose that the House of Lords were going back upon their previous decision. Apart from that, having since yesterday had an opportunity of considering Lord Loreburn's language carefully, I do not feel myself pressed with any difficulty by the language which he used. Now, the state of facts in the case of *The Bellanoch* (*ubi sup.*) was this: that the *Canning* was coming down southward, and her course in the first place lay between certain buoys, and her course at that point was necessarily a fixed course, she had to come between those two buoys. Those buoys were distant from the place where the *Bellanoch* was lying about three hundred yards, and the time which the *Canning* would take to traverse that distance was about four minutes. It was proved as a matter of fact that the three occasions upon which the *Bellanoch* reversed her engines, and did not make the proper sound signal, were at periods of time more than five minutes before the collision occurred. They are all given in the judgment of the Lord Chief Justice in the report of the case, *The Bellanoch* (97 L. T. Rep., at p. 318; 10 Asp. Mar. Law Cas., at p. 486; (1907) P., at p. 179), in the court below. I think that Lord Loreburn's first sentence, which is this: "There was no obligation to give the signal until the *Canning* came to the buoys, after which there was in fact no default," meant this, that the *Bellanoch* was not bound to manœuvre and give notice of manœuvres to the *Canning* before she came through the buoys, because her course at that point was necessarily a fixed course, and that there was no default in point of fact after she came through the buoys because there was no reversal of her engines during the period of time for which the *Canning* was traversing that distance. Therefore Lord Loreburn's first sentence means, I think, that the regulation never came into force at all. Then he

goes on to make an assumption, and this is what raises the difficulty: "But I will assume, though I will not affirm, that the duty of the *Bellanoch* was to sound three short blasts on each and every of the three occasions when, according to the log, she reversed her engines," then come the words upon which the difficulty arises. Now, the facts were that the *Bellanoch* was lying in the mud; her course, as far as she could be said to have a course at all, was a very slow course by forcing herself over the mud by operations of her engines of a disjointed kind, in that her engines first went full speed ahead to get some way on the vessel if she could, and then they went full speed astern, not for any purpose of driving the vessel astern, not for any manœuvre of navigation at all, but for what I may call a dredging or cleansing operation; her actual purpose in putting her engines astern was to free her propeller from the mud, and she was doing those acts of reversing her engines not for any purpose of navigation, but for the purpose of getting her machinery for navigation in such a condition as that it would operate for the purposes of navigation. Those being the facts, Lord Loreburn's words are these: "I think if she had done so, that is to say, if she had blown the blasts, it could not in this case have affected the collision." I do not think he meant by that that it could not in fact have affected the collision. I think what he meant was that the fact that the engines were from time to time going astern was a fact altogether irrelevant to the other vessel, just as much as the fact that the green light which was so placed that the other vessel could not see it under any circumstances was irrelevant to the other vessel. The fact that the engines were going astern, which was concealed by the hull of the ship and the water, was a matter of no importance whatever for the *Canning* to know, because it was not an operation which would result in any movement of the *Bellanoch* which would affect the movements of the *Canning* in any way. When he says it could not have affected the collision I think he means that it is a matter wholly irrelevant for the purpose of whether the collision should happen or not. Then he goes on to say this, and I read these words again with difficulty: "The master of the *Canning* knew perfectly well what was the course of the *Bellanoch* and what her manœuvre was, and the whistle could not have told him anything he did not know already."

Now, I do not think that in those words, or rather that word "manœuvre," Lord Loreburn intended to include the fact that the engines were going astern. What he meant was, the whistle could not have told him anything material that he did not know already; it would have told him that the engines were going astern, but that was a fact which was perfectly immaterial to him and the *Canning*, because it was a proceeding which, so far as the *Canning* was concerned, was of no moment at all, because it was not affecting the movements of the *Bellanoch* so as to cause the *Canning* to make some other manœuvres for the purpose of avoiding the manœuvres of the *Bellanoch*. That is the way in which I construe Lord Loreburn's words, and I do not think that what was said in *The Bellanoch* (*ubi sup.*) was intended to affect in the smallest degree that which was laid down in *The Fanny M. Carvill* (*ubi sup.*) and deliberately adopted by the House of Lords in *The Duke of Buccleuch* (*ubi sup.*). Now, having said that, I simply want to say something about the facts of this case. The facts were that the *Malin Head* in the first place ported her helm and blew a port helm signal. She then steadied her helm, and in my view of the facts what happened was this: Having ported her helm and given the proper signal, she then abandoned that manœuvre—namely, of continuing on a rectilineal course. She steadied her helm, and she continued on that course for a time, which is described as being two or three minutes, though I do not bind myself to minutes at all; but what seems to me to be material is this, that upon the *Malin Head's* own evidence, having steadied her helm, she said to herself, "That other vessel is so manœuvring that I must make a further manœuvre to avoid collision, and I must put my helm hard-a-port," and she put her helm hard-a-port. Whether that was done after a minute or a minute and a half or three minutes seems to me comparatively immaterial. I call it a new manœuvre, because it was a manœuvre taken afresh for the purpose of escaping a difficulty in which a movement of the *Corinthian* was placing the *Malin Head*; and she was adopting a new course in order to meet a new difficulty, and I think that was a new manœuvre. I by no means affirm that if a vessel puts her helm to port and then hard-a-port she is bound to blow a port helm signal a second time; but here it appears to me there was a new manœuvre undertaken, and for that new manœuvre the *Malin Head* was bound to give the other vessel the proper signal. That being so, I think it follows from the law laid down in *The Fanny M. Carvill* (*ubi sup.*) and *The Duke of Buccleuch* (*ubi sup.*) that the vessel was to blame, and I think that that follows whether or not a sufficient amount of time elapsed after that for the other vessel, the *Corinthian*, to have done something to escape the collision. As I understand this statute, the very purpose of the Act is to render it unnecessary to condescend upon evidence with regard to that matter. She was in default for not doing that, and, even if the collision would inevitably have happened if she had blown the blast, I think the statute was meant to exclude evidence as to whether it was or was not inevitable. But apart from that we have received this answer from our assessors. We have put to them this question: "At the moment the *Malin Head* hard-a-ported was the collision inevitable?" Their reply is, "Probable, but not inevitable." If that be so, the failure of the *Malin Head* to blow a blast was a matter which might, even if it did not, have contributed to the collision. Therefore on that ground I hold the *Malin Head* to blame. Now, there were other heads advanced by the appellants to show that the *Malin Head* was to blame. Upon those we have not heard counsel for the respondents, because this point was sufficient for us; but of course, if this case should go further, we have neither formed nor expressed any opinion upon them. The other point is this: The *Corinthian* says not only is the *Malin Head* to blame, but I am not to blame. Upon that I have only to say that which the other members of the court have said. The salient and significant question on this part of the case is this, What was the position of the *Malin Head* in the channel? Is the red line

which is drawn on the chart substantially right, or is the black line substantially right; was the *Malin Head* approximately upon the north shore of the channel, or was she in mid-channel? If she was approximately on the north shore of the channel and the vessels were coming down practically end on, I do not think anybody could dispute that it was the duty of the *Corinthian* to go to starboard, so that the two vessels should pass port to port; and if, on the other hand, the *Malin Head* was in mid-channel, or more to the southward of the channel, then possibly the manœuvres of the *Corinthian* might have been justified. But the point here is, What was the course upon which the *Malin Head* was running? Now, the principal point upon that to be determined is the position of the vessels in reference to these buoys—the Margaret Tail Buoy and the two dredge buoys—and it is really simply a question of fact as to where she was in the channel. Upon that the learned judge has come to a conclusion, and I do not feel myself in a position to review his decision upon that question of fact. I think, therefore, as regards that, the *Corinthian* must fail, and that both the vessels must be held to blame.

Solicitors: for the appellants, *Pritchard* and *Sons*; for the respondents, *Thomas Cooper* and *Co.*

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

April 2, 5, *and May* 4, 1909.

(Before PICKFORD, J.)

INTERNATIONALE GUANO-EN-SUPERPHOSPHAATWERKEN *v.* ROBERT MACANDREW AND CO. (*a*)

Charter-party—Exceptions—Deviation—Liability of owners.

The owners of a ship which deviates from her chartered voyage are not protected by exceptions from liability contained in the charter-party for damage to the cargo occurring either before or after such deviation, as they are then in the same position as common carriers.

A charter-party provided for the carriage of a cargo of superphosphate partly to Algeciras and partly to Alicante, the ship having the option of calling at Coruña for cattle. The ship went first to Coruña and thence to Algeciras, where she discharged part of her cargo. From Algeciras she should have gone direct to Alicante, but went instead to Seville for the purposes of the shipowners, which was a deviation unauthorised by the charterers. On arrival at Alicante the cargo was found to be seriously damaged. Part of the damage occurred before the deviation.

Held, that the deviation put an end to the charter-party as from the beginning of the voyage, and that the shipowners were liable.

Joseph Thorley Limited *v.* Orchis Steamship Company Limited (10 Asp. Mar. Law Cas. 431; 96 *L. T. Rep.* 488; (1907) 1 *K. B.* 660) *followed.*

COMMERCIAL LIST.

Action tried before Pickford, J. sitting without a jury.

The plaintiffs claimed 310*l.* as damages for breach of a charter-party. The facts and arguments are sufficiently stated in the judgment.

Simon, K.C. and *Mackinnon* for the plaintiffs.

Scrutton, K.C. and *Leck* for the defendants.

PICKFORD, J. read the following judgment:—This was an action tried before me which involved a claim for damage to a cargo of superphosphate carried on a steamer called the *Cid*, under a charter-party made by the defendants, or at any rate under which they are liable. The cargo was loaded at a place called Zwijndrecht, in Holland, and was to be carried partly to Algeciras and partly to Alicante, the ship having the option of calling at Coruña for cattle. The superphosphate when it is first made comes out of what I think is called a mixer, is quite hot, and contains a considerable quantity of free sulphuric acid, which is used for the purpose of the manufacture. Before being shipped it is cooled and the free acid diminishes according to the time the superphosphate is kept under this process. It is kept a longer or a shorter time according to the length of the voyage. Sometimes it has to go only a very short voyage; sometimes a longer voyage, and the superphosphate which has to be sent on long voyages requires more effective cooling than that which has to be sent simply on a short voyage; and the reason of that is that this free acid has a corrosive effect on the bags in which the superphosphate is shipped, and the longer it has to be kept in them the more important it is to get rid of the free acid. If it has to be sent upon a long voyage it is also packed either in stronger bags or in double bags instead of single ones, whereas on a short voyage it is often packed only in single bags. Some attack was made on the method of the preparation and bagging of this particular cargo, but I am satisfied that it was properly prepared and bagged for a voyage of ordinary length to Spain; that is for about fourteen or twenty days. The *Cid* left Zwijndrecht on the 8th Oct. 1907. She arrived at Coruña on the 13th Oct., and left upon the 21st, having been there a considerable time. She arrrived at Algeciras on the 25th Oct. and discharged part of her cargo there, and left Algeciras on the 4th Nov., there being a considerable detention at Algeciras as well as at Coruña. From Algeciras she ought to have gone direct to Alicante, but instead of that she went to Seville for the purposes of the shipowners. She arrived at Seville on the 5th Nov., she left upon the 8th, and arrived at Alicante on the 11th Nov. This was a deviation, and was not authorised by the charterers, and some five or six days were occupied by that deviation. At Alicante the cargo was found to be seriously damaged by reason of the acid having corroded the bags and allowed some of the superphosphate to escape. When the bags were sufficiently corroded to allow the superphosphate to escape it came into contact with other parts of that same bag and also with other bags and so caused further damage; and the damage increased, and in an increased ratio, with each day the cargo was allowed to remain in that condition. Claims were made upon the plaintiffs in respect of that damage and they settled those claims for a sum of 310*l.*, which is the sum they now claim from the defendants.

The plaintiffs allege that the deviation puts an end to the charter-party as from the beginning

(*a*) Reported by LEONARD C. THOMAS, Esq., Barrister-at-Law.

of the voyage, and prevents the defendants from relying on any of the exceptions at any period of the voyage, and that therefore they are liable for the whole of the damage as common carriers. The defendants deny that proposition, and say they are only liable for such damage as was occasioned by the deviation; and they also say that the damage in this case was occasioned by the inherent vice of the cargo. They also allege, as I have said, improper preparation and bagging, but, as I have also said, I do not act upon that contention. The defendants also said that a greater proportion of the damage, if not the whole, occurred before deviation, and that the defendants are protected at any rate as to that damage by the provisions of the charter, because they say that the exceptions will apply to any part of the voyage which was before the deviation, and that the defendants are only deprived of the benefit of the exceptions after the deviation. I have, therefore, to decide the effect of the deviation upon the obligations and rights of the parties; and that depends really upon what I take to be the true effect of the decision in the case of *Joseph Thorley Limited* v. *Orchis Steamship Company* (*sup.*). The plaintiffs contended that the effect of that decision was to support their contention that a deviation puts an end to the contract in the charter-party as from the beginning of the voyage no matter when or where the deviation took place. The defendants contended that that was not the effect of the decision, because that point was not before the court at that time, the deviation in that case having occurred at the beginning of the voyage. Now, it is not necessary for me to cite that case at any length. The conclusion I have come to is that it does decide that where there is a deviation the special contract by charter-party ceases to exist. It was not necessary for the court in that case to consider the effect of a deviation in the middle or towards the end of the voyage, and I am not at all clear that that point was present to the minds of the learned judges in delivering judgment, and for two reasons: The first is that, as I have said, the deviation in that case took place at the beginning of the voyage, and, in the second place, all the learned judges refer several times to the analogy of cases decided upon policies of insurance, and in the case of insurance a deviation only avoids the policy from the time it takes place. If the question in this case had been present to the minds of the court I think they probably would have pointed out the different effect of deviation in those two cases. But, however that may be, they laid down propositions, not dicta, but as the foundation of their judgment, which go the full length I have mentioned, and I think I must accept them; and I am strengthened in this by the fact that I think this view of the decision in that case was taken by Bucknill and Bargrave Deane, JJ., sitting as a Divisional Court in the case of *The Europa* (11 Asp. Mar. Law Cas. 19; 98 L. T. Rep. 246; (1908) P. 84). I think, therefore, on the authority of that case, I must hold that the defendants cannot rely on the terms of the charter, and must be treated in this case as common carriers. It was suggested by one of the learned judges in the case of *Joseph Thorley Limited* v. *The Orchis Steamship Company* (*sup.*) that they might have been in a less favourable position than even common carriers; but his Lordship did not point out in what way. I do not think for the purposes of this case that they can be in a worse position than that of common carriers.

That leaves still a serious question to be decided, and that is this: Whether as common carriers they are responsible for the damage in this case, it being alleged that it was occasioned by the inherent vice and the nature of the goods themselves. Now, common carriers, as I take it, are not liable for damage due to the nature of the thing carried so long as they perform their voyage with reasonable dispatch under all the circumstances which they have to encounter. I think until the deviation in this case the defendants did perform the voyage with reasonable dispatch. The delay at Coruña was beyond what was expected and was considerably longer than anybody contemplated; but the evidence before me was that it was due to bad weather, which made it unsafe for the vessel to proceed on her voyage. I have more doubt about the long time which was occupied in discharging at Algeciras, but I have no evidence that it was due to negligence or to the orders to go to Seville, and I do not see my way to reject the evidence of the master that it was due to the want of facilities of discharging and to the fact that they did not discharge at a quay but had to discharge in the roads. As I have said, I think the cargo was properly cooled and bagged for an ordinary voyage to Spain, but I do not think it was in a condition to stand the excessively long voyage of thirty-four days to which it was exposed. I think one part of Mr. De Lange's evidence supports me in that. He said he would not have consented to their calling at Coruña at all if he had had any notion that the delay there would have been so long; and the reason for that, no doubt, was that he anticipated that such a delay would injure the cargo, prepared as it was for a shorter voyage. I think there must have been damage arising from that delay and from the long time which was occupied in discharging at Algeciras. The evidence is conflicting as to the state of the cargo at Algeciras; but I think there was damage to the cargo which was discharged there, and I think there was also damage to the cargo afterwards discharged at Alicante after it arrived at Algeciras. It is said that no claims were made in respect of the Algeciras cargo, and that may be so, but I think there was damage to the whole of the cargo from the time the vessel left Algeciras and the time the deviation began. I do not accept the evidence of the master and the mate that the condition at Algeciras and Alicante was the same. It is contrary, I think, to common sense that there should be no effect from the extended five or six days which were occupied in consequence of the vessel going to Seville and from the fact that the holds were open and that cargo was loaded—I do not think there was any discharged—at that port, and also in the voyage from Seville to Alicante. It is also contrary to the undisputed fact that a great deal more rebagging was required in respect of the cargo discharged at Alicante than in respect of the cargo which was discharged at Algeciras. When damage of this kind once sets in, as I have said, it increases at an increasing rate with each day that the cause is allowed to exist, and this would be especially so where

the holds had been opened for a considerable time, as they were at Algeciras and also as they were at Seville. I think the condition of the cargo was obvious to the master at Algeciras, and therefore I think he cannot protect himself by saying that he did not know that the nature of the cargo was such that a prolongation of the voyage would increase the damage that was taking place. I think he ought to have known that it should be discharged as soon as possible, and I think its condition was much aggravated by the extra time occasioned by the deviation after its exposure at Algeciras, and although a common carrier is not responsible for damage arising from the nature of the article itself so long as he performs his voyage properly, he is responsible if he aggravates that damage by any breach of contract on his part. In this case I think he did. I think there was a considerable aggravation of the damage to the cargo occasioned by the deviation to Seville and the five or six extra days which were consumed in consequence. How much I have to attribute to that and how much I have to attribute to what took place before she reached Algeciras it is very difficult to say. I can only estimate it as best I can as a jury would estimate it. I was rather invited to say that I could estimate it by a sort of proportion between the number of new bags required or the amount of rebagging required to the smaller cargo which was discharged at Alicante compared with the amount which was required with regard to the larger cargo at Algeciras; but I do not think I can take it in that way. The best I can do is to make an estimate from all the facts, and, on the whole, the conclusion I have come to is that the plaintiffs are entitled to the sum of 175*l.* in respect of the damage which is attributable to the act of the defendants; and I shall give judgment for that amount with costs.

Solicitors for the plaintiffs, *Stephenson, Harwood, Henderson*, and *Witt*.

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

April 27 *and May* 25, 1909.

(Before Pickford, J.)

Mercantile Steamship Company Limited and Dale *v.* Hall. (*a*)

Agreements between master and crew — Stipulations contrary to law—Merchant Shipping Act 1894 (57 *&* 58 *Vict. c.* 6), *ss.* 113, 114, 221, 226.

Stipulations contained in agreements made between the masters and crews of vessels are contrary to law in so far as they are inconsistent with provisions of the same character contained in the Merchant Shipping Act 1894.

The Merchant Shipping Act 1894, *which authorises agreements between the master and crew of any vessel, provides that "the agreement . . . 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 or allotment of wages or otherwise, as are not contrary to law." It further prescribes certain penalties for the offences of not joining the ship and absence without leave.*

The master and crew of a vessel proposed entering into an agreement which contained a stipulation relating to the above offences, but prescribing penalties inconsistent with those contained in the Act:

Held, that such a stipulation was "contrary to law" within the meaning of sect. 114 *of the Act.*

Commercial list.

Special case stated for the opinion of the court and tried by Pickford, J. sittting without a jury.

The plaintiffs were the master and owners of the steamship *Lena*, and the defendant was the superintendent of the Mercantile Marine Office at Barry.

On the 6th Oct. 1908 the *Lena* was at Barry loading a cargo of coal for shipment to Port Said, for the purpose of which voyage a crew of twenty-seven hands was required, and the plaintiff Dale, as master, had arranged for a crew of that number to serve on board the *Lena* on the terms of an agreement which contained (*inter alia*) the following stipulation:

> The said master shall be entitled to deduct from the wages of any member of the said crew the following amounts—viz., for not joining at the time specified in column two, two days' pay, or, at his option, any expenses which have been properly incurred in hiring a substitute; and for absence at any time without leave from his ship or from his duty, a sum equal to two days' pay for any period of absence not exceeding twenty-four hours, and a further sum equal to four days' pay for each succeeding completed or uncompleted period of twenty-four hours' absence.

The plaintiff Dale and the proposed crew attended at the Mercantile Marine Office at Barry for the purpose of signing the proposed agreement, but the defendant, acting on the instructions of the Board of Trade, refused to allow the agreement to be signed in his presence or to attest it, on the ground that the proposed stipulation was contrary to law.

The question for the opinion of the court was whether the stipulation was contrary to law.

Sir *W. S. Robson* (A.-G.) and *Rowlatt* for the defendant. — The proposed stipulation is contrary to law because it is inconsistent with the provisions of the Merchant Shipping Act 1894 which created the offence, prescribed the tribunal, and indicated the limits of punishment. It abrogated the tribunal by agreeing to do without it. If the master chose to stand by the agreement and not go before the magistrate, he would not be accepting the conditions of sect. 221, but would be putting a penalty upon the seaman. The point was that the agreement provided for a forfeiture different from that provided by the Act. The Act carefully guarded against improper deductions from wages, and its object was to make an agreement for the parties:

> *Great Northern Steamship Fishing Company* v. *Edgehill*, 11 Q. B. Div. 225.

Sect. 226, if considered in the light of this case, is very strongly in favour of the contention of the Board of Trade. [Pickford, J.—Sect. 226 does not deal with the power of making agreements.]

Atkin, K.C. and *Roche* for the plaintiffs.—A stipulation providing for a deduction from a seaman's wages for serious damage is contrary to law. There is nothing to prevent an em-

(*a*) Reported by Leonard C. Thomas, Esq., Barrister-at-Law.

ployer agreeing to a penalty for an offence which is not included in the Act:

Fraser v. *Hatton*, 26 L. J. 226, C. P.

It is conceded that this is not to be their only remedy, because they are left to their remedy by action as provided by sect. 226. The agreement was legal, and not contrary to anything in the Act.

Cur. adv. vult.

May 25.—Pickford, J.—This is a special case stated in an action brought by the plaintiffs against the defendant, who was the superintendent of the Mercantile Marine Office at Barry, and the action was brought against the defendant on the ground of his refusal to allow a certain stipulation to be inserted in an agreement with the crew of a vessel, and to test the agreement or any agreement containing such stipulations, his reason being that he was instructed by the Board of Trade to so refuse, on the ground that the stipulation attempted to be introduced into the agreement was contrary to law by virtue of a section of the Merchant Shipping Act 1894, to which I will refer later. The defendant does not admit that any action would lie against him for such a refusal, but he does not take that point in this case, because both parties wish to have the opinion of the court as to whether the Board of Trade were right in saying that that stipulation was contrary to law. The stipulation is set out in the special case, and is to this effect: [His Lordship read it, and continued:] That was the stipulation which the master and owners of the ship wished to put into the agreement with the crew, and the defendant, as represented by the Board of Trade, says that that stipulation ought not to be inserted. Now, these matters relating to the engagement of seamen are governed by that part of the Merchant Shipping Act beginning at sect. 113, and that section provides that the master shall enter into an agreement. Sect. 114 provides for things which it is necessary should be inserted into the agreement, and thus under sub-sect. 3 it is provided that "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 seamen in each case, whether respecting the advance and allotment of wages or otherwise, as are not contrary to law." I take it that the seamen were prepared to enter into the agreement if the representative of the Board of Trade allowed the stipulation to be inserted. What is said is that it is inconsistent with the provisions of the Act contained in sect. 221 (*b*), and is therefore contrary to law. Now, I reserved judgment in this case because I wanted to see if I could get from the authorities any guidance as to what was the exact meaning attached by the law to the words "contrary to law"; but I have not got assistance from the cases, because they do not turn on facts and circumstances such as arise in this case. The stipulation may, of course, be contrary to the law generally, or it may be contrary to certain express provisions of the Merchant Shipping Act 1894, to which I need not refer more particularly, because there are provisions which say that no other stipulations shall be inserted in certain respects other than those provided in the Act. There is no express provision prohibiting stipulations such as this, and I have, therefore, to consider whether, if stipulations are not expressly prohibited by the Act, they are contrary to law if they are inconsistent with the provisions of the Act on the same subject. I think they are, and the question therefore now comes down to this: Is this stipulation inconsistent with the stipulations on the same subject in the Merchant Shipping Act 1894? Now, when going through the sections, the provisions with which these stipulations are said to be inconsistent are contained in sect. 221, sub-sect. (*b*). That sub-section provides for the same event of absence without leave, and provides a punishment by forfeiture of wages; or, if the court thinks fit, by imprisonment for such absence. It is in these terms: "If he neglects, or refuses without reasonable cause, to join his ship, or to proceed to sea in his ship, or is absent without leave at any time within twenty-four hours of the ship's sailing from a port, either at the commencement or during the progress of a voyage, or is absent at any time without leave and without sufficient reason from his ship or from his duty, he shall, if the offence does not amount to desertion, or is not treated as such by the master, be guilty of the offence of absence without leave, and be liable to forfeit out of his wages a sum not exceeding two days' pay, and in addition for every twenty-four hours of absence, either a sum not exceeding six days' pay, or any expenses properly incurred in hiring a substitute; and also, except in the United Kingdom, he shall be liable to imprisonment for any period not exceeding ten weeks with or without hard labour." Now, that sub-section constitutes an offence of absence without leave, and provides for certain consequences which shall follow. The stipulation proposed to be introduced into the agreement provided also for consequences that will follow on absence without leave, and they are different consequences from those mentioned in the sub-section. The sub-section provides that for absence without leave he shall pay out of his wages a sum not exceeding two days' pay, and, in addition, for every twenty-four hours of absence, either a sum not exceeding six days' pay or any expenses properly incurred in hiring a substitute. The agreement provides that he shall forfeit a sum equal to two days' pay, fixing it absolutely, and for every period of arrears a sum equal to four days' pay for each succeeding completed or uncompleted period of twenty-four hours' absence. That fixes a sum equal to four days instead of a sum not exceeding six days. It therefore provides different consequences from those provided by the Act. Now, these must be in addition to or in substitution for the provisions of the sub-section. If they are in substitution they amount to a repeal of the sub-section, which it is not competent for the parties to do. If they are in addition, the seaman is not only to be punished in accordance with the provisions of the Act, but is to receive further punishment; and therefore I think they are inconsistent with the provisions of the sub-section. But Mr. Atkin says that the stipulation is justified by another section in the Act which, he says, allows these stipulations to be inserted. This section is 226, and provides that "nothing in the last preceding section or in the sections relating to the offences of desertion or absence without leave shall take away or limit any remedy by action or by

summary procedure before justices which an owner or master would but for those provisions have for any breach of contract in respect of the matters constituting an offence under those sections, but an owner or master shall not be compensated more than once in respect of the same damage." Now, he says this stipulation merely amounts to the fixing of an amount of the damages that can be recovered for the offence of being absent without leave, and that therefore it is within the provisions of sect. 226, because it is only allowing the shipowner to recover the damages for breach of contract which he could have recovered without the section of the Merchant Shipping Act 1894 fixing the damages. Now, if that were the effect of the stipulation, there might possibly be something in the argument, but in my opinion it does a great deal more. It does not leave the shipowner to recover the amount which is fixed as a deduction by this stipulation by action, but provides an agreement by which it is to be deducted from wages by the master, and, although I do not think the master is made the final judge, this agreement provides a machinery of deduction for the offence of absence without leave, and does not fix the amount which is to be recovered in the action. The subsequent provision that the owner or master is not to be compensated more than once in respect of the same damage does not, I think, affect the question, because the question is whether the shipowner is entitled to enforce penalties in a different way from those provided by the Merchant Shipping Act 1894. I think these provisions were inconsistent with the provisions of the Merchant Shipping Act 1894, and therefore they are contrary to law within the meaning of sect. 114 and the sub-section. I think, therefore, that the defendant was justified, and my answer to the special case is that this stipulation was contrary to law.

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

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

May 11 *and* 25, 1909.

(Before Pickford, J.)

H. G. Harper and Co. *v.* Vigers Brothers. (*a*)

Principal and agent—Charter-party—Undisclosed principal—Principal contracting as agent—Right of principal to sue.

A contract in charter-party form was expressed to be made between the plaintiff "by authority and as agent for owners" and the defendant.

No principal was named in the contract, and the plaintiff, who was a shipbroker, was not in fact acting as agent for any owners, but was contracting for himself. He later chartered a steamer at a freight less than that specified in the contract.

Held, that the plaintiff was entitled to recover as principal the freight specified in the contract.

Schmalz *v.* Avery (16 *Q. B.* 665) *followed.*

Sharman Brandt (*L. Rep.* 6 *Q. B.* 720) *and* Fairlie *v.* Fenton (*L. Rep.* 5 *Ex.* 169) *discussed and distinguished.*

(*a*) Reported by Leonard C. Thomas, Esq., Barrister-at-Law.

Commercial List.

Action tried by Pickford, J. sitting without a jury.

The plaintiffs were a firm of shipbrokers, and claimed a balance of freight alleged to be due under a charter-party made between themselves and the defendants.

The charter-party, which was dated the 3rd Feb. 1908, contained the following clause:

> It is this day mutually agreed between H. G. Harper and Co, as agents for owners of the good steamship called the (to be named later) of tons net register or thereabouts . . . now expected ready to load about second half June, but lay days not to commence before the 15th June, and Messrs. Vigers Brothers, of London, charterers.

The charter-party further provided for a rate of freight at 1*l.* 1*s.* 6*d.* for deals, battens, boards, and scantlings, and 1*l.* 5*s.* for slatings; and for brokerage at 5 per cent. "due to H. G. Harper and Co. on the signing hereof." It was signed "By authority of and as agents for owners, H. G. Harper and Co."

On the heading of the charter-party form appeared the words "H. G. Harper and Co., Shipbrokers."

The plaintiffs had, at the time of entering into the charter-party, no agreement or authority from any owners to provide a ship.

On the 22nd May Messrs. H. G. Harper and Co. entered into an agreement with Messrs. Ollgaard and Thoersen, a firm of Norwegian shipowners, to provide a ship to fulfil their contract with the defendants which commenced in the following form:

> It is this day mutually agreed between Messrs. Ollgaard and Thoersen, as agents for . . . owners of the good steamship called the *Hektos* . . . and H. G. Harper and Co., of London, as agents for the charterers . . . that the said steamship . . . shall proceed to London Surrey Commercial Dock, &c.

The agreement further provided for an all-round freight of 1*l.* per ton, and is signed "H. G. Harper and Co., as agents for the merchants."

The *Hektos* was declared to the defendants on the 5th June, and the bills of lading were made out reserving freight as per charter-party, but the defendants declined to pay the higher rate of freight specified in the charter-party.

Bankes, K.C. and *Roche* for the plaintiffs.—If an agent enters into a contract naming a principal, when he is in fact not the agent, the other party is entitled to repudiate the contract on the ground that he contracted on the security of the named principal. But this does not apply where no principal is named and the supposed agent is in fact the real principal:

Schmalz v. *Avery* (*sup.*);
Carver's Carriage by Sea, sect. 128

In the charter-party no ship was named, and it was quite open to the plaintiffs either to fix a ship themselves or enter into a contract as agents, and it cannot be said that they were agents for the defendants. [Pickford, J.—Does it not turn upon the fact that in the charter-party of the 22nd May the plaintiffs describe themselves as agents for merchants?] The plaintiffs could not make the defendants their principals without their knowledge or consent, and their case is that

the plaintiffs entered into the contract as agents for some undisclosed principal.

Bailhache, K.C. and *Maurice Hill* for the defendants.—The plaintiffs are described in the charter-party as shipbrokers, and the inference to be drawn is that they were agents for a principal, who, having a number of ships, reserves the right to name a convenient ship. One person cannot be both principal and agent at one and the same time:

Sharman v. *Brandt* (*sup.*).

Where a broker or agent acts for either disclosed or undisclosed principals, the contract is not made with him, but with the person for whom he purports to act:

Fairlie v. *Fenton* (*sup.*).

Schmalz v. *Avery* was distinguishable. The contract in that case was not a brokerage contract, and there was no evidence as to how the charter-party was signed. According to *Sharman* v. *Brandt*, where a broker makes a contract even for an undisclosed principal, the broker cannot sue, but in *Schmalz* v. *Avery* the plaintiff was not a broker. The vital distinction between *Schmalz* v. *Avery* and the present case is that Schmalz, who described himself as agent for the freighter, was himself the shipper of the goods, and thus fulfilled in himself the description of the class of persons for whom he purported to act. If the plaintiffs had been the owners of the boat they would have brought themselves within *Schmalz* v. *Avery* if they had named themselves in the charter party as owners and supplied one of their own boats.

Bankes in reply.—In *Sharman* v. *Brandt* the plaintiff was employed by the defendant as broker, but sold his own goods, which he had no right to do, and that was sufficient to dispose of the case. *Fairlie* v. *Fenton* was a case of employment of a broker on the market, whose position was therefore different from that of a shipbroker. A person who describes himself in a contract as agent for a principal is liable on the contract if proved to be the real principal:

Carr v. *Jackson*, 21 L. J. 137, Ex.; 7 Exch. 382.

Cur. adv. vult.

Pickford, J.—In this case the plaintiffs sued the defendants for the balance of money alleged to be due upon what is called a contract in charter-party form, and the question for decision arises in this way: The plaintiffs are shipbrokers. They say they are also shipowners, but for the purposes of this case they must be taken as shipbrokers. They negotiated a contract with the defendants for the carriage of a cargo of timber, the contract being dated the 3rd Feb. 1908. The contract was in this form: "It is this day mutually agreed between H. G. Harper and Co., as agents for the owners of the good steamship" to be named later, then follows her description, "and Messrs. Vigers Brothers, of London, charterers, that the said steamship should carry this cargo and deliver it at London Surrey Commercial Docks at a freight for deals, battens, boards, and scantlings of 1*l.* 1*s.* 6*d.* per standard, and slatings 1*l.* 5*s.* per standard"; and the brokerage is 5 per cent. and is "due to H. G. Harper and Co. on the signing hereof, and the steamer is to be reported by them at the custom-house at port of discharge." It is signed "by authority and as agents for owners, H. G. Harper and Co." Now, that document is an entire misrepresentation of the actual state of things. Harper and Co. were not acting for any owners at all. They had no ship at that time which was going to fulfil this charter, nor had they any agreement or authority from any owners to provide a ship under this charter. They had no principals. It is said that it was a speculation by them in freight, and of course it was, because if they could not get a ship at that freight they would lose, and if, as happened, they got a ship at less freight, they would make money. I think the probability is that Mr. Harper was correct when he stated in evidence that the primary object was to get brokerage, and he probably realised that if the defendants knew that he had not any shipowner behind him at all, and that he was only contracting in the air and taking his chance of getting a ship, I think he knew it was very likely that the defendants would not enter into the contract with him, and he would not get the brokerage. That was the primary object in what he did. It did involve, no doubt, a speculation in freight. Now, I think that if the defendants had known that Mr. Harper had no principal, and that he was merely contracting with himself, in all probability they would not have made the contract, and I also think it is pretty clear that if the true state of affairs had been explained to them and they had made the contract there certainly would have been no litigation. I am not going to decide whether it is so or not, though I have great doubt about it, but it was said that it is a practice of shipbrokers to make contracts of this kind representing that they are acting for owners when they really have no principals at all; but, if that be so and it causes complications, they are to a great extent responsible for them.

Now, having made that contract, on the 22nd May 1908 they made a contract with some Norwegian shipowners for the charter of a ship called the *Hektos* to fulfil the contract which they had made with the defendants Messrs. Vigers, and they made it in this form: "It is mutually agreed between Messrs. Ollgaard and Thoersen, as agents for the owners of the steamship called the *Hektos*" —then it describes where she is—"and H. G. Harper and Co., of London, as agents for the charterers, that the said steamer shall carry this cargo to the Surrey Commercial Docks at an all-round freight of 1*l.* for deals, battens, boards, slatings, and scantlings"—that is to say, at considerably less than the freight that the defendants had agreed to pay the plaintiffs. It goes on: "The master or owners to telegraph the shippers of the cargo giving the charterers' names—namely, Vigers Brothers—and giving at least six clear days' notice of the probable date of steamer's arrival at the loading port." Then that is signed "H. G. Harper and Co., as agents for the merchants." Now, that is just as absolute a misrepresentation of the true state of things as was the first contract. They were not acting as agents for Messrs. Vigers, whose name they took upon themselves to put into the charter. They made no contract between Messrs. Vigers and these gentlemen, and they were not acting as agents for merchants, although they so describe themselves in signing the charter. What their object was in making it in that form I do not

think it is necessary for me to consider. Mr. Harper said it was a matter of business. It may be so, but when I find one party to the negotiations carefully concealing the nature of the transaction, and representing it to be other than it is, I come to the conclusion that he does it, at any rate, not for the advantage of the other party to the negotiation. But it is not necessary for me to form any conclusion as to why it was done, because, as Mr. Bankes properly pointed out, it does not really affect the relations between the plaintiff and the defendant, and is therefore only a matter of prejudice. Therefore I do not concern myself further with it. Having made that charter, on the 5th June they declare the *Hektos* to the defendants as being the ship which would fulfil the contract of the 3rd Feb., and it was argued by Mr. Bailhache for the defendants that that altered the position of the plaintiffs having no principals, and from that time they were acting for principals—viz., the owners of the *Hektos*. I do not think that contention is correct. The owners of the *Hektos* never were principals so far as Messrs. Vigers Brothers were concerned. There never was any charter made between them or any privity between them at all, except possibly the bills of lading afterwards signed. I think the facts remained exactly the same after the declaration of the *Hektos* as before —viz., that the plaintiffs had contracted ostensibly as agents, but really being themselves principals with the defendants. Now, the goods were shipped, and they came forward on the *Hektos*. The bills of lading were made out reserving freight as per charter-party of the 22nd May. Possibly it would have been difficult to make them out reserving any other freight, but, at any rate, that is the way it was made out, and that freight was not the freight due upon the contract of the 3rd Feb., but was a freight of 1*l*. which had been agreed upon the *Hektos*. The cargo arrived, and there was a question of the amount to be paid, and correspondence took place which it is necessary for me to refer to, because it is said to have been a settlement of the matter by the plaintiffs abandoning the claim which they are now making. On the 2nd July the master informed the defendants that the *Hektos* had been reported. On the 9th July the defendants wrote to the plaintiffs, saying: "With reference to our charter dated the 3rd Feb. for about 935 standards Koivusaani, we find that the steamship *Hektos*, which steamer loaded the goods under the charter, is only being paid at the rate of 1*l*. per standard. We presume, therefore, that we shall only be debited at this rate in freight. Please confirm." The plaintiffs replied on the same day: "We are in receipt of your favour of even date *re* steamship *Hektos*, and we really cannot understand why you write to us as you do. When we took the charter up in February last we could not tell whether the market would go in our favour or against us. In this instance it has happened to go in our favour, and, seeing that in a good many cases we have sustained heavy losses, we consider we are fully entitled to the difference. Had the market gone against us, we should, of course, have had to pay the necessary freight to obtain a substitution boat." On the 11th July the defendants write back: "Our charter-party was between owner and ourselves. The charter owner's hold is 20*s*. per standard. We note you propose to take the difference, but we think you will agree with us it is not regular for agents to take a profit. Kindly, therefore, let us have freight account made out at 20*s*. per standard, as per owner's charter, and also owner's authority to pay you freight." On the same day the plaintiffs reply: "We are in receipt of your favour of even date, and are surprised at the attitude you take up in this matter. You knew very well that we were taking this quantity up as a parcel, and no steamer was named. At the time the rate was a cheap one or you would not have chartered." I ought to have said that there is no suggestion that it was an improper freight that was got from the defendants in February; it was the proper market freight. The letter goes on: "We have a large connection with foreign owners and are closely connected with a good many boats, so that when we take up any goods we know for certain that we shall be able to provide the necessary tonnage." I am not quite sure that I can accept that. Continuing, they say: "In the present case we had not one of our regular boats to put in, and therefore the *Hektos* was chartered instead." On the 16th July the plaintiffs attempted to put a "stop" on the cargo for freight, but it had at that time been discharged. They also found this difficulty, that the bills of lading which the defendants held reserved the freight at 1*l*., and not at the higher rate, and therefore they would have found a difficulty in enforcing it as a "stop" on the freight even if the cargo had not been discharged. The result of that was that on the 17th July they wrote a letter which is said to be a settlement of the whole matter. That letter is in these terms, and is written to the defendants' solicitors and not to the defendants themselves. "In reply to your letter of yesterday, we have already 'phoned you that we are prepared to withdraw the stop and issue a release, and, as you propose to pay the 280*l*. 15*s*. 1*d*. and dock dues, we will take that as settlement of freight per steamship *Hektos* on Messrs. Vigers' portion of the cargo and drop the 1*s*. 6*d*. per standard because the bill of lading is made out erroneously." If that letter stopped at the word "erroneously," there would have been a good deal to have been said for the contention that, there being a dispute as to whether they could charge the larger amount or not, they agreed to drop the 1*s*. 6*d*.; but it goes on: "But as regards our claim for that additional 1*s*. 6*d*., our Mr. Harper will take an early opportunity of seeing Mr. Vigers on the subject." Now, it is said that that was a settlement by which they accepted 280*l*. 15*s*. 1*d*. in satisfaction of the whole of their claim. I cannot see that it is, as it goes on expressly, after saying they will take it as a settlement, to say: "We have a further claim of 1*s*. 6*d*. upon our contract with you, and, as to that, we will take an early opportunity of seeing you on the subject." I think that means this: "Owing to the form in which the bill of lading has been drawn up, we do not intend to go on trying to claim this as freight, but we do adhere to a claim for a further 1*s*. 6*d*. on our contract with you, and we will see you about it." I do not think that was an acceptance of the 280*l*. 15*s*. 1*d*. and dock dues in settlement of the whole matter. That left the difference of 1*s*. 6*d*., which is the matter of dispute in this action.

It was contended on behalf of the plaintiffs that they come exactly within the four corners of the decision in *Schmalz* v. *Avery* (*sup.*), which is referred to in Carver's Carriage by Sea in these terms in sect. 128: "Where a charter-party has been made by an agent expressly on behalf of a principal, the agent is not personally liable upon the contract, even though the principal be a foreign one, and although he may not have authorised the supposed agent to make the contract. If the agent was not authorised, no contract at all has been concluded, unless it can be shown that the agent had no principal at all, and was, in fact, contracting for himself; in which case probably he may sue or be sued on the contract." Now, in the present case the facts are the same. It is shown here, I think, that the agent had no principal, and was, in fact, acting for himself, and *Schmalz* v. *Avery* certainly seems to decide that in that case the principal may sue upon it himself. I need not refer to the judgment at any length. It is said he may be considered an agent for himself, which is a curious position, but, at any rate, in that case a person who described himself as agent, I think, for the freighter, being himself the freighter, was held to be entitled to sue on the charter-party. Now, after the note which I have read in Carver's Carriage by Sea, in which *Schmalz* v. *Avery* is cited, the author says, "compare *Sharman* v. *Brandt*," and that case was relied upon by Mr. Bailhache, as was another case, *Fairlie* v. *Fenton*, as being contrary to *Schmalz* v. *Avery*, and as showing that the plaintiffs in this case could not sue. I think what I have to decide is whether this case comes within *Schmalz* v. *Avery* or *Sharman* v. *Brandt* and *Fairlie* v. *Fenton* (*ubi sup.*). The latter case may be put on one side, because, as I read it, the plaintiff contracted for a principal whom he named, and there was such a principal, but the plaintiff as broker claimed the right to sue upon the contract because he said he had an interest in it such as an auctioneer has, who is allowed to sue although he contracts for a principal. Now, that is not this case at all. Fairlie was not the principal; he was an agent and the principal existed. *Sharman* v. *Brandt* is a little difficult to deal with, because it is not quite clear how much turns on the question of the Statute of Frauds and how much turns upon the general principles of law, but there are, no doubt, expressions in which it would seem to be contrary to the decision in *Schmalz* v. *Avery*. It is to be noticed, however, that in that case Sharman, the plaintiff, who was trying to sue upon the contract, was the agent of the defendant, and had been instructed by the defendant to go into the market and buy for him. Under those circumstances, the court, not unnaturally, held that he could not turn himself into a principal and sue the person who had instructed him as agent as if they were transacting business as principals. Therefore I do not think that these cases, when you look into them, are decisions which really touch the decision in *Schmalz* v. *Avery*.

But Mr. Bailhache contended that there were other distinctions. One of them I have already dealt with—viz., the declaration of the *Hektos* on the 5th June. He also said this was distinguishable because the contract in *Schmalz* v. *Avery* was not a brokerage contract. I confess I do not see any difference. A broker is only an agent. There are some brokers, no doubt, who perform somewhat peculiar functions different from other agents, but a shipbroker is only an agent to make a charter, just as anybody else is agent to make a charter. It was contended on behalf of the defendants that there might be a difference in the signature, and that there is nothing to show how the charter in *Schmalz* v. *Avery* was signed; that it may have been signed personally by Mr. Schmalz, and that therefore he was entitled to sue and be sued on that ground. All I can say is, that that is not the ground upon which the case was decided. It does not appear what the signature was in the report, but it does not appear in any part of the judgment that the signature was in any way a matter which entered into the consideration of the court in deciding that case. A further distinction taken by Mr. Bailhache was that in the case of *Schmalz* v. *Avery* the plaintiff himself shipped the goods, whereas in this case the plaintiff was not the shipowner, but got another shipowner to perform the contract. I do not think that makes any difference. It does not make any difference whether the plaintiff put in his own ship or a ship he had chartered, and which, therefore, he had at his disposal *pro hac vice*. For these reasons I cannot see any distinction between this case and *Schmalz* v. *Avery*, and therefore the plaintiff is entitled to recover this money on the authority of that case. But, as I have said, I am quite satisfied as to this, that, if he had disclosed the true state of affairs to the defendants at the time he made the contract, either no contract would have been made at all, or, if it had been made, there would have been no litigation about the matter. Under those circumstances, as he has brought the whole of this litigation about by choosing to conceal the real state of affairs, I do not think I can give him any costs. Therefore I think the judgment should be for the plaintiffs, but without costs.

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

Solicitors for the defendants, *Trinder, Capron*, and *Co.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Monday, March 1, 1909.

(Before Bargrave Deane, J. and Elder Brethren.)

THE BUTESHIRE. (a)

Salvage—Practice—Pleading—Admission of facts—Denial of inferences—Right of plaintiffs to give evidence—Evidence as to value.

Various tugs and lifeboats instituted salvage suits to recover salvage for services rendered to a steamship, her cargo and freight. After the plaintiffs in the various suits had delivered statements of claim, the solicitors for the defendants obtained an order to consolidate the suits and delivered a defence in which the defendants admitted "the facts alleged in the various statements of claim, but not the inferences

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

sought to be drawn from the said facts," and submitted "themselves to the judgment of the court thereon." The plaintiffs then had discovery of the defendants' log books. On the hearing of the consolidated suits, counsel for some of the plaintiffs tendered the log book of the defendants' vessel as evidence of the inference to be drawn from the facts; counsel for other plaintiffs applied for leave to amend the claim on behalf of the salvors for whom he appeared on the ground that the log book disclosed a material fact which those salvors could not have known when the claim was delivered.

Held, that the plaintiffs were not entitled to call evidence or put in documents in support of their case as the facts pleaded by them were admitted, and that no amendment could be allowed at the trial, as the application was too late and should have been applied for after discovery.

Held, further, that, on the facts as admitted, the salvors should be awarded 7275l., which was apportioned between them.

SALVAGE SUITS.

The plaintiffs were the owners, masters, and crews of the steam tugs *Victor*, *Champion*, *Premier*, *Florida*, *Arcadia*, *Aid*, *Lady Curzon*, and *Lady Crundall*, and the crews of the lifeboats *Eliza Harriett* and *Charles and Suzanna Stephens*, stationed at Margate and Ramsgate.

The defendants were the owners of the steamship *Buteshire*, her cargo and freight.

The plaintiffs in the various suits claimed salvage for services rendered to the *Buteshire*, her cargo and freight, when ashore on the Long Sand in the Thames estuary. The *Buteshire*, a screw steamship of 5583 tons gross and 3619 tons net register, went ashore on the early morning of the 27th Dec. 1908, while on a voyage from the Argentine to London, *viâ* Liverpool, with a cargo of frozen meat, and remained ashore until towed off by the tugs about 4 p.m. on the 28th Dec. The tug *Victor* rendered a further service by remaining in attendance on the *Buteshire* until the early morning of the 29th Dec.

The owners, masters, and crews of the steam tugs *Victor* and *Champion*, the steam tug *Premier*, and the coxswain and crew of the Margate lifeboat *Eliza Harriett*; the owners, masters, and crews of the steam tugs *Florida* and *Arcadia*, the owners, master, and crew of the steam tug *Aid*; the coxswain and crew of the lifeboat *Charles and Suzanna Stephens*; and the owners, masters, and crews of the steam tugs *Lady Curzon* and *Lady Crundall* delivered statements of claim on the 12th, 18th, 20th, 23rd, and 26th Jan. respectively.

The services proved to have been rendered by the plaintiffs are set out in the judgment of Bargrave Deane, J. In addition to the services dealt with in the judgment, the owners of the steam tug *Victor* alleged in par. 8 of their statement of claim that the *Buteshire* as she proceeded to Gravesend was in danger of going ashore; that those on the *Victor* signalled to her and hailed her to starboard her helm, which she did; that the master of the *Buteshire* then hailed the master of the *Victor* to go on board and take him to an anchorage as the pilot had lost his way, and that, after some conversation, the master of the *Victor* went on board and was requested to take charge and take the *Buteshire* to an anchorage, and that this was done; and that the tug was then sent to Gravesend in charge of the mate to fetch another pilot.

On the 25th Jan. the managing owner of the *Buteshire* made an affidavit of values in which he swore that the value of the *Buteshire* was 28,000*l.*, of her cargo 58,817*l.*, and of her freight *nil.*

On the 27th Jan. the court made an order consolidating the various suits.

On the 8th Feb. the court ordered that the issues raised by par. 8 of the statement of claim of the owners of the tug *Victor* be not tried on the 25th Feb., the day fixed for the hearing of the action. On the same day a further order was made that both plaintiffs and defendants should be at liberty to call evidence as to the value of the salved property; that the defence should be delivered in five days; and that within three days of the delivery of the defence the defendants should deliver an affidavit of documents.

On the 11th Feb. the defendants delivered a defence to the consolidated suits by which they admitted the facts alleged in the various statements of claim with the exception of the allegations contained in par. 8 of the statement of claim of the tug *Victor*, but did not admit the inferences sought to be drawn from the facts, and they submitted themselves to the judgment of the court thereon. They pleaded that the values of the salved property were as stated in the affidavit of values, and denied the allegations of fact contained in par. 8 of the statement of claim delivered on behalf of the *Victor*.

On the 11th Feb. the plaintiffs delivered a reply joining issue, and on the same day notice of trial was given for the 25th Feb.

L. Batten, K.C. and *Dawson Miller* for the tugs *Victor* and *Champion*.

Aspinall, K.C. and *H. C. S. Dumas* for the tugs *Lady Curzon* and *Lady Crundall*.

C. R. Dunlop for the tug *Arcadia*.

A. Bucknill for the tug *Florida*.

Baden Powell, K.C. and *R. H. Balloch* for the tug *Premier*.

C. Stubbs for the tug *Aid* and the Ramsgate lifeboat.

A. E. Nelson for the Margate lifeboat.

Laing, K.C. and *D. C. Leck* for the defendants, the owners of the *Buteshire*, her cargo and freight.

Evidence as to the value of the salved property was called by the plaintiffs and defendants, and is dealt with in the judgment delivered by the court.

Counsel for the tugs *Victor* and *Champion*, who had the conduct of the consolidated suit, tendered the log of the *Buteshire* as evidence of the inferences to be drawn from the facts admitted on the pleadings, but the court refused to permit any evidence to be given or documents to be put in, as the facts pleaded by them were admitted, and the court was only concerned with the inferences to be drawn from those facts.

Counsel for the tug *Premier* then applied for leave to amend their statement of claim on the ground that the log book and the letters of the master disclosed a material fact which the plaintiffs

could not have known when their claim was delivered, but the application was refused on the ground that the application was too late and should have been made immediately after discovery.

BARGRAVE DEANE, J.—In this case the steamship *Buteshire*, a vessel of 5583 tons gross and 3619 tons net register, on a voyage from Buenos Ayres to London with a cargo of frozen meat, got on to the Long Sand in the early morning of the 27th Dec. last, and she was got off on the 28th. She was in a very awkward position, and it was no doubt advisable she should be got off as soon as possible. The weather was extremely bad. It is said to have been blowing a gale from the east, with squalls and snow and a bad sea, and undoubtedly she was well on this sand. The first vessel to come up to her seems to have been the Margate lifeboat. Next came the *Lady Curzon*, followed by the *Victor*, and shortly after that by the *Champion*. Those three tugs were the only tugs which were towing on the first of the three tides. The next vessels to come up were the *Aid*, bringing out the Ramsgate lifeboat, and the *Arcadia* and *Premier*. So on the second tide there were six tugs towing. Finally, on the third tide the *Florida* and the *Lady Crundall* came up, and all eight tugs took part in the towage. Now, I have to apportion my award among all these claimants, and, to add to my difficulties, the values are not agreed. I and the Elder Brethren have, to the best of our ability, to arrive at what we consider to be the fair value of the ship and her cargo. According to the plaintiffs, the ship is worth 66,000*l.*, and her cargo 91,000*l.*, which makes a value of over 150,000*l.* According to counsel for the defendants, the value of the ship is 28,000*l.*, and that of her cargo 67,759*l.* We have arrived at these figures. The ship originally cost 73,000*l.* in 1893. She had repairs to the extent of 2000*l.* done in 1900, and in 1905 she underwent repairs to the extent of 10,000*l.* She is now valued at 28,000*l.* by her owners, but I find she was insured for 30,000*l.*, and that the machinery and other things on board her brought her insurance up to 60,000*l.* I take that as being a little beyond her full value, and I have taken 40,000*l.* as the fair value of the ship and machinery. The cargo is more difficult to assess, because we have very little means of judging. Counsel for the defendants puts the value at about 67,700*l.*, and the other side says about 90,000*l.* We have taken a common course and split the difference—75,000*l.*—which gives a total value of 115,000*l.* Now, of these tugs, some towed on three tides, some on two, and some on one, and there are also differences between them as to their values, horse-power, tonnage, and other matters. I cannot go into all these details. We have gone into them in my room, and the result is that I award the following sums : The *Lady Curzon* 1460*l.*, the *Victor* 870*l.*, the *Champion* 850*l.*, the *Aid* and the Ramsgate lifeboat 1000*l.*, the *Arcadia* 750*l.*, the *Premier* 600*l.*, the *Florida* 600*l.*, the *Lady Crundall* 870*l.*, and the Margate lifeboat 275*l.*—total 7275*l.* ; and I certify for separate representation in each case.

Solicitors for the *Victor* and *Champion* and the lifeboat *Eliza Harriett*, *C. J. Smith* and *Hudson* ; the *Lady Curzon* and the *Lady Crundall*, *Mowll* and *Mowll* ; the *Arcadia*, *Clarkson*, *Greenwell*, and *Co.* ; the *Florida*, *Pritchard* and *Sons* ; the *Premier*, *Charles E. Harvey* ; the *Aid* and the Ramsgate lifeboat, *Thomas Cooper* and *Co.* ; the *Buteshire*, *Lowless* and *Co.*

Monday, April 26, 1909.

(Before Sir J. BIGHAM, President.)

EL ARGENTINO. (*a*)

Mortgage — Necessaries supplied—Mortgagee in possession — Right to freight — Payment of necessary men.

The owners of a British steamship, which was mortgaged to builders to secure part of the purchase money, bought coal for a voyage to the River Plate and back. The coal was supplied to the ship at Barry on the credit of the owners, payment being made by bill due and payable a month after the supply of the coal. When the bill fell due it was not met. The owners also failed to pay an instalment of the purchase price, whereupon the mortgagees—the builders —took constructive possession of the steamship. The builders then went into voluntary liquidation, and the liquidator brought the ship home, freight being earned. The necessary men claimed to be paid out of the freight the sum due to them for coals.

Held, reversing the decision of the registrar, that the necessary men were not entitled to be paid out of the freight for the coal they had supplied, for they had retained no interest in the coal. Nothing of theirs, neither labour nor material, was used to earn the freight, and so they could have no interest in the freight, and it should be paid out to the mortgagees.

MOTION in objection to the report of the registrar reporting that certain necessary men the suppliers of coal to the *El Argentino* were entitled to a sum of freight lying in the registry in preference to the mortgagees who had taken possession of the ship.

The *El Argentino* was built by Sir James Laing and Sons Limited, and was owned by the Anglo-Argentine Steam Shipping Company Limited who took delivery of her in Feb. 1907. As the builders had not been fully paid for the vessel, they drew bills on the Anglo-Argentine Company for the balance which were payable at intervals, and the builders also had a first mortgage on the vessel and certain insurance policies. Sir James Laing and Sons Limited discounted some of the bills drawn on and accepted by the Anglo-Argentine Company Limited with Barclay and Co. Limited, and the latter firm also had the benefit of the first mortgage on the vessel.

On the 21st Nov. Kaye, Son, and Co. Limited sold to Wincott, Cooper, and Co., who were acting as the managing owners of the *El Argentino* for the Anglo-Argentine Company 2466 tons 9cwt. of coal for 1880*l.* 13*s.* 4*d.* for the use of the *El Argentino* payment to be made less 2½ per cent. in thirty days, and the suppliers drew a bill for the amount due to them 1833*l.* 13*s.*

The coal was put on board the vessel at Barry on the 14th Dec. for the use of the *El Argentino* on her outward and homeward voyages. The vessel arrived at Monte Video on the 9th Jan.

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

1908, and on the 13th Jan. the payment for the coals fell due, but the Anglo-Argentine Company had become involved in financial difficulties, and the suppliers were not paid the amount due to them.

On the 8th Feb. Sir James Laing and Son suspended payment, and the owners of the *El Argentino* having failed to pay an instalment of the purchase money on the same day the *El Argentino* was taken constructive possession of by Sir James Laing and Sons on behalf of Barclay and Co., who had discounted acceptances of the Anglo-Argentine Company, in respect of the building contract to the extent of 121,000*l.* and had the benefit of the first mortgage on the vessel.

On the 10th Feb. Thomas Cooper and Co, solicitors, acting on behalf of Messrs. Kaye, Son, and Co. Limited, the suppliers of the coal wrote to Sir James Laing and Sons Limited in the following terms :

We understand that you are the first mortgagees of this vessel and that you either have taken or propose to take possession of her. We think it right to inform you that our clients Messrs. Kaye, Son, and Co. Limited, have claims against the vessel in respect of coals supplied to her when she left this country. The claim amounts to 1911*l.* 10*s.* Our clients claim a right to be paid the amount, or at all events the value of the coals used on the way home out of the freight which the vessel will earn on that voyage, and we shall be glad to hear from you that you will take the necessary steps to protect our client's claim so as to obviate any proceedings being taken to enforce it.

Sir James Laing and Sons Limited replied on the 11th Feb. :

We will be glad if you will refer us to any authority under which your clients are entitled to a preference over our mortgage for their claim of 1911*l.* 10*s.* With regard to the coal consumed on the homeward voyage, this, no doubt, has been supplied to the ship on the credit of the Anglo-Argentine Company, and we are advised that we are entitled to use all coal and stores actually on board the vessel at the time we take possession. If we are wrong on this point we would be glad to be corrected, and to make the necessary provision for your clients' claim, but as there are other mortgages behind ours, we must necessarily be careful as to what moneys we pay.

To that letter Thomas Cooper and Co. on the 12th Feb. replied :

We do not know that we can refer you to any actual decision to the effect that a mortgagee must pay out of any freight he collects the costs and expenses of the voyage in respect of which the freight is collected, but it seems to us that on the most ordinary principles the person who takes the benefit of the results of a voyage must pay the expenses, the expenditure of which has brought about those results. In the circumstances we suggest that when you receive the freight you should at all events set aside sufficient to cover our clients' claim so that no difficulty need arise when the freight is collected, and the rights of our clients can be adjusted at a later period.

To this letter Sir James Laing and Sons Limited replied suggesting that Thomas Cooper and Co. had better write to the solicitors for Sir James Laing and Sons Limited.

On the 17th Feb. Sir James Laing and Sons Limited went into voluntary liquidation, a Mr. Squance being appointed liquidator.

On the same day, Barclay and Co. Limited applied to the Admiralty Court under sect. 30 of the Merchant Shipping Act 1894 (56 & 57 Vict. c. 60) and obtained an injunction restraining the owners or mortgagees from dealing with the El Argentino, or with the shares thereof until further order of the court.

On the 20th Feb. Messrs. Simey and Iliff, solicitors to Mr. Squance, the liquidator, wrote to Thomas Cooper and Co. asking whether the latter could refer them to any authority under which the liquidator would be justified in paying Messrs. Kaye's claim under the circumstances mentioned, and saying that if they could do so the liquidator was quite prepared to consider the matter favourably, the letter then proceeded :

Further complications, however, have arisen in respect of orders which have been obtained by the consignees of the cargo in view of several conflicting claims, and the freights are to be paid to Messrs. Birt, Potter, and Hughes, Limited, our clients' agents in London, and after payment thereout of the ship's disbursements the balance is to be paid into court. You will thus see that our client is not in a position to recognise any claims excepting those which are actually liens or charges upon the vessels.

On the 24th Feb. Thomas Cooper and Co. replied to that letter that as the freights were to be paid into court, their clients would have an opportunity of putting forward their claim, and stated that it seemed to them that as the freight could not have been earned without the use of the coals which had been supplied by their clients, at all events the value of the coal used subsequent to the mortgagees taking possession, ought to be paid for.

On the 26th Feb. the following order was made by the Admiralty Court as to the *El Argentino*.

(*a*) That Messrs. Birt, Potter, and Hughes do act as ship's agents in connection with the completion of the homeward voyage and the discharge of the cargo. (*b*) That they do collect the freights and pay all proper disbursements, including their own proper remuneration and thereupon pay the balance of such freight into this court. (*c*) And that they use all reasonable care and diligence to keep the expenses down to the lowest possible amount consistent with the due carrying out of the above purposes.

Liberty to apply. This order to be without prejudice to any question raised now or hereafter by any person interested as to his or any person's right to the freights, or as to whether any particular expense defrayed under this order ought to come out of freight or proceeds of ship, or as to any other question of priorities or marshalling.

The freight was paid into court under this order, and on the 31st March Thomas Cooper and Co. entered a caveat in respect of a sum of 1911*l.* 10*s.*, said to be due to Messrs. Kaye and Son and Co. Limited out of the freight in respect of coals supplied to the *El Argentino*. The caveat was renewed on the 12th Jan. 1909.

On the 18th Jan. 1909 the judge of the Admiralty Court made an order that the balance of the freight in the registry, standing to the credit of the *El Argentino* should be paid out to Barclay and Co. Limited, less the sum of 2500*l.* to be retained in respect of an amount stated to be 1911*l.* 10*s.* claimed to be due to Kaye, Son, and Company Limited. and referred the claim to the registrar and merchants.

The claim of Messrs. Kaye, Son, and Co. Limited was filed on the 3rd Feb., and by it they claimed:

	£	s.	d.
Bunker coals on board on leaving Monte Video the 29th Jan. 1908, 1370 tons at current price for Welsh coal at Buenos Ayres, 36*s.* less 1*s.*	2397	10	0
Or alternatively 1370 tons supplied at Barry the 14th Dec. 1907 at 15*s.* 6*d.* ...	1061	15	0
Or alternatively 2466 $\frac{9}{20}$ tons at 15*s.* 6*d.* ...	1911	10	0

The reference came on for hearing on the 23rd Feb. 1909, and the registrar made his report on the 24th Feb. 1909. In his report, after referring to the orders and stating the facts set out above, the registrar proceeded:

The above facts being agreed, it also being agreed that certain correspondence contained in letters dated the 10th, 11th, 12th, 13th, and 20th Feb. 1908 are to be taken as a part of the agreed facts, the question resolved itself into one of law, and on the 23rd Feb. 1909, this matter was argued before me by counsel for Messrs. Kaye and by counsel for Messrs. Barclay and Co. The question was, have the mortgagees in possession a right to recover the freight without paying for the supplies to the vessel necessary for the earning of such freight, it being admitted that those who supplied the articles had no maritime lien. It is undeniable that a solvent shipowner would deduct from the freight the amount of such disbursements as these before arriving at the net freight. In my opinion, the claimants are entitled to be paid out of the freight the sum of 1911*l.* 10*s.* on the principle that, having received the benefit of this expenditure in the shape of the freight becoming due by the completion of the voyage, and I regard the voyages from and to the United Kingdom as one adventure, they must pay it. This seems to me to be the principle laid down by the House of Lords in *Bristow* v. *Whitmore* (1 Mar. Law Cas. O. S. 95 (1861); 1861, 31 L. J. 467, Ch.). It was said that this decision was not to be found approved in any subsequent case. It appears, however, to me to be so clear and equitable a proposition as not to need subsequent approval. But I think also that the same principle is to be found in *Tanner* v. *Phillips* (1 Asp. Mar. Law Cas. 448 (1872); 42 L. J. 125, Ch.), in which *Bristow* v. *Whitmore* was cited, where it was admitted that the charterers were entitled, as against mortgagees in possession, to deduct from the gross freight advances on account of freight as stipulated in the charter-party, but not money advanced merely as loans and not referred to in the charter-party. See also Carver, sect. 590 as to right of a mortgagee of shares of a part owner. Several cases were cited by counsel for Messrs. Barclay, but they do not appear to alter the main principle, and are clearly distinguishable from the present case. Having come to this conclusion, it is unnecessary to refer further to the arguments of counsel, though it is perhaps desirable that I should state that, in my view, coals cannot be regarded as part of the equipment of a ship, so as to bring sect. 4 of the Admiralty Court Act 1861 into force. As an application will be necessary for the payment out to Messrs. Kaye of the sum which I find due to them, the incidence of the costs of this reference can be decided by the court on such application.

On the 1st March 1909 the solicitors for Messrs. Barclay gave notice of objection to the registrar's report, and on the 3rd March the solicitors for Messrs. Kaye, Sons, and Co. Limited consented to the objections being heard on motion.

On the 1st April the solicitors for Messrs. Barclay and Sons served a notice of motion on Messrs. Kaye, Son, and Co. Limited and their solicitors asking for an order that the report of the registrar wherein he reported that Messrs. Kaye, Son, and Co. Limited were entitled to 1911*l.* 10*s.* out of the freight in court should be rejected on the grounds that it was admitted by the claimants that: (*a*) They had sold the coal to the Anglo-Argentine Company Limited, the owners of the *El Argentino*, on their personal credit only; (*b*) they had no possessory or maritime lien on the ship or freight and no assignment of the freight; (*c*) the *El Argentino* was a British ship and the owners were a limited company, registered and having its office in England; (*d*) Barclay and Company Limited were entitled to the benefit of the mortgage on the ship and of the possession taken by the mortgagees before the freight was due or paid. That on the above admitted facts the registrar was wrong in holding that the claimants had any right to have the personal contract debt of the Anglo-Argentine Company for the said coal discharged out of the freight which was collected on behalf of the mortgagees in possession.

Scrutton, K.C., *Leslie Scott*, and *R. A. Wright* for Barclay and Co. Limited.—Kaye, Son, and Co. have no right to have a personal debt due from the Anglo-Argentine Company discharged out of this freight which was collected on behalf of Barclay and Co. Limited, who occupy the position of mortgagees. A mortgagee in possession is an owner, and as such is entitled to receive the freight:

Keith v. *Burrows*, 37 L. T. Rep. 291; 3 Asp. Mar. Law Cas. 481 (1877); 2 App. Cas. 636.

If the ship is merely mortgaged, the mortgagee does not acquire a right to the freight, but, once in possession, he is entitled to it:

Carver's Carriage of Goods by Sea, 4th edit. sect. 592.

In this case Barclay and Co. Limited are in the position of mortgagees in possession, and as such are entitled to this freight and are under no liability to pay for the coal. A mortgagee in possession is not liable for necessaries supplied to a ship unless the master when ordering them was acting as his agent:

The Troubadour, 16 L. T. Rep. 156; L. Rep. 1 A. & E. 302.

Until the necessary man brings an action he has no claim on the vessel, and a mortgage in existence when the action is brought would rank before the claim for necessaries:

The Pacific, 10 L. T. Rep. 541; Br. & Lush. 243; *The Two Ellens*, 26 L. T. Rep. 1; 1 Asp. Mar. Law. Cas. 208 (1872); L. Rep. 4 P. C. 161.

The case of *Tanner and Phillips* (*ubi sup.*) does not help Kaye, Son, and Co. *Bristow* v. *Whitmore* (*ubi sup.*) was cited in the case of *Tanner and Phillips* (*ubi sup.*), but it was not approved by Lords Wensleydale and Chelmsford, and it merely shows that if the mortgagee ratifies the act of the master he must ratify the whole of it. Sect. 590 of Carver's Carriage of Goods by Sea referred to in the registrar's report does not touch the question raised in the present case.

Laing, K.C. and *Dunlop* for Kaye, Son, and Co.—When the mortgagees took constructive possession of the vessel she was in Monte Video with a large quantity of this coal on board. Without the coal the mortgagees could not have earned the freight, and the court will not leave the necessary

man to look to the bankrupt owners of the vessel for payment. The cost of the coal consumed to earn freight should be deducted from the gross freight earned just as wages, towage, pilotage, dock dues, and cost of discharging cargo are deducted from it. The case of *Bristow* v. *Whitmore* (*ubi sup.*) was followed in *The Feronia* (17 L. T. Rep. 619; L. Rep. 2 A. & E. 65), and in that case the learned judge said, referring to *Bristow* v. *Whitmore*: "It is a strong authority for saying that the mortgagee in possession, or the owner ought not to be allowed to possess himself of this freight until the master has been indemnified for the labour and disbursements by which that freight was produced." *Bristow* v. *Whitmore* has also been recognised as an authority in the *The Red Rose* (L. Rep. 2 A. & E. 80) and in *The Orienta* (71 L. T. Rep. 343; 7 Asp. Mar. Law Cas. 508; (1894) P. 271).

The PRESIDENT.—If I had any doubt about this case I should take time to consider my judgment, but I really have no doubt at all. The coal in question, when it was sold by Messrs. Kaye, Son, and Co. to the owners of the *El Argentino*—that is, the mortgagors, became the property of the mortgagors, and Messrs. Kaye retained no interest in it of any kind whatever. The result is that though part of the coal was undoubtedly used on the voyage from Monte Video to this country, for the purpose of earning the freight payable in respect of that voyage, it was coal consumed which belonged to the mortgagors. It was not coal consumed belonging to Messrs. Kaye, or in which Messrs. Kaye had any interest whatever. Messrs. Kaye, Son, and Co. are, therefore, in my opinion, not in a position to say, and cannot be allowed to say, that the freight has been earned in any sense at their expense. Nothing of theirs, neither labour nor material, was used for the purpose of earning the freight, and if nothing of theirs was used for the purpose of earning the freight, they cannot by any possibility have any interest in the freight earned. I therefore think that the report of the registrar cannot be supported, and that the money in court, so far as it represents the freight, must be paid out to the mortgagees.

Solicitors for Barclay and Co., *Cattarns* and *Cattarns*.

Solicitors for Kaye, Son, and Co., *Thomas Cooper* and *Co.*

May 25 *and* 26, 1909.

(Before Sir J. BIGHAM, President, and Elder Brethren.)

THE NADOR. (*a*)

Collision—Fog—Failure to hear sound signals—Proof of negligence—Inevitable accident.

A vessel in charge of a compulsory pilot, having run into a fog, was rounding under a port helm to come to an anchor when she collided with a vessel lying at anchor whose bell was being regularly sounded for the fog. The bell of the vessel at anchor was not heard by those on the vessel coming to anchor until just before the collision.

Held, that neither the pilot nor the crew of the vessel coming to anchor were negligent in not hearing the bell of the vessel at anchor, that the plaintiffs had failed to prove any negligence on the part of the defendants, and the action must be dismissed.

DAMAGE ACTION.

The plaintiffs were William France Fenwick and Co. Limited, the owners of the steamship *Monkwood*; the defendants were the owners of the steamship *Nador*.

The case made by the plaintiffs was that shortly before 4.30 a.m. on the 10th Jan. 1909 the *Monkwood*, a steel screw steamship of 1141 tons gross and 715 tons net register, was lying at anchor in the neighbourhood of the Sunk Light vessel, in the course of a voyage from Sunderland to London laden with a cargo of coals, and manned by a crew of seventeen hands all told. The wind was west-south-west, moderate, the weather foggy, and the tide ebb of force unknown. The *Monkwood* was at anchor head to tide. Her regulation anchor lights were being duly exhibited and were burning brightly, her bell was being regularly sounded for fog, and a proper anchor watch was being kept on board her. In these circumstances those on board the *Monkwood* saw the masthead and green lights of the *Nador* (the fog signals of which vessel had been previously heard) about 500 yards off and about four points on the starboard bow. The *Nador*, however, instead of keeping clear, as she could and ought to have done, opened her red light, and came on towards the *Monkwood*, and, as soon as it was seen that she could not clear, the windlass of the *Monkwood* was opened and her engines were put astern, but the *Nador* came on and struck the starboard bow of the *Monkwood* with her port side amidships, doing damage.

Those on the *Monkwood* charged the *Nador* with not keeping a good look-out; with failing to keep clear of the *Monkwood*; with failing to ease, stop, or reverse her engines, or let go her anchor; with failing to stop her engines on hearing a fog signal forward of her beam; with failing to indicate her course by whistle signal; and with crossing ahead of the *Monkwood*.

The case made by the defendants was that shortly before 4.20 a.m. on the 10th Jan. the *Nador*, a steel screw steamship of 2031 tons gross and 1301 tons net register, manned by a crew of twenty-three hands all told, was about one mile to the north of the Sunk Light vessel in the course of a voyage from Boujil to Leith, *viâ* London, with a cargo of locust beans. The weather was a dense fog, with a light westerly breeze, and the tide was about two hours ebb, of the force of about three knots an hour. The *Nador*, in charge of a duly licensed Trinity House pilot, had been steering north-east by north, and was coming round head to tide with the engines full speed ahead and the helm hard-a-port, intending to anchor, and was making about three knots an hour. The whistle of the *Nador* was being duly sounded at proper intervals, her regulation lights were being duly exhibited and were burning brightly, and a good look-out was being kept on board ot her. In these circumstances those on the *Nador* saw the riding light of the *Monkwood* almost ahead and about 150 yards distant, and at about the same time the steamer's bell was heard

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

and a second light was observed very faintly, which appeared to be a second riding light being run up to the masthead. As the only chance of avoiding the collision which appeared inevitable, the engines of the *Nador* were kept working ahead and her helm was kept hard-a-port, but just before the collision, and with a view to ease the blow, the helm was put hard-a-starboard and again hard-a-port. In spite of these manœuvres, the *Nador* with her port side in the way of No. 2 hatch struck the *Monkwood*, which had again sounded her bell, on her starboard bow, and both vessels were damaged.

The defendants denied that the collision was caused by any neglect or default on the part of the defendants, and alleged that it was an inevitable accident; and they further alleged that the *Nador* was in charge of a compulsory pilot, and alleged that, if the collision was due to the negligence of any person on the *Nador*, which they denied, it was solely caused by the negligence of the pilot.

Aspinall, K.C. and *A. D. Bateson* for the plaintiffs.

Laing, K.C. and *J. Southall* for the defendants.

The cases of *The Culgoa* (*Shipping Gazette*, April 28, 1894) and *The Woodford* (March 11, 1905, and in H. of L. March 9, 1906) were referred to during the course of the case.

The PRESIDENT.—In this case I think the loss must rest where it falls. I am not satisfied that there was any negligence on the part of the *Nador*. The *Nador* had passed the Sunk Light in circumstances which, in my opinion, afforded no sort of warning that she was approaching a fog of the density which, in fact, appears to have been the case. There was nothing to lead those in charge of her to the conclusion that the proper course was then to anchor. They entered the fog suddenly, and then and not till then the proper course was to anchor. There was no negligence up to that time. When they entered the fog they realised that the only thing to be done was to bring the ship to an anchor, and they took the proper steps to do that. They took care to ascertain, what I am informed is the correct expression, that there was a clear eye. They did their best to ascertain that there was room and reasonable safety to perform the manœuvre. We have been told there was a vessel on their starboard side going in the same direction, and the *Nador* appears to have put her engines astern to get clear of the area of her evolutions. The helm was then put hard-a-port and the engines full speed ahead, a proper step for effecting the operation they had determined upon. It was then that they realised that the *Monkwood* was lying at anchor; and the real point in the case is whether the men on board the *Nador* were negligent in not having realised, by the use of their eyes or ears by their look-out, that the *Monkwood* was where she was. Several witnesses have sworn that in fact they did not realise the existence of the *Monkwood* until they had commenced the manœuvre of bringing the *Nador* round under port helm. I feel constrained to accept that evidence. I am advised that neither whistles nor bells can be absolutely relied upon where you have to take into account wind and the noise of the engines. I do not know why the sounds of the *Monkwood's* whistle and her bell did not reach the ears of those on board the *Nador* before they did, but I am satisfied that the sounds did not reach them. Counsel for the plaintiffs say this is nothing more than an ordinary case of negligence; that the pilot and the master must have been grossly negligent; but here, where the *Nador* was in this fog, a thick and perhaps a dense fog, in circumstances when such men would be very likely to pay attention to and to hear sounds, if in fact they could be heard, I am satisfied that for some reason which I cannot explain they did not hear them; and I do not attribute any blame to them for not hearing them. If they did not realise that the *Monkwood* was there it is obvious they could do nothing more than they did. The pilot attempted to improve the position by a momentary starboarding of his helm, but he realised that that change would produce no good effect and might make matters worse, and he persevered, as I think he was right in doing, in keeping his ship on her port helm in the hope that by so doing she would have enough way on to complete the turning operation sufficiently rapidly to escape the anchored *Monkwood*. He made a miscalculation in that, or rather his hopes were not realised, for we know that he collided with the anchored vessel. It is suggested, as I understand, that he might have done better if instead of persevering with his port helm and his engines full speed ahead he had put his engines astern, but I am advised and I agree that if he had done that the position might, as counsel for the defendants suggested, have been aggravated for the worse, and instead of receiving comparatively small damage the *Monkwood* would have been most seriously injured amidships. In these circumstances I think that I cannot find that this vessel, which was in the hands of and under the control of a compulsory pilot, was in any way negligent in what she did or omitted to do; nor can I say the pilot was negligent. It appears to me that the whole thing was—I do not like to use the expression act of God, because it is not what I call an act of God at all—but it was an accident, a misfortune, which nobody could have avoided. Exercising reasonable care would not have prevented the thing from happening. Reasonable care was exercised and did not prevent the accident. In those circumstances I think, as I have said before, that the loss must rest where it has fallen, and that this action must be dismissed.

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

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

May 26 and 27, 1909.

(Before Sir J. BIGHAM, President, and Elder Brethren.)

THE CADEBY. (*a*)

Collision—Allegation by plaintiff that defendant is alone to blame—Admission by defendant that both vessels are to blame—Onus of proof—Duty to begin.

In a collision case the plaintiffs delivered a statement of claim alleging that the collision was solely caused by the negligent navigation of the defendants' vessel. The defendants and counter-claimants delivered a defence in which they denied that the collision was caused by the negligent navigation of their vessel, and alleged that it was caused solely by the negligence of those on the plaintiffs' vessel. Subsequently the solicitors for the defendants wrote to the solicitors for the plaintiffs that, though they relied on the allegations of fault made against the plaintiffs' vessel, they admitted that the collision was contributed to by fault on the part of the Cadeby. *At the trial counsel for the plaintiffs submitted that, as the defendants had admitted they were negligent, the onus was on the defendants to prove negligence on the part of the plaintiffs, and that the defendants should begin.*

Held, that, as the plaintiffs alleged that the defendants were solely to blame, and the defendants only admitted they were in part to blame, the onus was on the plaintiffs to begin, if they still sought to prove that the defendants were alone to blame.

DAMAGE ACTION.

The plaintiffs were the owners of the steamship *Henry R. James;* the defendants and counter-claimants were the owners of the steamship *Cadeby*.

The case made by the plaintiffs in their statement of claim was that the collision was solely caused by the negligent navigation of the *Cadeby*. They alleged that shortly before 5.55 a.m. on the 20th Jan. 1909 the *Henry R. James*, a steel screw steamship of 3150 tons gross and 1980 tons net register, manned by a crew of twenty-two hands all told, was proceeding through the Would Channel, off the coast of Norfolk, in the course of a voyage from Sunderland to Newport in water ballast. The weather was fine and clear, the wind about north-west, moderate, and the tide flood of the force of about a knot. The *Henry R. James*, steering S.E. by S. ¾ S. magnetic, was making about nine knots an hour; she was carrying the regulation lights for a steamship under way, which were burning brightly, and a good look-out was being kept on board of her.

In these circumstances those on board the *Henry R. James* observed the masthead lights, and shortly afterwards the red light, of the *Cadeby* distant about two miles, and bearing a little on the port bow. The *Henry R. James* kept on her course, and the *Cadeby* approached with her lights gradually broadening on the port bow of the *Henry R. James*, and the steamers were in positions to pass safely port side to port side, but the *Cadeby*, instead of doing so, as she could and ought to have done, when at a short distance suddenly opened her green light, and, after momentarily showing both side lights, shut in her red light, causing imminent danger of collision. The helm of the *Henry R. James* was at once put hard-a-port, her whistle sounded one short blast, and her engines kept working full speed ahead as the only chance of avoiding collision, but the *Cadeby*, although loudly hailed, coming on at great speed, and swinging under a starboard helm, with her stem struck the port side of the *Henry R. James* abaft the bridge with great violence, cutting right into her, and causing her serious damage.

Those on the *Henry R. James* charged those on the *Cadeby* with not keeping a good look-out; with neglecting to pass port to port; with improperly starboarding; and with not easing, stopping, or reversing their engines.

The case made by the defendants was that the collision was not caused by the negligent navigation of the *Cadeby*, but was caused solely by the negligent navigation of the *Henry R. James*.

They alleged that shortly before 5.45 a.m. on the 20th Jan. the *Cadeby*, a screw steamship of 1130 tons gross and 676 tons net register, manned by a crew of fifteen hands, was proceeding through the Would on a voyage from Antwerp to the Tyne in water ballast. The weather was fine and clear, with a light wind from the N.N.E., and the tide was flood of the force of one to two knots. The *Cadeby* was making about nine knots through the water on a course of N.W. by N. ½ N. magnetic. 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 the two masthead lights of the *Henry R. James*, and another white light apparently on her deck, were observed about three miles distant, and bearing about half a point on the starboard bow. The *Cadeby* kept her course until the lights of the *Henry R. James* were about a quarter of a mile distant, when the helm was put hard-a-starboard, but just afterwards the *Henry R. James* opened her red light. The engines of the *Cadeby* were then stopped and reversed full speed, but the *Henry R. James* continued to come on under port helm, swinging across the bows of the *Cadeby*, and with her port side first amidships and then further aft struck the stem of the *Cadeby*, doing her damage.

Those on the *Cadeby* charged those on the *Henry R. James* with not keeping a good look-out; with improperly porting; with neglecting to indicate her course by whistle signals; with not exhibiting side lights in accordance with the regulations; and with neglecting to slacken speed or stop or reverse their engines.

After the pleadings were closed, the solicitors for the defendants wrote a letter to the solicitors for the plaintiffs in which they said:

> While relying on the allegations of fault on the part of the *Henry R. James* which are made in the defence, we admit on behalf of our clients that the collision was contributed to by fault on the part of the *Cadeby*, and we propose to read this letter at the trial.

The case came before the court on the 26th and 27th May.

Aspinall, K.C. and *D. Stephens* for the plaintiffs.—The letter written by the defendants' solicitors admits that the negligence of those on the

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

Cadeby contributed to the collision. The only issue now left is whether there was negligence on the part of those on the *Henry R. James*; it is for the defendants to prove this, and they should begin.

Laing, K.C. and *T. F. Dawson Miller* for the defendants.—The allegation by the plaintiffs is that the collision was solely caused by the defendants' negligence; that allegation must be proved by the plaintiffs. If they use the defendants' admission, they must take it as a whole, and it is not an admission that the defendants were negligent, but that both plaintiffs and defendants were to blame. The plaintiffs cannot get judgment that the defendants were alone to blame on that admission, and, if they still seek to obtain that judgment, they must call evidence to prove it.

The PRESIDENT.—That appears to be so. The plaintiffs should begin.

The evidence for the plaintiffs and defendants having been called, the defendants' vessel, the *Cadeby*, was found alone to blame.

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

Solicitors for the defendants, *Botterell* and *Roche*, agents for *Botterell, Roche*, and *Temperley*, Newcastle-on-Tyne.

House of Lords.

June 24, 25, *and July* 19, 1909.

(Before the LORD CHANCELLOR (Loreburn), Lords MACNAGHTEN, JAMES OF HEREFORD, ATKINSON, COLLINS, GORELL, and SHAW, with Nautical Assessors.)

ABRAM LYLE AND SONS *v.* OWNERS OF STEAMSHIP SCHWAN. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Unseaworthiness—Damage to cargo—Bill of lading—Exceptions.

If a ship is sent to sea fitted with apparatus of an unusual construction, which may work properly if managed by a skilled man with great care, but is liable to get out of order if unskilfully handled, and become a source of danger, and those who have to use it in the ordinary course of navigation have no intimation or knowledge of its unusual and dangerous character, or of the need for the exercise of special care, the ship is unseaworthy; and if it does in fact get out of order and cause damage to the cargo, the owners will not be held to have exercised "reasonable care and diligence in connection with the ship, her tackle, machinery, and appurtenances," within the meaning of an exception in the bill of lading, and will be held liable for the damage to the cargo.

Judgment of the court below reversed.

APPEAL from a judgment of the Court of Appeal (Lord Alverstone, C.J., Vaughan Williams and Buckley, L JJ., with Nautical Assessors), reported 11 Asp. Mar. Law Cas. 215 (1909); 100 L. T. Rep. 357; (1909) P. 93, who had reversed a judgment of Deane, J. at the trial, reported (1908) P. 356.

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

The facts, which were not in dispute, appear sufficiently from the report in the court below, and from the judgments of their Lordships.

Sir *R. Finlay*, K.C., *Laing*, K.C., and *Balloch*, for the appellants, argued that if a ship was fitted with apparatus which might work rightly if handled with extreme care, but was very liable to go wrong, such ship was not seaworthy; and the owners are not protected by the exceptions in the bills of lading dealing with negligence of the officers or crew, or as having used all reasonable care and diligence in connection with the ship. It is clear on the evidence that the chief engineer did not really understand the working of this cock, as Deane, J. held, or, if he did, he did not inform any of his subordinates. *Steel* v. *State Line Steamship Company* (3 Asp. Mar. Law Cas. 516 (1877); 37 L. T. Rep. 333; 3 App. Cas. 72), which was relied on in the Court of Appeal, has no bearing on this case. As to the meaning of "seaworthy," see *Hedley* v. *Pinkney and Sons Steamship Company* (7 Asp. Mar. Law Cas. 483 (1894); 70 L. T. Rep. 630; (1894) A. C. 222).

Scrutton, K.C. and *Bateson*, for the respondents, contended that the Court of Appeal took the right view. Deane, J. misdirected himself. The evidence shows that the respondents took proper and reasonable care to make the ship seaworthy, and if the seacock did not work properly it was owing to the negligence of the engineer, and in either case they are protected by the exceptions in the bills of lading. They referred to

Ajum Goolam Hossen and Co. v. *Union Marine Insurance Company*, 9 Asp. Mar. Law Cas. 167; 84 L. T. Rep. 366; (1901) A. C. 362;

Hedley v. *Pinkney*, in the Court of Appeal, 7 Asp. Mar. Law Cas. 135 (1891); 66 L. T. Rep. 71; (1892) 1 Q. B. 58;

Blackburn v. *Liverpool, Brazil, and River Plate Steam Navigation Company*, 9 Asp. Mar. Law Cas. 263; 85 L. T. Rep. 783; (1902) 1 K. B. 290;

Hamilton v. *Pandorf*, 6 Asp. Mar. Law Cas. 44, 212 (1887); 57 L. T. Rep. 724; 12 App. Cas. 518.

Sir *R. Finlay*, K.C. was heard in reply.

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

July 19.—Their Lordships gave judgment as follows:—

Lord ATKINSON.—My Lords: In this case the plaintiffs sued to recover damages in respect of a cargo of sugar shipped on board the steamship *Schwan*, to be carried from Bremen to London. The greater part of the cargo had been seriously injured, if not entirely destroyed, in transit by reason of the main hold of the ship having been flooded with sea water to the depth of about 4ft. There is no controversy as to the extent of the damage done to the sugar, nor as to the cause of it, and the only question for decision is whether or not the shipowners are protected by the tenth clause of the bill of lading, which again resolves itself in effect into two questions: (1) Was the ship seaworthy when loaded—that is to say, reasonably fit to perform the service which the shipowner engaged her to perform, viz., to carry these goods to their destination; and (2) if not seaworthy in fact, had the owners and their agents proved that they had discharged the duty imposed upon them by this article—*i.e.*, had "exercised reasonable care and diligence" to

make her seaworthy? It was not contended that if she was not seaworthy in fact the burden of proving the exercise of this care and diligence did not rest upon the shipowners. The ship was furnished with bilge pipes, running from each of the holds, by means of which the water in the bilges could, by a suction pump worked by a donkey engine situated in the engine-room, be drawn up and discharged into the sea through a pipe opening under water. This pipe was furnished with a seacock, but this cock was always open during pumping operations, and was not necessarily closed even at sea. On each of these bilge pipes was placed a non-return valve, designed to permit the water to pass freely from the hold during pumping operations, but to prevent its return to the hold through regurgitation. This was its primary purpose. Incidentally, the valve, if closely shut, would prevent any sea water which might enter from the sea into the discharge pipe from leaking into the hold. It is clear, however, upon the evidence, that, at all events in new ships, such as the *Schwan* was, non-return valves of this kind are liable to get choked by chips of wood, tow, and such other substances, when passing through them. When this occurs the valve does not shut down closely, and water approaching it from the sea can readily leak through it into the hold. This is, in fact, precisely what occurred in the present case. It almost necessarily follows that if the water was left free to flow from the sea down through the discharge pipes, and these non-return valves were the only appliances, other than the seacocks, provided to prevent it from flowing into the hold, the ship would be unseaworthy, inasmuch as her safety or that of her cargo would entirely depend on the continuously effective action of a valve, or of valves, which might at any moment go wrong.

It is contended, however, on the part of the respondents, that an additional and effective precaution against all danger of this kind was provided by a certain cock, called a "three-way cock with a two-way inlet," fitted on the pipe leading from the non-return valves to the sea. This cock is described by the trial judge as a pipe with three junctions in it, one junction opening to the sea to take in sea water, one opening to the bilges, and one to the suction pump, the three openings being in the same horizontal plane. The cock was made in Germany, where the ship was built by (it is not disputed) competent builders. It differed from cocks made in England for similar purposes in two respects. First, in the latter only two of the openings are in the same horizontal plane, the third being vertical. And second, a most vital matter, while the plug of the English manufactured cock is so constructed that no matter in what direction or to what extent it may be turned, it can never open more than two ways at once, the plug in this cock is so constructed that although, if turned home in either one or other of the directions in which it can be turned, it only opens two ways at once, yet, if not turned home but left in a somewhat intermediate position between the two extremes it opens three ways at once, and, as far as it is concerned, leaves a free passage for the water to flow from the sea down the pipes, to the non-return valves. It is not disputed that it was in this way that the hold got flooded in the present case. The plug, either through negligence, carelessness, or ignorance, or by design, was left half-turned, the sea water passed down freely to the non-return valve, which was choked by a piece of tow, or some such substance, and the water leaked through this valve into the hold. One would have supposed that on the discovery of the flooding the cause of it would have at once suggested itself to anyone acquainted with the structure of the cock. The fact that it did not suggest itself to any member of the crew, or to any of the persons who inspected the vessel until she was on her return voyage from London to Bremen, is the strongest evidence that they were all ignorant of the peculiar structure of the cock and the danger that might result from its use. The cock was fixed beneath the floor of the engine-room, the top of the plug being flush with the floor and visible from it. The plug was turned by a box spanner. Two grooves were cut upon the top of this plug, indicating the direction in which it should be turned, and showing when it was turned home. It was not disputed, however, that the internal construction of the cock could not be ascertained by inspecting its exterior, and that no indication whatever was given by anything external of the position, or action, of its internal parts when the plug was left in an intermediate position, or any position closely approaching thereto. Furthermore, the cock did not conform to requirements prescribed by the English Lloyd's Rules or the Rules of the Bureau Veritas; or, it was contended, by those of the Germanischer Lloyd. These rules are respectively as follows: The English Lloyd's rules provide that

> The arrangement of pumps, bilge injections, suction and delivery pipes is to be such as will not permit of water being run from the sea into the vessel by an act of carelessness or neglect.

Art. 34, sect. 10, of the rules of the Bureau Veritas provides (*inter alia*) that

> Valve chests, cocks and pipe connections must in all cases be so arranged that water from the sea cannot accidentally be run into the ship.

The Germanischer Lloyd rules provide as follows:

> Rule 2. All seacocks and when practicable all other valves and cocks must be easily accessible. They are to be placed above the engine-room and stokehold floors and must be so arranged that no doubt can arise as to whether they are open or shut.
>
> Rule 7. Wherever there is a possibility of the admission of water into a vessel's hold the pipes leading thereto must be fitted each with two valves working independently of each other so that the flooding of a compartment even when the valves are carelessly handled is rendered impossible.

The chief engineer, Meyer, stated that he was himself well acquainted with the structure and action of this cock. The judge at the trial disbelieved him. In my view the judge's conclusion on this point was amply justified by the evidence of the captain, of Herr Motting, and most of all by the conduct of the engineer himself. The captain's evidence is clear and distinct upon the point. The evidence of Herr Motting, the respondents' surveyor, leads irresistibly to the same conclusion. And indeed that gentleman for himself says that when he inspected the ship he never saw the cock opened, that the piping arrangements on the plans tell nothing of the structure of this cock, and that "he thought" and "expected" when "it was put into the ship it would

open two ways at once, and not three ways at once." The learned judges in the Court of Appeal were apparently of opinion that this cock was, owing to its mechanism, a dangerous cock—that is, a fitting calculated to endanger in its use the ship or cargo. It was used frequently. The chief engineer stated that he used the pump every four hours on his voyage from Bremen to London, and on each of these occasions the cock must have been used. And it certainly would appear to me that a due regard for the safety of the ship and cargo would have imperatively demanded that every member of the crew likely to use this cock or interfere with it should, before the voyage commenced, have been fully instructed as to its proper use, and fully informed as to the danger to be avoided, since the best machinery may become a source of danger if placed under the control of the ignorant or unskilled, and the best equipped ship may become unseaworthy if her crew are unacquainted with the nature, structure, and proper use of the appliances with which she is furnished. In my view it is therefore clear that this ship, equipped as she was, and manned by the crew she carried, was, at the time she was loaded, in fact unseaworthy.

It was urged, however, by Mr. Scrutton on behalf of the respondents that even if this be so the respondents are protected under clause 10 of the bill of lading, because they and their agents had exercised "reasonable care and diligence" in fulfilment of their obligation to provide a seaworthy ship, inasmuch as—(1) They had this ship built by a first-class builder; (2) had her fitted with a kind of cock in common use in Germany for ships of her kind and class; (3) had sent their own engineer Meyer over to superintend the building of her; (4) and caused her to be inspected by the proper German official. There appears to be no question as to the character of the builders, but as to the second ground relied upon, though a cock with three openings in the same horizontal plane such as this may be the design of cock commonly used in German-built vessels, there is no proof whatever that a cock which, if the plug be placed in an intermediate position, opens three ways at once, and places the non-return valve, if the seacock be open, in direct communication with the sea is commonly used. Indeed, the evidence of Herr Motting suggests, if it does not prove, the contrary. It would be strange indeed if it were otherwise, seeing that such a cock does not conform to the requirements of the rules above mentioned. Mr. P. Winstanley, a witness examined for the respondents, who inspected the ship in London, to whom the real cause of the flooding never occurred, put the matter as to the marking on the top of the plug quite plainly in the following questions and answers.

Would you have passed it, as a Bureau Veritas surveyor, it you had known it?—You mean in building the ship?

Yes.—I do not think so.

It is in the teeth of your own rules, is it not?—I do not know that it is material, but our rules would require a second valve, like the one I saw produced.

At any rate, your rules do not contemplate a three-way cock which lets the water down into the bilges without your knowing it?—Well, that is hardly this case, is it? It is that the marks show that it is so.

But the marks do not show, do they, that if you do not adjust them properly the water will find its way down?—You would have to know beforehand. Once you know it is perfectly clear according to the marks.

There is no evidence whatever that any person connected with the respondents other than Meyer, the engineer, saw the inside of this cock, was informed of the nature of its mechanism, or knew anything whatever of the danger involved in its use, or that any person other than Meyer ever took any pains to obtain information on any of these points. But Meyer's story of his knowledge of the working of the cock was inconsistent with his conduct, and was, in my opinion, rightly disbelieved. He could not have tested the cock properly or he must have discovered its defects. No officer connected with the Germanischer Lloyd was examined. Neither was any engineer or inspector unconnected with the respondents who inspected the ship before the flooding occurred examined as a witness. I concur with Deane, J. in thinking that Meyer, the agent of the respondents, designated by them to superintend, on their behalf, the building of this ship, failed to exercise "reasonable skill and care in connection with the ship, her tackle and appliances," and that the accident was due to his neglect. Meyer's principals are, I think, responsible for this negligence. But Meyer's default did not, in my view, at all consist, as the Court of Appeal apparently considered, in failing to use properly a particular piece of mechanism with the structure and action of which he was well acquainted, but in his failing to inform himself, when he had ample opportunity, before the ship was loaded, what the nature of that mechanism was, what the danger involved in its use, and in his failing to insist upon its removal from the ship. On the contrary, she was permitted to go to sea with an equipment dangerous in itself, but rendered doubly dangerous by reason of his ignorance of its operation. I am, therefore, of opinion that the decision appealed from was wrong and should be reversed, that the judgment of Deane, J. should be restored, and that this appeal should be allowed with costs.

Lord MACNAGHTEN :—My Lords: I concur.

Lord JAMES.—My Lords: I also concur.

Lord COLLINS.—My Lords: I have read Lord Atkinson's judgment, and I have nothing to add.

Lord GORELL.—My Lords: The question in this case is whether the appellants are entitled to recover from the respondents for the loss which they have sustained by reason of damage to certain bags of sugar, of which they were the owners, carried by the steamship *Schwan* from Bremen to London in Nov. 1907, under bills of lading the material clauses of which are as follows: "(1) The act of God . . . and all accidents, loss, and damage whatsoever from defects in hull, tackle, apparatus, machinery, boilers, steam, and steam navigation, or from perils of the seas, ports, harbours, canals, and rivers, 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 other craft, or otherwise, and the owners being in no way liable for

any consequences of the causes before mentioned." "(10) It is agreed that the exercise by the shipowners or their agents of reasonable care and diligence in connection with the ship, her tackle, machinery, and appurtenances shall be considered a fulfilment of every duty, warranty, or obligation, and whether before or after the commencement of the said voyage." The bags of sugar were stowed in No. 2 hold of the vessel, and the damage was caused by sea water, which found its way into that hold in the following manner: The suction pipe of the ballast donkey pump in the engine-room was connected through a cock with two pipes, an inlet pipe from the sea, and a suction pipe from the bilges in the holds, including No. 2 hold. This cock, which is described as a three-way cock with a two-way inlet, was constructed so that by turning the plug of the cock water could be drawn by the donkey pump either from the sea or from the holds. The plug had a mark on the top of it which indicated the positions to which it should be turned in order to accomplish either object. The evidence showed that the construction of the cock was defective, in that if the plug were placed in certain positions it would be open all three ways at the same time, and therefore that water could flow direct from the sea through the cock and pipes into the holds. There were no marks on the plug to indicate these positions. In the bilge suction pipe, where it passed through the stokehold, and could be examined, there was a non-return valve, designed so as to allow water to be pumped from the bilges, but to prevent water so pumped from flowing back from the pipe into the bilges. It is established that in the course of the voyage the plug must have been in such a position as to allow sea water to flow into the bilge suction pipe, and that something, either tow or a chip, had become fixed in the non-return valve, and prevented it from closing properly, and thus the sea water flowed into the No. 2 hold and did the damage. The appellants' contention was that the defect in the cock rendered the vessel unseaworthy for the voyage; in other words, that she was not reasonably fit to carry the cargo, and that reasonable care and diligence had not been exercised by the shipowners or their agents to render her seaworthy in this respect. The *Schwan* was a new vessel, built at Rostock in Germany in 1907, under the supervision of surveyors to the Germanischer Lloyd, but none of these surveyors were called at the trial. Meyer, an engineer, superintended the building of the vessel and the fitting of the machinery on behalf of the owners, and after her completion he was chief engineer of the vessel. He swore that he saw the cock while it was being constructed, that he was well acquainted with the way in which it worked, and that he knew when it was fitted that in certain positions all three ways were open. Deane, J., who tried the case, did not believe this evidence. The learned judge gave judgment for the plaintiffs on the ground that the defendants had not established that they exercised through their agent due care with regard to the machinery on board the vessel. I think it may be taken that, although he did not say so in terms, he thought that the vessel was unseaworthy, and he found that due care had not been taken by Meyer to guard against the unseaworthiness. This decision was reversed by the Court of Appeal. That court was advised by its assessors that the cock as constructed was a dangerous cock, but that a careful engineer could have adjusted the plug so that the pipe to the bilges would be closed when the pipe communicating with the sea was open; and that the non-return valve if in working order would be a sufficient protection against the entrance of any water which might get into the pipe to the bilges in consequence of the construction of this particular valve. And the court came to the conclusion, having regard to the advice given, that the vessel was not unseaworthy, and that so far as the cock was concerned the case fell within the principle of *Steel* v. *State Line Steamship Company* (*sup.*). The court considered that the passing of water through the cock was due to neglect of the engineer in not seeing that the plug was in its proper position, that the exceptions in the bill of lading protected the respondents, and that the obstruction in the non-return valve was also within the said exceptions. There is no controversy in the case as to the law applicable to it. The principles of that law are very fully stated in the case to which reference has been made. The ordinary warranty that the vessel should be at the time of sailing seaworthy, that is, taking the whole circumstances together, reasonably fit for accomplishing the service which the shipowners engaged to perform, is modified in this case by the provisions of clause 10 of the bill of lading, and therefore the questions which must first be considered are whether the vessel was seaworthy, whether reasonable care and diligence were exercised by the shipowners or their agent to make her sea worthy, and whether, if these two questions are answered in the negative, the damage was occasioned by want of seaworthiness.

Now, I agree with the Court of Appeal in thinking that it was established that the cock was of unusual construction. It ought to have been constructed in the ordinary and proper way, so that it was impossible for water to pass from the sea into the bilges of the vessel, whereas this was not only possible but very probable unless great care were taken. The advice given to the court below, that the cock as constructed was dangerous, appears also to be thoroughly sound. The danger which will arise if a seacock is fitted so as to permit of water passing from the sea into the holds of a vessel when the cock is in certain positions might almost be considered to be obvious, and it can hardly be said that there was any difference in the evidence of the experts on both sides on these two points. The evidence for the appellants is very emphatic, and I think it clear from the evidence called for the respondents, that their witnesses would not have passed such a cock. It was stated by Herr Motting, the marine engineer, for the respondents, that the cock was of a form common in boats built in Germany, and was one of the regular pattern of the Rostock shipbuilding yard, and that he had four more under his charge fitted with similar cocks. But the cross-examination of this witness disclosed the fact that he had never examined the inside of the cock until after the damage in question arose, and cannot have known of the defective construction until that date. There was no evidence produced by the respondents from the German surveyors on these

points, nor is there any real support to be found in the evidence for the shadowy suggestion made by the respondents that there was a purpose in constructing the cock in the way in which it was made. It was, however, contended by the respondents that even if the cock was of an improper and dangerous character, yet a careful engineer could have adjusted the plug so that the pipe to the bilges would be closed when the pipe to the sea was open, and so that the pipe to the sea would be closed when the pipe to the bilges was open, or, in other words, could have adjusted the plug so that water could not pass from the sea to the bilges, and that therefore the vessel could not be considered as unseaworthy. It was said that this was analogous to the case of a porthole which was considered in the case above referred to. In such a case an accessible porthole might be open or closed as required, and if improperly left open there would be negligence but not unseaworthiness. There is, I think, no doubt that if an engineer knew exactly the working of the cock he could put the plug in such a position that there would be no danger of the incursion of water into the vessel, though the evidence makes it clear that it would be a matter of some nicety so to adjust the plug. It is on the ground that this could be done by a careful engineer that the Court of Appeal has considered the case to be one of negligence and not of unseaworthiness. But then comes in the consideration that to make the proper adjustment the necessary knowledge of the structure of the cock must be possessed by the engineer. Both sides are agreed about this. As already stated, Deane, J., who saw and heard the witness Meyer, the chief engineer, has found, as a fact, that he did not at the material time know that the cock would open three ways instead of two, and there is absolutely no evidence that any of his subordinates were warned about the danger or knew anything about the peculiar structure of the cock. In the heavy weather which the vessel met with pumping appears to have been required every four hours, and at these times the cock had to be altered, so that probably the other engineers besides the chief used it. If the cock had been of a proper and usual character there would have been no danger in its use, and in my opinion the engineers in using the machinery would be entitled to assume that it was of such character unless they were warned to the contrary. There was nothing whatever in the marks or otherwise to indicate to them any necessity for any special care. In this respect, so far as relates to the exceptions in the bill of lading, during the voyage the chief engineer was in the same position as the other engineers, for, according to the judge's finding, he did not know of the peculiar structure of the cock. The question then seems to be: Is a vessel seaworthy which is fitted with an unusual and dangerous fitting which will permit of water passing from the sea into her holds unless special care is used, and those who have to use the fitting in the ordinary course of navigation have no intimation or knowledge of its unusual and dangerous character, or of the need for the exercise of special care, and might, as engineers of the ship, reasonably assume and act upon the assumption that the fitting was of the ordinary and proper character, which would not permit of water so passing however the fitting was used? I think that this question should be answered in the negative. With all respect, in my opinion, the judgment of the Court of Appeal does not give its proper weight to this point. The position is this—the vessel was not reasonably fit to carry the cargo in the circumstances, for the cock in question was of an unusual, improper, and dangerous character, and those who had to use it on the voyage had no reason to suspect this, though if they had known the truth they could have adjusted the cock so as to prevent any risk of water getting to the cargo. That is to say, the vessel was, in respect of this cock, not reasonably fit to be worked in the way which might ordinarily be expected.

A further point to consider arises from the respondents' contention that the vessel could not be treated as unseaworthy because the bilge suction pipes were fitted with non-return valves, and that such valves formed an adequate protection against the admission of sea water into the holds through those pipes. On examination in London it was found that the non-return valve on the pipe leading into the hold where the sugar was damaged had in it a piece of two and a wooden chip which had prevented the valve from closing properly. It was shown by the evidence that refuse of one kind or another may easily get to these valves, and they have to be examined from time to time to see that they are clear. So that these valves cannot be relied on with certainty to prevent the incursion of water into the holds. To guard against the danger of water getting into the holds through pipes leading into them, rules are laid down by Lloyd's rules for the construction of ships, the rules of the French Bureau Veritas, and the rules of the Germanischer Lloyd. All these rules contain very stringent provisions to the effect that the arrangements shall be such as will not permit of water being run from the sea into a vessel by an act of carelessness or neglect. The seventh of the German rules is this: "Wherever there is a possibility of the admission of water into a vessel's hold the pipes leading thereto must be fitted each with two valves working independently of each other, so that the flooding of the compartment, even when the valves are carelessly handled, is rendered impossible." It seems clear that this cock did not comply with either of the three sets of rules notwithstanding a suggestion that there was a sea-cock as well. I come, therefore, to the conclusion that the *Schwan* was not in the circumstances reasonably fit to carry the goods of the appellants, and that the damage was due to the unseaworthiness. Then does clause 10 of the bill of lading protect the respondents? This depends on the question of fact whether Meyer, in his capacity as the agent of the respondents to superintend the construction of the ship and her machinery, exercised reasonable care and diligence in connection with the ship, her tackle, machinery, and appurtenances. The finding of fact is that he did not. This finding is not affected by the fact that the vessel was built under the survey of the surveyors to the German Lloyd. They may not in fact have inspected this particular cock, and it certainly is a remarkable feature of the case that none of them were called by the respondents, nor was any reason given to account for the absence of their evidence. For these reasons, in my opinion, the appeal should be

allowed, and the judgment of Deane, J. restored, with costs here and below.

Lord SHAW. — My Lords: The facts in the case have been stated by your Lordships who have preceded me, and my view thereon is in substantial accord with the narrative given. In my opinion it is established by the evidence that the seacock of the *Schwan* was of unusual construction and was dangerous in the sense of permitting the access of sea water to the hold and cargo. This danger could have been avoided only on two conditions—viz., (1) that it was known to exist, and (2) that with the most scrupulous exactitude an adjustment could have been made on each use of the pump so as to avoid the peril. With regard to the first, I accept and agree with the view of Deane, J. that the danger was not known to the chief engineer, who was the owners' superintending agent, while the vessel was being built at Rostock, and ought to have seen and appreciated it before the vessel put to sea; indeed, I think that such a danger did not occur to him until he was searching about in his mind for a possible cause of the accident. I therefore agree with the learned judge who tried the case, that par. 10 of the bill of lading affords no defence to the suit, because, in my view, the "reasonable care and diligence in connection with the ship, &c.," were not, in fact, exercised. With regard to the second point, it is no doubt true that the need for care and exactitude in the working of even unusual appliances would not, *per se*, demonstrate unseaworthiness, and the principle of *Steel* v. *State Line Steamship Company* (*ubi sup.*) seems so far applicable. But there is a question of degree, and in the present case I cannot hold that the positive and serious danger arising from a peculiar and, so far as I can see, positively needlessly peculiar, construction of part of the ship's tackle or machinery did not involve unseaworthiness. In the ordinary working of the ship in all weathers by an ordinary crew, such danger, in my opinion, was present, and was present to such a degree as to render the vessel unseaworthy, and her owners liable on that ground.

The LORD CHANCELLOR (Loreburn). — My Lords: I also think that this appeal should be allowed.

Judgment appealed from reversed. Judgment of Deane, J. restored. Respondents to pay to the appellants their costs in this House and below.

Solicitors for the appellants, *Cattarns* and *Cattarns*.

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

Supreme Court of Judicature.

COURT OF APPEAL.

July 13 *and* 14, 1909.

(Before COZENS-HARDY, M.R., FARWELL and KENNEDY, L.JJ.)

SAILING SHIP LYDERHORN COMPANY LIMITED *v.* DUNCAN, FOX, AND CO. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Charter-party—Option to cancel if ship not ready for loading cargo on certain date—Ship ready for loading cargo as stiffening.

A vessel is ready to load when she is discharged and ready in all her holds so as to give the charterers complete control of every portion of the ship available for cargo, except so much as is reasonably required for ballast to keep her upright.

By a charter-party dated the 15*th Nov.* 1907 *shipowners chartered their ship to charterers to load a cargo of nitrate of soda.*

By clause 4 *of the charter-party certain lay days were to be allowed the charterers for loading, to be reckoned from the day after the master gave notice to the charterers' agents that the ship was ready to receive cargo, and were not to commence before the* 1*st Jan.* 1908. *Stiffening of nitrate was to be supplied as required, but not before the* 10*th Dec., on receipt of forty-eight hours' notice from the captain of his readiness to receive the same, or lay days to count.*

By clause 13, *should the vessel not have arrived at her loading port and be ready for loading cargo (in accordance with the charter) on or before the* 31*st Jan.* 1908, *the charterers were to have the option of cancelling or maintaining the charter.*

On the 27*th Jan.* 1908 *the captain gave the agents of the charterers notice that he required* 700 *tons of nitrate for stiffening. The ship was then down to stiffening point, and the charterers had notice of it. The agents of the charterers refused to supply nitrate for stiffening, except at the ship's risk and expense, and without prejudice to the charter being cancelled. The cargo then remaining on board could not have been discharged by the* 31*st Jan.* 1908, *and on that day the charterers cancelled the charter-party, purporting to exercise their option thereunder.*

Held, that the ship was not ready for loading cargo on the 31*st Jan.* 1908, *within the meaning of clause* 13 *of the charter-party, inasmuch as she was not ready for loading cargo other than stiffening; and that therefore the charterers were justified in cancelling the charter-party.*

Decision of Lord Alverstone, C.J. (11 *Asp. Mar. Law Cas.* 237 (1909); 100 *L. T. Rep.* 736) *affirmed.*

THE plaintiffs as the owners of the sailing ship *Lyderhorn* claimed damages from the defendants in respect of alleged breaches of a charter-party dated the 15th Nov. 1907.

The *Lyderhorn* then being at Caleta Buena discharging a cargo of coal and intending to complete her discharge at Iquique, distant some

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

forty miles, the plaintiffs entered into the charter-party, which contained the following material clauses :—

Clause 1 provided that the ship should, with all convenient speed, load at Iquique and Caleta Buena, or as near thereto as she might safely get, and there being tight, staunch, and strong, and in every way fitted for the voyage, receive from the factors or agents of the merchants a full and complete cargo of nitrate of soda in bags, not exceeding what she could reasonably stow and carry over and above her tackle, apparel, provisions, and furniture.

Clause 4 provided that twenty-five working days (the word "working" to exclude surf days, Sundays, and all other holidays, whether ecclesiastical or civil) were to be allowed the merchants for loading the ship, and for waiting orders abroad. Lay days should be allowed to be reckoned from the day after the master gave notice in writing to the charterers' agents that the vessel (being clear of all inward cargo or ballast, and well cleaned) was ready to receive cargo and not to commence before the 1st Jan. 1908 at the respective ports, and to cease when they gave him notice in writing that he was at liberty to proceed to sea. Stiffening of nitrate was to be supplied as required at Iquique, but not before the 10th Dec, on receipt of forty-eight hours' notice from the captain of his readiness to receive the same, or lay days to count.

Clause 5 provided that should the ship be detained by the charterers or by their agents beyond the time before specified for loading or discharging the cargo in the aforesaid port, demurrage should be paid daily to the master or his order as same should become due at the rate of 4*d.* (British sterling) per register ton per day for each and every day's detention afterwards, such detention not to exceed ten running days. And should the vessel be unnecessarily detained by the master beyond the time therein specified, demurrage should be paid by him at the same rate and in the same manner to charterers or to their agents. Should the vessel be unnecessarily detained at any other period of the voyage, such detention was to be paid for by the party delinquent to the party observant at the above-named rate of demurrage. Sufficient cargo was to be supplied at Iquique to enable the vessel to shift to Caleta Buena in safety.

Clause 13 provided that should the vessel not have arrived at her loading port and be ready for loading cargo (in accordance with the charter) on or before noon of the 31st Jan. 1908, the charterers were to have the option of cancelling or maintaining the charter, such option to be declared twenty-four hours (Sundays and holidays excepted) after notice of readiness had been received by the charterers or their agents.

The *Lyderhorn* arrived at Iquique on the 13th Dec. 1907, having then on board rather more than half her then cargo of coal—some 2800 tons.

At Iquique vessels discharge in the roads.

By the 27th Jan. 1908 she had discharged as much of her coal as could safely be unladen unless some stiffening in the way of ballast or sufficient cargo was put on board. The captain thereupon gave to the agents of the defendants notice in writing under the charter-party of his readiness to receive stiffening, and that he required that 700 tons of nitrate for stiffening should be supplied.

The agents of the defendants on the same date refused to supply nitrate for stiffening except at the ship's risk and expense, and without prejudice to the charter being cancelled.

The captain on the same date replied that his vessel was ready to receive 700 tons of stiffening as per charter-party, and again demanded it. But the agents of the defendants on the 29th Jan. 1908 refused to supply the stiffening unless the captain would agree to redeliver it if the charter-party was cancelled.

Demurrage notes were then delivered by the captain to the agents of the defendants, and on the 31st Jan. 1908 they cancelled the charter-party, purporting to exercise their option contained in clause 13 of the charter.

Freights having fallen, the vessel was on the 6th Feb. 1908 rechartered by the defendants on a charter-party which contained similar terms, but at a rate of 13*s.* per ton instead of 16*s.*, the rate in the charter of the 15th Nov. 1907.

The plaintiffs claimed the sum of 1042*l.* 4*s.*, made up as follows: To difference in freight under the charter-party of the 15th Nov. 1907 and that of the 6th Feb. 1908 at 3*s.* per ton on 4261 tons, the quantity delivered—639*l.* 3*s.*; to damages for detention of the vessel between the 30th Jan. 1908 and the 7th Feb. 1908, both inclusive, namely, nine days, at 4*d.* per ton per day on 2687 tons—403*l.* 1*s.*; total, 1042*l.* 4*s.*

The defendants by their defence said (*inter alia*) that it was an implied condition of the charter-party that notice of readiness to receive stiffening should be given at such a time as to make it possible that the ship should be ready to receive cargo on or before noon of the 31st Jan. 1908; or, alternatively, if such notice was not so given, the defendants as charterers were entitled at their option to refuse to comply therewith; that at the time when the captain's written notice was given it was, in fact, impossible that the ship should be ready to receive cargo on or before noon of the 31st Jan. 1908; that at noon of the 31st Jan. 1908 the ship was not ready to receive cargo, whereupon the defendants by a written notice of that date to the master exercised their option to cancel the charter-party in accordance with the terms thereof.

The question to be decided, therefore, was whether, upon the 27th Jan. 1908, when the captain gave notice that his vessel required the stiffening, she was ready to load within the meaning of clause 13 of the charter.

For the purposes of the action it was admitted that on the 27th Jan. 1908 the *Lyderhorn* was down to stiffening point, and that the defendants, or their agents, had notice of it on that day, and the plaintiffs admitted that between the time the stiffening notice had expired on the 29th Jan. 1908 and noon on the 31st Jan. 1908 the coal remaining on board at the expiration of the stiffening notice on the 29th Jan. 1908 could not have been discharged by noon on the 31st Jan. 1908, the date and time by which the ship was to be ready to load or the charterers might cancel under clause 13.

It was contended by the plaintiffs that, inasmuch as by the terms of clause 4 of the charter-party stiffening of nitrate was to be supplied as required at Iquique on receipt of forty-eight hours' notice from the captain of his readiness to

receive the same, and, further, that time occupied in discharging ballast was not to count as lay days, the ship was ready to load in accordance with the charter when the captain gave notice on the 27th Jan. 1908 that he was ready for stiffening.

It was further contended by the plaintiffs that, inasmuch as both parties knew that the vessel was discharging cargo at Iquique and would require stiffening, the ship was for the purpose of the mutual rights and obligations of the parties ready to load when she could receive cargo, whether for stiffening or other purposes; and also that nitrate, put upon board for stiffening, was loading the vessel, the only difference being that the time occupied in loading the stiffening was not to count as lay days.

It was contended by the defendants, on the other hand, that the effect of clauses 4 and 13 of the charter-party, taken together, was that the charterers were bound to supply stiffening at any time after the 10th Dec. 1907, but that under no circumstances were lay days to commence running until the 1st Jan. 1908; and that if the vessel was not ready to receive cargo, other than stiffening, by the 31st Jan. 1908, she was not ready for loading in accordance with the charter; and that the charterers were therefore justified in cancelling the charter.

The action came on for trial before Lord Alverstone, C.J. sitting without a jury at the Liverpool Assizes.

On the 29th March 1909 the learned judge delivered judgment in London, when his Lordship decided (11 Asp. Mar. Law Cas. 240 (1909); 100 L. T. Rep. 736) that on the construction of the charter-party the vessel was not ready for loading cargo on the 31st Jan. 1908 within the meaning of clause 13 of the charter-party, inasmuch as she was not then ready for loading cargo other than stiffening; and that the charterers were therefore justified in cancelling the charter-party.

From that decision the plaintiffs now appealed.

Horridge, K.C. and *Keogh*, for the appellants, referred to

Groves, Maclean, and Co. v. *Volkart Brothers*, Cab. & Ell. 309; 1 Times L. Rep. 92, 454;
Vaughan v. *Campbell, Heatley, and Co.*, 2 Times L. Rep. 33;
Towse v. *Henderson*, 19 L. J. 163, Ex.

Sanderson, K.C. and *Leslie Scott*, K.C. for the respondents.

Horridge, K.C. replied.

Cozens-Hardy, M.R.—This appeal raises a question on the construction of a charter-party, a question undoubtedly of some difficulty. But, upon the whole, I come to the conclusion that the interpretation that the Lord Chief Justice has put upon it is correct. Now, the clause upon which the action was taken in this charter-party is clause 13: "Should the vessel not have arrived at her loading port and be ready for loading (in accordance with this charter) on or before noon of the 31st Jan. 1908, the charterers to have the option of cancelling or maintaining this charter." Before considering some of the clauses in detail I should mention this: It seems to me to be quite apparent that the bargain on the one side and on the other was that the charterers should have the whole of the space in the vessel for their nitrate; and that, on the other hand, the shipowners should not have the right, which, but for this stipulation, they might have had, to say that they would provide what was necessary for a sailing ship either in the shape of ballast or in the shape of freight-paying cargo which might take the place of ordinary ballast. But then what is the obligation involved by clause 13? When is a ship "ready for loading"? I think that the authorities which have been cited to us really decide that question; and I cannot put it better or more accurately than by using the language which has been adopted by counsel on both sides, and it is this: A vessel is not "ready to load" unless she is discharged and ready in all her holds so as to give the charterers complete control of every portion of the ship available for cargo, except so much as is reasonably required for ballast to keep her upright. What does that mean in a charter-party like this? The ship had to be, before the 31st Jan. 1908, tendered as an upright ship, a discharged ship ready for loading in the sense which I have referred to; and, moreover, a ship rendered upright and safe by being stiffened, not with ballast, not with coal, but with nitrate. That nitrate had to be provided by the charterers, as and when requested by the captain, to take the place of the coal which would be required to be moved, but required and provided in such time and under such circumstances as to enable the ship to be discharged of all strange cargo on the 31st Jan. 1908 so that the charterers might be able to use every portion of the space of the ship and to stow their cargo in what manner they might think fit. Now, is there anything in this charter-party inconsistent with that? Clause 13 not merely says that the vessel must be ready for loading on or before noon of the 31st Jan. 1908, but must be ready for loading in accordance with this charter. What does that mean? That means, it seems to me, stiffened not with coal, but stiffened with nitrate. One must go back to clause 4. That clause seems to be inconsistent really with the very elaborate and careful argument of Mr. Horridge. That contemplates, in language which I will read, two notices. It says that twenty-five working lay days are to be allowed the merchants for loading the ship and for waiting orders abroad; and that "lay days shall be allowed to be reckoned from the day after the master gives notice in writing to charterers' agents that the vessel (being clear of all inward cargo or ballast, and well cleaned) is ready to receive cargo"; that is to say, twenty-four hours notice, but not to commence before the 1st Jan. 1908. Then "stiffening of nitrate"—which is somewhat different from readiness to load—"to be supplied as required at Iquique, but not before the 10th Dec., on receipt of forty-eight hours' notice from the captain of his readiness to receive the same." Therefore there are two notices. One a notice that stiffening is to be supplied at forty-eight hours' notice, which is something different and distinct from the notice that the ship is ready to receive cargo, that being a forty-eight hours' notice on which alone the lay days would have run. That was really the view which the parties, I think, throughout this transaction themselves had taken. On the 27th Jan. 1908 the master gave this notice: "I beg to give you forty-eight hours' notice that the British barque *Lyderhorn* now in the port of

Iquique has discharged her coal cargo down to stiffening"—not completely discharged of course —" and cannot discharge with safety after 5 p.m. to-day. I will now kindly ask that you will give the *Lyderhorn* 700 tons of nitrate stiffening as stipulated in her nitrate charter-party dated, Liverpool, the 15th Nov. 1907." The distinction between stiffening and discharging is rendered still more clear, if possible, by what happened between the parties at a subsequent date on an identical charter-party, where the master gave notice that he was ready to receive 500 tons of stiffening to enable her to discharge the coal. On the 25th Feb. there was a further notice: "I beg herewith to give notice that the British barque *Lyderhorn* has discharged the whole of her inward cargo of coals and is now ready for straight loading a full and complete cargo of nitrate of soda."

In my view of this charter-party the ship cannot be said to be ready for loading in accordance with the charter so long as she had a foreign cargo on board taking up part of the space in the ship to the use of which the charterers were entitled. Then it was said there was something in the latter part of clause 1 which ought to drive one to a different conclusion. It is said that the time occupied in discharging ballast or in shifting ports not to count as lay days ought to induce us to put a different construction upon it. I am unable to follow that argument. That clause seems to me to contemplate two events, neither of which happened. The ballast was not discharged and there was no shifting of ports. And even if those events had happened, as at present advised, I should not be prepared to give the importance to those points which Mr. Horridge has attached to them. In my view on the facts of this case, and the event which is contemplated by clause 13 having happened, the charterers exercised the option which they were entitled to exercise, and they duly and properly cancelled the charter.

FARWELL, L.J.—I am of the same opinion. The charter-party in the present case appears to me to provide for two distinct matters: First of all there is the provision by the shipowners of a vessel "ready for loading" in accordance with the charter on or before the 31st Jan. 1908. That means, as already pointed out, a vessel discharged in all her holds, and also with sufficient stiffening — that is, with sufficient ballast—on board to keep her upright. In the absence of any further contract it would be the duty of the shipowners to tender the ship so standing upright either by means of ballast, or, as stated by Parke, B. in the case which has been referred to of *Towse* v. *Henderson* (*sup*), by goods or merchandise taken by the shipowners themselves in lieu of putting in ballast, whichever they think fit. That latter part is the matter to which the second head of this contract refers. In lieu of doing that, it was arranged between the parties that the stiffening should be provided in the manner pointed out in clause 4 which has just been read. If it were not for that clause it is plain that, whether it be ballast or whether it be freight, the shipowners were the persons who would have to get it and put it there; and that the ship would not be ready for loading until it was properly stiffened. The provision for stiffening the ship is quite distinct from that relating to the ship being ready for loading, and provides for a separate notice being required and being given. Therefore it appears to me that the contract becomes reasonably plain. The ship has not been properly stiffened by reason of the default of the shipowners, and therefore there is the breach provided for by clause 13. With regard to the word "ballast"—I mean the word "ready"—a clause like that expressed in general terms cannot limit or render nugatory an express provision contained four lines above in the same charter. With regard to Mr. Horridge's arguments as to the portions that are struck out, I do not think that one is entitled to look at the portions that are struck out. If one does, one is open to the retort that the parties thought that was not a proper arrangement to enter into. Speaking for myself, I do not think that we are entitled to treat this as distinct from a clean copy because we are supplied with the actual words which are struck out. I do not think parol evidence is admissible to show what was put forward by one party and rejected by the other. I think, therefore, that the appeal must be dismissed.

KENNEDY, L.J.—I think so too. We have but one question to solve, which is this: Was this vessel on the 31st Jan. 1908 at least ready for loading in accordance with the charter-party? It is an agreed fact that she was not, because it is taken at the time when the question arose first between the parties that she could not have become a ready ship on the 31st Jan. 1908 unless it was sufficient to constitute such readiness under the charter that she had on board, still in her holds, a considerable portion of an inward cargo yet to be discharged at the time before the vessel could be cleared. Now, in the very able argument that we have heard on behalf of the appellants, it is said that this is a condition of readiness under the charter. In my opinion, although I agree that there is a difficulty in perfectly and satisfactorily considering this charter-party, that is not sound. It is true, no doubt, that in regard to a sailing ship she must stand upright in order to be a ship at all and take in cargo. It is no objection to her readiness that she should be a ballasted ship to the extent to which she contains only so much of the weighty contents as is necessary to keep her upright—what is commonly called ballast. And it is quite true that that ballast, according to the judgment in the case of *Towse* v. *Henderson* (19 L. J. 163, Ex.), which has been referred to, and which is cited by the late Mr. Carver in his Law of Carriage by Sea—no doubt correctly treating it as an authority in the absence, of course, of stipulations to the contrary contained in any charter-party which has to be considered—may take a profitable form for the shipowner by means of his shipping merchandise as ballast. But I have never heard, nor has an instance been produced in which a shipowner could say: "I offer you a ready ship on the date on which we agreed, although I have on board still, in the space which, according to contract, your goods which are to be loaded and to occupy, so many hundred tons of cargo to be discharged yet, at a port we are to go to." I have never heard of such a case, and the contention seems to me to be wrong on the face of it. It seems to me to be inconsistent with ordinary business

purposes, because it is impossible to say that a ship is at the disposal of the charterer who is to load it when out of that ship and out of her holds is to come a quantity of stuff for a person who is at the same time getting cargo out of the ship. It is impossible to suppose that the thing can be done without friction and without arrangement between the two persons who have no connection with one another—the receiver of the inward cargo and the loader of the outward cargo. Then when we come to look at the actual terms of the charter-party by which the case is governed, it is to me clear, as it is to the other members of this court, that the arrangement was that, this being a sailing ship, she was to be loaded, whatever she came in with as ballast—that is to say, whether it was ballast so called or freight paying goods in the shape of new cargo—with a complete cargo of nitrates, the nitrate taking the place, so far as ballast was necessary, of ballast, and, therefore, the ship being completely loaded with the nitrate cargo.

But, of course, when you have to arrange the question of lay days—that is, the time which is to be allowed for loading the cargo—you must make some provision for the taking on board of so much of the nitrate as represents the equivalent of the ballast which is necessary or the weight which is necessary to keep the ship upright. You must make special terms for that, because it may be from time to time, if she comes in with cargo, the receivers of that cargo may take their cargo out. Therefore it throws on the charterers an obligation to provide the nitrate so far as it is required for stiffening, in this particular case, during a period any time after the 11th Dec., giving apparently what the parties thought was sufficient time. That is all that we have to deal with in connection with the date of the 11th Jan. 1908, after which notice might be given immediately that the vessel was ready to receive the cargo. It is said, and that is what it comes to on the part of the appellants, that directly the notice was given, which the charterers were bound to comply with after forty-eight hours, to take on board so much stuff as would make the ship safe while they were discharging, it was impossible from that moment for the charterers to take advantage of the cancelling clause. It seems to me that it would require very strong words to make that supposition a sound one on the terms of clause 4, because there is to be a separate and distinct notice of readiness to load, and it is readiness to load which alone prevents the operation of the option. Now, I think that the words of clause 4, fairly read, mean this: "We promise you and undertake to supply the stiffening of nitrate as you require it, after forty-eight hours' notice, not before the 10th Dec., but any date after that time, to keep your ship safe. But, while that is done, there is nothing in the clause to prevent the operation of the ordinary law that the ship must be ready to load." When you ask what "ready to load" means, again looking at clause 4, it means "ready stiffened with a nitrate cargo so far as it safely is required, and ready to give all the rest of the accommodation of the ship to the cargo which is to be loaded subject to the lay day period." When I look at the clause, "Time occupied in discharging ballast or shifting ports not to count as lay days," I confess that I do not feel myself much pressed by it. In the first place, we are not dealing with ballast. But it is possible under this charter-party that the ship may have come in ballast from Iquique. For, as was pointed out in the course of the argument, the ship, being partly loaded under this charter-party, was going to or from Iquique to the other port and to be loaded there. There are various contingencies provided for, and one is the possibility of her coming to Iquique, which was the loading port she was to go to first; she could go to her port in ballast. Be that as it may, I am not going myself to treat that as a sound construction which would alter the natural and proper meaning of clause 4 by reference to a general clause of that kind. "Time occupied in discharging ballast or in shifting ports not to count as lay days." That clause may properly be construed, as Farwell, L.J. has pointed out, by treating it as a clause providing, not for that which will happen under the charter-party, but what may happen under the charter-party, the clause being read: "Time occupied in discharging ballast, if any, or in shifting ports, if any, not to count as lay days." As I say, those clauses are obscure in their wording, and in this particular case it is difficult, and the German courts have found it equally difficult in a case which came before them on this charter-party, to construe the same. But be that as it may, the particular charter-party before us could only have, as a natural construction, the construction put upon it by the Lord Chief Justice, which we affirm.

Appeal dismissed.

Solicitors for the appellants, *Walker, Son,* and *Field,* agents for *Weightman, Pedder,* and *Co.,* Liverpool.

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

July 7, 8, *and* 31, 1909.

(Before COZENS-HARDY, M.R., FARWELL and KENNEDY, L.JJ.).

REDERIAKTIESELSKABET SUPERIOR *v.* DEWAR AND WEBB. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Charter-party — Lien — Demurrage incurred at port of loading—Demurrage payable day by day as falling due.

A charter-party provided that, should the vessel be detained by the charterers or their agents over and above the laying days, which were provided for in a clause preceding, demurrage should be paid to the master at a specified rate for each and every day's detention afterwards "to be paid day by day as falling due"; and that the owner or master of the vessel should have "an absolute lien and charge upon the cargo and goods laden on board for the recovery and payment of all freight, demurrage, and all other charges whatsoever."

Held, that a lien was enforceable against the consignees of the cargo of the vessel under a bill of lading which incorporated the charter-party in respect of demurrage incurred at the port of

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

loading, although it was payable day by day there as falling due.

Pedersen *v.* Lotinga (28 *L. T. Rep. O. S.* 267 (1857); 5 *W. R.* 290) *and* Gardner and Son *v.* Trechmann (5 *Asp. Mar. Law Cas.* 558 (1884); 53 *L. T. Rep.* 518; 15 *Q. B. Div.* 154) *distinguished.*

Decision of Bray, J. (1909) 11 *Asp. Mar. Law Cas.* 232; 100 *L. T. Rep.* 513) *affirmed.*

An action was brought by the owners of the ship *Superior* against the holders of a bill of lading claiming a declaration that they were entitled to a lien for certain sums in respect of dead freight, demurrage, and charges, and payment thereof, under a charter-party dated the 27th Feb. 1907, which was incorporated by the bill of lading.

The charter-party contained (*inter alia*) the following clauses:—

By clause 1 it was provided that the *Superior* was to proceed to a safe loading place in the port of Buenos Ayres, and there load a full and complete cargo of wheat and (or) linseed in bags, and deliver the cargo at a safe port in the United Kingdom or Continent between Bordeaux and Hamburg, as per bills of lading, on being paid freight as specified in clause 2—viz, 15*s.* 6*d.* per ton of 2240lb. English gross weight delivered.

By clause 4 it was provided that, should the vessel be ordered to a direct port within the limits on signing bills of lading, freight was to be reduced by 1*s.* per ton.

By clause 5 it was provided that the freight should be paid as follows—viz.: Sufficient cash for ship's use (if required by the master) to be supplied on account of freight at port of loading not exceeding one-third part subject to 7½ per cent. commission to cover all charges, and the balance of freight on the right and true delivery of the cargo in cash without discount.

By clause 9 the charterers were to have the option of shipping other lawful merchandise, in which case freight was to be paid on the vessel's dead weight capacity for wheat or maize in bags on this voyage at the rates above agreed on for heavy grain, but the ship was not to earn more freight than she would if loaded with a full cargo of wheat and (or) maize in bags. All extra expenses for loading such merchandise over heavy grain were to be paid by the charterers.

By clause 12 thirty-five running days (Sundays and holidays, strikes excepted) were to be allowed the charterers (if the ship were not sooner dispatched) for loading, and the discharge was to be effected according to the custom of the port. Lay days were to commence the day after the master had given written notice that his vessel was discharged and ready to receive or discharge the cargo.

By clause 13 it was provided that, should the vessel be detained by the charterers or their agents over and above the laying days, demurrage should be paid to master at the rate of 4*d.* per net register ton for each and every day's detention afterwards, to be paid day by day as falling due.

By clause 16 wharfage dues, if any, for loading were to be for account of the charterers.

By clause 19 it was provided that the owner or master of the vessel should have an absolute lien and charge upon the cargo and goods laden on board for the recovery and payment of all freight, demurrage, and all other charges whatsoever.

By clause 23 5 per cent. brokerage was due by the ship on the above freight, dead freight, and demurrage ship lost, or not lost, cancelled, or not cancelled, on signing the charter-party.

By their statement of claim the plaintiffs alleged that written notice to the effect that the vessel was ready to load was given on the 23rd April 1907, and that making an allowance for Sundays and holidays, the lay days expired on the 7th June; that the vessel was not dispatched by the charterers from Buenos Ayres until the 15th July 1907, being thirty-eight days on demurrage, for which the plaintiffs claimed 791*l.* 19*s.* 8*d.*

The plaintiffs also alleged that on the 6th July 1907, when only 617 tons had been loaded, leaving space for 1263 tons, the master proceeded to sea in accordance with the request of the charterers; and that in these circumstances freight was payable on the dead-weight capacity of the vessel, on which, after crediting for the bill of lading freight already paid, they were still entitled to 915*l.* 13*s.* 6*d.*; or alternatively that they were entitled to the same amount as dead freight, or the amount of the expense of acting upon the request of the charterers.

The plaintiffs also claimed 255*l.* 12*s.* in respect of wharfage dues, towage, pilotage, &c., which they alleged they had paid for, and at the request of the charterers.

The *Superior* arrived at London on the 9th Sept. 1907, when the plaintiffs exercised their lien on the cargo for the above-mentioned sums, but the cargo was released on the defendants undertaking to be responsible for any sum net exceeding 1963*l.* 5*s.* 2*d.*, for which they might establish a right to exercise a lien.

The defendants denied that the vessel was on demurrage, and pleaded that if there was any delay in loading it was occasioned by strikes. They further denied that they were liable in any sum for demurrage, dead freight, or charges, or to any lien for them. They also pleaded that they were not charterers or agents of the charterers, but were merely indorsers of the bills of lading to whom in the goods had passed.

It was admitted that the ship was not fully loaded at the port of loading, and that the plaintiffs had a good claim against the charterers for damages.

Under these circumstances the plaintiffs contended that a claim for dead freight could be included under the words "all charges whatsoever in clause 19 of the charter-party," and that they were entitled to a lien for demurrage and charges.

The defendants contended that no lien was given by the charter-party for dead freight; and that there could not be a lien for demurrage which was payable in advance.

On the 19th Feb. 1909 the action came on for trial before Bray, J., sitting without a jury in Middlesex, when his Lordship reserved judgment.

On the 5th March 1909 the learned judge delivered a written judgment, in which he decided (11 Asp. Mar. Law Cas. 232 (1909); 100 L. T. Rep. 513) that the clause 19 could not be construed as conferring a lien for dead freight; and that

the plaintiffs' claim failed in this respect. As to the claim for demurrage, his Lordship was of opinion that the words in the charter-party were wide enough to give a lien for demurrage at the port of loading, although it was payable day by day there; and he gave judgment for thirty-seven days' demurrage.

The defendants now appealed from so much of the judgment as was not in their favour.

Scrutton, K.C. and *Leck*, for the appellants, referred to

Diederichsen v. *Farquharson and Co.*, 8 Asp. Mar. Law Cas. 333; 77 L. T. Rep. 543; (1898) 1 Q. B. 150;
Gardner and Son v. *Trechmann* (*sup.*);
Pedersen v. *Lotinga* (*sup.*);
Kirchner v. *Venus*, 12 Moo. P. C. 361;
Gray v. *Carr*, 1 Asp. Mar. Law Cas. 115 (1871); 25 L. T. Rep. 215; L. Rep. 6 Q. B. 522;
Serraino and Sons v. *Campbell*, 7 Asp. Mar. Law Cas. 48 (1890); 64 L. T. Rep. 615; (1891) 1 Q. B. 283;
Smith v. *Sieveking*, 5 Ell. & Bl. 589.

[KENNEDY, L.J. referred to *Manchester Trust Limited* v. *Furness, Withy, and Co. Limited* (8 Asp. Mar. Law Cas. 57; 73 L. T. Rep. 110; (1895) 2 Q. B. 282, 539, at pp. 544, 545).]

Bailhache, K.C. and *Adair Roche*, for the respondents, referred to

W. N. White and Co. Limited v. *Furness, Withy, and Co. Limited*, 7 Asp. Mar. Law Cas. 574; 72 L. T. Rep. 157; (1895) A. C. 40;
Sanguenetti v. *Pacific Steam Navigation Company*, 3 Asp. Mar. Law Cas. 300 (1876); 35 L. T. Rep. 658; 2 Q. B. Div. 238;
Kish v. *Cory*, 2 Asp. Mar. Law Cas. 593 (1875); 32 L. T. Rep. 670; L. Rep. 10 Q. B. 553;
Bannister v. *Breslauer*, 2 Mar. Law Cas. O. S. 490 (1867); 16 L. T. Rep. 418; L. Rep. 2 C. P. 497;
Porteos v. *Watney*, 4 Asp. Mar. Law Cas. 34 (1878); 39 L. T. Rep. 195; 3 Q. B. 534, at p. 541.

[KENNEDY, L.J. referred to *Christoffersen* v. *Hansen* (1 Asp. Mar. Law Cas. 305 (1872); 26 L. T. Rep. 547; L. Rep. 7 Q. B. 509, at p. 514).]

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

Hansen v. *Harold Brothers*, 7 Asp. Mar. Law Cas. 464 (1894); 70 L. T. Rep. 475; (1894) 1 Q. B. 612;
Fry v. *Chartered Mercantile Bank of India*, 2 Mar. Law Cas. O. S. 344; L. Rep. 1 C. P. 689; 14 L. T. Rep. 603 (1865);
Capel v. *Comfort*, 4 L. T. Rep. 448; *sub nom.* *Chappell* v. *Comfort*, 10 C. B. N. S. 802.

The arguments sufficiently appear from the judgment.

Cur. adv. vult.

July 31.—The following written judgment of the court (Cozens-Hardy, M.R., Farwell and Kennedy, L.JJ.) was delivered by

KENNEDY, L.J.—In this case there are four points which have been put before this court on appeal from the judgment of Bray, J. Three of these can be disposed of very shortly. They are points of detail, and it is convenient to deal with them first. The appellants say that the learned judge, in dealing with the plaintiffs' claim for demurrage, ought to have found, as a matter of fact, that the loading at Buenos Ayres was for a considerable period prevented by a strike of labourers and stevedores. There is an exception in the charter-party "strikes excepted," and the defendants contended before the learned judge that, at all events for a portion of April and May, this exception operated. The learned judge has decided against them, on the ground, in the first place, that during the period of the strike no cargo at all was provided by the charterers; and secondly, on the ground that the strike was not a general strike, but a partial strike, and that it is not shown that if the charterers were ready to load it would have prevented the loading of this vessel. Other vessels were being loaded, and one (the *Mecca*) was being loaded by the charterers themselves. We have no reason, we think, for differing from the learned judge on this point. The next matter of appeal also is a matter of fact affecting the plaintiffs' demurrage claim. The defendants do not dispute a detention of the ship at the loading port up to the 10th July. The learned judge has allowed the plaintiffs' claim for damages beyond this date up to the 14th July. We agree with the appellants' counsel that the evidence as to the period between the 10th and 15th July is meagre. The question is, Was it sufficiently strong to justify Bray, J.'s finding in the plaintiffs' favour? On the 10th July, as we understand the facts, the necessary trimming of the cargo was completed. On the 11th July the ship moved into the roads. The plaintiffs' case is that the delay from that date to the date of sailing was caused by the difficulties in obtaining clearance. The learned judge has allowed the claim up to and including the 14th July. We are not prepared to say that he was not justified in taking this view upon the evidence before him, which included the examination and cross-examination of the captain of the *Superior*. The third point is one of a minor sort in matter of amount. Bray, J. has allowed in the plaintiffs' claim for "charges," for which a lien is given in clause 19 of the charter-party, charges not specifically mentioned in the charter-party. It appears that during the loading at Buenos Ayres, which seems to have been a troublesome and tedious business owing to the impecuniosity of the charterers' agent there, certain expenses outside the expenses mentioned in the charter-party were incurred by the ship's agents, with the consent, if not at the request, of the charterers' agents. They were expenses no doubt which benefited the charterers by facilitating the loading. But we have to consider what charges are covered by clause 19, so as to be justifiably exacted from the consignees under the bill of lading against whom the shipowners have claimed to exercise the right of lien in respect of these expenses, as well as in respect of charges specifically mentioned in the charter-party. In our opinion the judgment of Bray, J. in allowing these expenses to be treated as charges for which the lien is available has given the plaintiffs more than they are entitled to. The 19th clause is very wide in its terms: "All freight, demurrage, and all other charges whatsoever"; but as against the assignees of the bill of lading we do not think it can rightly be held to give the shipowners a lien upon their goods for expenses incurred by arrangement between shipowners and charterers outside any charter-party obligation. We do not know what the items in question are, and we can only state the principle upon which in this matter the accounts ought to be taken.

The parties know what the items are, and there will be no difficulty in adjusting the account.

We now come to the appellants' fourth point, in which lies the real substance of this appeal. They say that there is no lien enforceable against them in respect of demurrage of the *Superior* at the port of loading. The defendants are the consignees of the cargo of the *Superior* under a bill of lading which beyond question incorporates the condition of the charter-party in clause 19, to which we have already referred: "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 all freight, demurrage, and all other charges whatsoever." Turning to the demurrage clauses (Nos. 12 and 13) in the typewritten copy furnished to this court we find this: 12. "Thirty-five running days (Sundays and holidays, strikes excepted) to be allowed the said charterers (if the ship be not sooner dispatched) for loading, and the discharge to be effected according to the custom of the port. Lay days to commence the day after the master has given written notice that his vessel is discharged and ready to receive or discharge the cargo." 13. "Should the vessel be detained by charterers or their agents over and above the said laying days demurrage shall be paid to the said master at the rate of 4*d.* per net register ton for each and every day's detention afterwards to be paid day by day as falling due." The concluding words ("or discharge the cargo") of clause 12 are evidently either inserted or (if the original charter-party was a printed form) allowed to stand there in error. But it is quite clear, and it is, as we shall hereafter point out, deserving of notice, that under these clauses demurrage properly so called is provided for only at the port of loading where thirty-five lay days are given and a stipulated demurrage rate of 4*d.* per ton per diem is provided for any excess of time in loading. At the port of discharge the only provision is that the "discharge is to be effected according to the custom of the port," and the shipowners' remedy for detention there is therefore in the nature of damages. Now, the appellants, the consignees of cargo under bill of lading which incorporates by reference these conditions of the charter-party, contend that they do not operate to give the plaintiffs as against them any lien exercisable upon the cargo for the demurrage which was incurred at the port of loading. They contend that, although clause 19 gives an absolute lien and charge "for the recovery and payment of all freight, demurrage, and all other charges whatsoever," the lien does not apply to the demurrage incurred at the port of loading, because, by the terms of clause 13, the demurrage at the stipulated rate is "to be paid day by day as falling due." Now, there certainly is no principle of law which prevents a right of lien upon goods being superadded to a right of action of debt for the money which the lien secures; but the defendants' contention is based upon the judgments in two cases —*Pedersen* v. *Lotinga*, decided by the Queen's Bench in 1857 (*sup.*), and *Gardner and Son* v. *Trechmann* (*sup.*), in the Court of Appeal in 1884, before the Master of the Rolls (Lord Esher), Cotton, L.J., and Lindley, L.J. In our opinion there is nothing in the judgments in either of these cases which can rightly be held to justify the view which the defendants put forward as to the effect of the documents in the present case. *Pedersen* v. *Lotinga* (*ubi sup.*) is one of a large group of difficult cases in which the court has had to construe a charter-party in reference to a "cesser" clause—a clause, that is to say, containing a release of the charterer from liability under the charter-party as soon as the vessel is loaded and bills of lading have been given—and to say whether in the particular case the release applies to both demurrage accrued at the port of loading and to demurrage at the port of discharge, or only to the latter. The tendency of the decisions—we think it may now be treated as a general rule—is to treat the cesser in regard to extent as correlative and corresponding to the lien upon the cargo reserved in the particular charter-party. In *Pedersen* v. *Lotinga* (*ubi sup.*) the shipowner was suing the charterer for demurrage. The charter-party provided that at the port of loading, after the agreed days for loading, the master was to receive 5*l.* a day for demurrage "day by day." For the port of discharge the language is different. There was to be demurrage after the laying days at 5*l.* a day. It also contained a "cesser" clause and a provision that the shipowners should rest on their lien for freight and demurrage. The court held that the express agreement that the charterer should pay 5*l.* a day "day by day" showed that the lien clause in regard to demurrage must apply only to the demurrage at the port of discharge. In other words, the express terms of the demurrage clause "day by day" expressly gave the shipowner a vested right of action, and the lien clause in those circumstances was to be interpreted as limited in its application to demurrage at the port of discharge, which was differently worded. The reasoning of *Pedersen* v. *Lotinga* (*ubi sup.*) is commented on and elucidated by Blackburn, J. in *Christoffersen* v. *Hansen* (*sup.*), and is carefully explained by Cleasby, B. in *Francesco* v. *Massey* (L. Rep. 8 Ex. 101, at p. 105). *Gardner and Son* v. *Trechmann* (*ubi sup.*) was not a demurrage case. The shipowner there was insisting upon a lien for the difference between the charter-party freight and the bill of lading freight. There was a clause, "the freighter's liability to cease when the cargo is shipped, provided the same is worth the freight, dead freight, and demurrage on arrival at the port of discharge, the owner or his agent having an absolute lien on the cargo for freight, dead freight," &c. There was also a clause, "It is further agreed the captain to sign bills of lading as represented, and at any rate of freight; but should the total freight as per bills of lading be under the amount estimated to be earned by this charter, the captain to demand payment of any difference in advance." The bill of lading freight was in fact less than the charter-party freight, and the court held on both of two grounds that there was no lien against the bill of lading consignee for the difference. The bill of lading incorporated the charter-party only so far as its terms were consistent with the terms of the bill of lading, and there could be no lien for freight beyond the freight expressly named in the bill of lading. So that even if the lien clause would have applied as between the parties to the charter-party to the difference between the charter-party freight and the bill of lading freight, it was ousted

by the terms of the bill of lading. But the court further held that, rightly construed, the charter-party gave no lien even as against the charterer for the excess of the charter-party freight over the bill of lading freight, the charter-party in terms providing as it did for the demand of that difference by the captain in advance—that is to say, before the ship sailed. It is clearly in reference to the language of the particular charter-party and not as a statement of general principle that Lindley, L.J. uses the words upon which the appellants so much relied, that "there can be no lien for what is contracted to be paid in advance."

It appears to us that neither of these decisions, which turned in each case upon the construction of the terms of the particular and somewhat peculiar charter-party in regard to the question before the court, assists the defendants in the present case. So far from there being any reason for inferring in regard to the present charter-party that the lien clause (clause 19), although apparently unlimited, does not, both as against charterer and bill of lading holder, apply to the demurrage which has accrued in the port of loading and for which, as it was "payable day by day"—as to which expression I would refer particularly to the opinion of Bramwell, B. expressed in *Francesco* v. *Massey* (*ubi sup.*)—we agree that under the terms of clause 13 the shipowner got in respect of each day on demurrage a vested right of action. It appears to us that under this charter-party (clauses 12 and 13) demurrage properly so called can accrue at the port of loading. The true inference is that the grant to the shipowner of a lien for the recovery and payment of all demurrage given by clause 19 is to have its natural application and to be read as covering demurrage at the port of loading, where alone demurrage, properly so called, can arise. At the port of discharge under this charter-party the only claim for detention of the ship can be a claim for damages. It is quite true that in certain cases demurrage in a charter-party has been treated as covering damages for detention, but that is not its natural or *primâ facie* meaning: (see *Gray* v. *Carr*, *sup.*; *Lockhart* v. *Falk*, 3 Asp. Mar. Law Cas. 8 (1875); 33 L. T. Rep. 96; L. Rep. 10 Ex. 132; *Kish* v. *Cory*, *sup.*). And if in the present charter-party there is a lien given (as there is) for "all demurrage," we think that the fact that according to the terms of the same charter-party the only port in which demurrage can arise is the port of loading strongly makes for that construction of the whole document which would make the right of lien applicable to such demurrage, whether "payable day by day" or not. The result is that to the extent of the charges not specifically provided for in the charter-party this court varies the judgment of my brother Bray. But this was stated to be of a trifling amount, and the substantial question raised before us was that of liability to any demurrage in the port of loading, and our order on this appeal will be that the appeal is dismissed with costs.

Appeal dismissed.

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

Solicitors for the respondents, *Botterell and Roche.*

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

May 11 *and* 27, 1909.

(Before Pickford, J.)

Barque Robert S. Besnard Company Limited *v.* Murton. (*a*)

Marine insurance—Policy on freight—Constructive total loss—Notice of abandonment—Freight subsequently earned.

The plaintiffs being owners of a ship, insured the freight intended to be earned on a particular voyage with the defendant and other underwriters. Owing to stress of weather, the ship became a constructive total loss, and on the 20th Jan. 1906 *notice of abandonment was given to the defendant. The notice contained the following footnote: "In the event of your declining to accept abandonment, it shall be understood that you agree to the assured being placed in the same position as if a writ had been issued this day for the amount of your policy." The notice of abandonment was not accepted, but the defendant initialled the footnote. The ship was subsequently sold to the cargo owners who carried on the voyage, but the cost of repairs and towage necessary for earning the freight considerably exceeded the amount of freight receivable by them.*

Held, that the date on which the notice of abandonment was given must be taken as the date on which the rights of the parties were to be ascertained, that on that date there was a total loss of freight; and the fact that the freight was earned subsequently did not disentitle the plaintiff to recover.

Commercial List.

Action tried by Pickford, J. sitting without a jury.

The plaintiffs were the owners of the barque *Robert S. Besnard*, and the defendant was an underwriter of the policy on freight to be earned during the course of a voyage from Monte Video to New York. The ship was chartered to load the cargo and deliver it in accordance with the charter-party, for a lump sum freight of 4200 dollars on the entire capacity of the vessel under deck.

The charter-party was dated the 11th Aug. 1905, and the policy sued upon was effected on the 16th Aug. 1905, and was for 840*l.* freight on hides. The ship left Monte Video on the 1st Nov. 1905, and proceeded on her voyage until the 10th Jan. 1906, when she was towed into Charlestown, having encountered very bad weather. She was surveyed by order of the Consul, and the surveyors estimated that her repairs would cost between 20,000 dollars and 21,000 dollars, and that her value after repair would be from 7000 dollars to 10,000 dollars. Evidence was given at the trial to the effect that the cargo, if transhipped, could only have been carried by the ship as an American vessel at a very high freight, which in addition to the cost of handling, would have been considerably greater than the freight that could be carried under the charter.

On the 20th Jan. notice of abandonment was given by the plaintiffs to the underwriters in the

(*a*) Reported by Leonard C Thomas, Esq., Barrister-at-Law.

following terms: "By the instructions of the assured, we hereby abandon to you their interest in this vessel so far as may be concerned your policy for 840*l.* on freight, and we claim thereon a total loss." The following footnote was added:

In the event of your declining to accept abandonment, it shall be understood that you agree to the assured being placed in the same position as if a writ had been issued this day for the amount of your policy.

The notice of abandonment was not accepted, but the footnote was initialled by the underwriters. As a result of negotiation, the cargo owners purchased the vessel from the plaintiffs, the contract being to the effect that

The *Robert S. Besnard* Company Limited have sold and conveyed the barque as she now lies at Charlestown unto Richard S. Collett, named on behalf of the cargo owners, for the sum of 8500 dollars which includes the barque's apparel, furniture, and the stores on board.

The contract further provided that the purchaser of the barque should retain from the purchase money 3095 dollars for certain purposes, and that any overplus should be paid to the owner of the barque or his attorney. The contract also contained a clause to the following effect:

It is further understood and agreed that the expenses incurred in putting into Charlestown, including port charges there, towage claims, with wages and provisions of the crew from the date of bearing away until the departure from Charlestown shall be adjusted and settled according to the principles of general average; but no allowance in general average to be made for any damage or sacrifice to the said vessel itself. Said sale of the barque *Robert S. Besnard* also comprises all the interest in the freight moneys of the cargo now on board with the right to collect the same, and it is further represented and agreed that the whole of such freight money being a lump sum of 4200 dollars is payable on completion of the voyage, without offsets or credits, except only an advance made thereon in Monte Video amounting to the sum of 300 dollars leaving a balance to be collected on discharge 3900 dollars.

After being repaired, the barque was towed to New York where she arrived on the 10th Feb. 1906. Her cargo was delivered and freight amounting to 3795 dollars was collected. The cost of temporary repairs and towage amounted to 4345 dollars.

Atkin, K.C. and *Maurice Hill* for plaintiffs.—The question is whether or not the plaintiffs are entitled to have the matter dealt with as at the date upon which notice of abandonment was given. The ship and freight both suffered a constructive total loss, and as far as the owners were concerned there was nothing more to be done. A contract of affreightment can be detached from the ownership of a ship:

Sea Insurance Company v. *Hadden*, 5 Asp. Mar. Law Cas. 230 (1884); 50 L. T. Rep. 657; 13 Q. B. Div. 206, per Brett, M.R., at pp. 714-716.

[Pickford, J.—Here you can say there was a sale, but not under the same contract.] The plaintiffs could not earn the freight sold to a person who purported to salve, when as between owners and underwriters there has been a total loss. The owners have the same rights against the insurers as if there had been a total loss:

Scottish Marine Insurance Company of Glasgow v. *Turner*, 1 Macq. H. L. 334, per Lord Cranworth.

There is nothing more clearly established in insurance law than to look at the position at the date of writ:

Ruys v. *Royal Exchange Assurance Corporation*, 8 Asp. Mar. Law Cas. 294 (1897); 77 L. T. Rep. 23; (1897) 2 Q. B. 135.

On the 20th Jan. there was a total loss, and therefore the shipowner could either abandon freight to the underwriters and recover on total loss, or go on and earn the freight and claim the amount for ensuing labour which would probably be caused. The only question would be: Has anything happened which takes away that right or what salvage is there to which the underwriters are entitled if anything has been received from the sale of the chance of earning freight:

Benson v. *Chapman*, 5 C. B. 330; 6 M. & G. 792; 2 H. L. Cas. 696;
Stewart v. *Greenock Marine Insurance Company*, 2 H. L. Cas. 159.

Scrutton, K.C. and *Mackinnon* for the defendants.—Lord Truro in *Scottish Marine Insurance Company of Glasgow* v. *Turner* (*sup.*), at p. 341, said: "The expression 'loss of freight' has two meanings, and the distinction between them is material. First, freight may be lost in the sense that, by reason of the perils insured against, the ship has been prevented from earning freight; or, secondly, freight may be lost in the sense that, after it has been earned, the owner has been deprived of it by some circumstances unconnected with the contract between the assured and the underwriters on freight." It is submitted that there is a third meaning—viz., that freight may be lost by the owner in the sense that he has lost the right of earning it as between the assured and the underwriters, that is, when he has sold it. There was no reliable evidence of constructive total loss. An amount of freight was paid by the cargo owners to the people to whom the shipowners purported to have sold or assigned the freight. The voyage or adventure was never abandoned as the man who had the right to do it under the contract sold it to another who carried it out. The result was that there was no loss, constructive or otherwise, of freight, because the adventure was never abandoned. Although there might be some *quantum meruit* in respect of freight, that was not insured. It is instructive to compare the positions of a mortgagee or assignee or underwriter when a ship is abandoned. A mortgagee who has taken possession of a ship has a right to all the freight accruing at the time he takes possession:

Keith v. *Burrows*, 3 Asp. Mar. Law Cas. 280, 427, 481 (1877); 2 C. P. Div. 163, per Mellish, L.J., at p. 165; 2 App. Cas. 636, per Lord Cairns, at p. 646.

The assignee of a ship has a right to freight subsequently accruing:

Morrison v. *Parsons*, 2 Taunt. 407, per Lawrence, J., at p. 415.

[Pickford, J.—You say the purchaser is entitled to the freight, but not to a *quantum meruit*.] Abandonment to an underwriter on a ship transfers the freight subsequently earned as incident to the ship:

Case v. *Davidson*, 5 M. & S. 79; 2 Br. & B. 379.

These cases all show that the person mentioned becomes entitled to the freight. In the present case the adventure was not abandoned, but the assured was contemplating its transfer to another, and the case therefore comes within the language of Parke, B. in *Benson* v. *Chapman* (*sup.*, at p. 362), where he says: "We think, therefore, that the plaintiff is in the same position as if he had received the freight himself. Upon the view we have taken of the case it becomes immaterial to consider the effect of the abandonment, as to the receipt of freight; for the underwriters on the ship or freight never received any freight by virtue thereof; and, if the loss of the freight was not in its nature total, the abandonment could not make it so." There was on the date the writ was issued a loss of freight, which was in fact earned afterwards. The question was whether the rule applicable to salvage also applied to a claim for freight. On principle the deduction should be in proportion to what might be reasonably obtained. [Pickford, J.—Suppose freight can be earned, but at a greater expense than the original freight, would that be a constructive total loss?] It has been decided that freight is not lost because costs of repairs necessary to earn it would be greater than the freight.

Moss v. *Smith*, 9 C. B. 94;
Philpot v. *Swann*, 1 Mar. Law Cas. O. S. 151; 5 L. T. Rep. N. S. 183 (1861); 11 C. B. 270;
Mordy v. *Jones*, 4 B. & C. 394.

They also cited

Thompson v. *Rowcroft*, 4 East, 34;
Sharp v. *Gladstone*, 7 East, 24;
Barday v. *Stirling*, 5 M. & S. 6.

Atkin in reply.—*Sea Insurance Company* v. *Hadden* (*sup.*) was decided on the express ground that that which the owner would have got was not that to which the underwriters were entitled—viz, a claim under a *quantum meruit*. The cases cited on behalf of the defendants were all cited in the former case. [Pickford, J.—Can you reconcile that case with the other cases?] The former cases all raise the question as between the owner and the underwriter who is entitled to the freight. [Pickford, J.—In *Keith* v. *Burrows* (*sup.*) he was entitled to a *quantum meruit*.] That case decided that the mortgagee of a ship was entitled to freight from the time of taking possession. In *Case* v. *Davidson* (*sup.*) there was a dispute between the underwriters of the freight, and, if the freight had been earned, the underwriters would have suffered no loss.

Cur. adv. vult.

Pickford, J.—This was an action brought on a policy on freight, and the matter arises out of a charter of the barque called the *Robert S. Besnard*, under which she was chartered to load a certain cargo and deliver it in accordance with the charter, being paid a lump sum of 4200 United States gold dollars as freight for the entire capacity of the vessel under deck. She was to carry the cargo from Monte Video to New York, and the charter was of the date of the 11th Aug. 1905. On the 16th Aug. 1905 the policy now sued upon was effected; it was 840*l.* on freight on hides. The barque left Monte Video on the 1st Nov. 1905. She encountered very bad weather between the 25th Dec. 1905 and the 10th Jan. 1906, when she was towed into Charlestown. Surveys were held on her there by order of the consul, the result of the final survey, which was after she was docked, being that the surveyors estimated that the repairs would cost something between 20,000 dollars and 21,000 dollars, and the same surveyors estimated her value after repair as being from 7000 to 10,000 dollars. If these figures are accepted, it is clear that the ship was a constructive total loss, but it is said, first, that I ought not to accept those figures, and that, therefore, the first step which the plaintiffs have to take in order to show a total loss of freight they have not succeeded in taking. It is said that these were not really *bona fide* estimates, and, at any rate, that they do not prove the facts that are stated in them. I am not going through the correspondence and the documents which passed after the barque got into Charlestown in any detail; it is enough for me to say that there is plenty on that correspondence to show that the owners were very anxious to get the ship condemned, and that they would not have been at all nice about the methods by which they got her condemned. If the case rested on their evidence, I should have very grave doubts indeed whether I could act upon it, but, of course, the defendants to displace the evidence of these surveyors have to go further than that, because they have to go so far as to show that not only the conduct of the owners was suspicious and not straightforward, but that they succeeded in getting surveyors who would act upon their instructions to get the ship condemned in any way they could, whether she ought to be condemned or not. I have not found any evidence upon the documents, and in point of fact the documents were the whole evidence upon this point, to show that the surveyors had been, as I may call it, got at in any way. They were persons who *primâ facie* seemed to be disinterested persons; at any rate some of them were masters of English vessels, and although the instructions were sent to the master to get the ship condemned if he possibly could, I do not know what instructions were given to the surveyors, and I do not think that when surveyors are appointed by the consul in the way that these were, I ought, without evidence, to assume that they are acting *mala fide* whatever I may think of the intentions of the owners. There is no evidence to contradict their statement, and, therefore, I do not see my way not to accept the statements that they make as to the costs of repairs, of course taking them as estimates and not as absolute figures, and also their evidence as to the value of the vessel when repaired, taking their figures as an estimate as well. Therefore I think, on these materials before me, it is shown that this barque at Charlestown was a constructive total loss.

Now, there is also evidence which, although it is given by one of the owner's representatives, is in agreement with what I should think would be the fact—namely, that the cargo if transhipped could only have been carried on an American vessel at a very high freight, and that the high freight in addition to the cost of handling which would have been necessary for transhipment would have been considerably greater than the freight that could have been earned under the charter. Therefore, I think there was

a constructive total loss of the ship, and that the cost of transhipment if it had been attempted, would have been greater than the freight which would have been earned by the carrying on of the cargo. The final survey by the surveyors of which I have spoken was on the 18th Jan. 1906 and on the 20th Jan. 1906 notice of abandonment was given to the underwriters. It was in these terms: "To underwriters at Lloyd's on *Robert S. Besnard*. There is a note at the top, I suppose identifying the ship: "17/1/06 Put into Charlestown in a disabled condition." Then the letter goes on: "Dear Sirs,—By the instructions of the assured, we hereby abandon to you their interest in this vessel so far as may be concerned, your policy for 840*l.* on freight, and we claim thereon a] total loss." That was not accepted, but it contained this note at the bottom: "In the event of your declining to accept abandonment, it shall be understood that you agree to the assured being placed in the same position as if a writ had been issued this day for the amount of your policy." That was initialled by all the underwriters. In the time between the barque arriving at Charlestown and this notice of abandonment, negotiations had been going on with the cargo underwriters for the sale of the vessel to them because they were interested if they could in getting the cargo on to New York. The cargo was a very valuable one, and would have been disposed of at a very great sacrifice if it had been disposed of in Charlestown, therefore, the underwriters on cargo were anxious to get the cargo carried on to New York. As I say, negotiations had been going on with them for the purchase of the vessel by them, and their taking the cargo on in her. On the 24th Jan. 1906 they bought her. The contract recites that the *Robert S. Besnard* Company, Limited, have sold and conveyed the barque as she now lies at Charlestown unto Richard S. Collett, named on behalf of the cargo, for the sum of 8500 dollars which includes the barque's apparel, furniture, and the stores on board. Then it goes on further to agree this, that the purchaser of the barque should retain from the purchase money the sum of 3095 dollars for purposes which are specified there, and that any overplus should be paid to the owner of the barque or its attorney. The next clause is: "It is further understood and agreed that the expenses incurred in putting into Charlestown, including port charges there, towage claims, with wages and provisions of the crew from the date of bearing away until the departure from Charlestown shall be adjusted and settled according to the principles of general average; but no allowance in general average to be made for any damage or sacrifice to the said vessel itself. Said sale of the barque *Robert S. Besnard* also comprises all the interest in the freight moneys of the cargo now on board with the right to collect the same, and it is further represented and agreed that the whole of such freight money being a lump sum of 4200*l.* dollars is payable on completion of the voyage, without offsets or credits, except only an advance made thereon in Monte Video amounting to the sum of 300 dollars, leaving a balance to be collected on discharge 3900 dollars." The amount that was collected was not 3900 dollars, but a little less, in consequence, I think, of some question of discount. Now, one thing in contention between the parties was whether any part of that 8500*l.* dollars, and, if so, what part, was given for the freight? It was said on behalf of the plaintiffs that nothing was given for freight, and that the 8500 dollars was made up in this way: 3000 dollars for the vessel and 5500 dollars for the release from liability in general average, and that if that agreement had not been made that sum of 5500 dollars is what the cargo-owners in all probability would have had to pay in the general average. Those were, in fact, the sums at which these values were estimated at the time, and I am not satisfied that, as it was suggested, the owners of the ship considered that there was no contribution due to general average because the sacrifice that had been made would come under the rule laid down in the case of *Shepherd* v. *Kottgen* (3 Asp. Mar. Law Cas. 544 (1877); 37 L. T. Rep. N. S. 618; 2 C. P. Div. 585). I am not satisfied that that was so at all upon the documents; the log and the protest I do not think go so far as it was contended they did—namely, to show that what was sacrificed in respect of the ship, the mast and so on, were a loss before they were cut away, and, therefore, without attempting to say what the consideration would have been, I am not at all satisfied that the owners of the ship were rather getting the best of the cargo owners because they knew that there would be no contribution.

The barque was repaired after she had been bought in this way and was towed to New York. She arrived there on the 10th Feb., when she delivered the cargo, and 3795 dollars of freight was collected by the purchasers, the difference, as I said, being made up by some question I believe of discount. The cost of the temporary repairs and towage to New York, according to the evidence before me, amounted to 4345 dollars, and, therefore, the cost of temporary repairs necessary for earning the freight with the cost of towing exceed the amount of freight which was receivable at New York. Under those circumstances, the question is, was there a loss of freight which entitles the plaintiffs to recover upon the policy? Now, in considering this question, I think I am confined to the date of the 20th Jan. which is to be taken as the beginning of the action. It is agreed that the plaintiffs are to be put into a position of this writ having been issued on that date. If the writ had been issued on that date, the action would have been commenced on that date, and according to the case before the present Lord Collins (then Collins, J.) of *Ruys* v. *Royal Exchange Insurance. sup.*, at p. 135) the commencement of the action is the date at which I have to look when I have to consider the rights of the parties. Now, what was the position at that date? First, it is said there was no constructive total loss of the ship. I have already dealt with that and said that in my opinion upon the evidence there was. I am also satisfied that to tranship and carry on the cargo at that time would have cost more than would been obtained for the freight, and these facts, I think, show, to use the expression of the present Master of the Rolls in *Guthrie* v. *North China Insurance Company* (7 Comm. Cas., at p. 138), no prudent uninsured owner would at that time have transhipped or endeavoured to tranship to earn the chartered freight, and, therefore, I think the barque under the circumstances was disabled at

that date from performing the voyage by peril of the seas. But then it is said that although that might be so, the facts show that the voyage was not abandoned, and certain letters and telegrams were referred to in order to prove that. Most of them were, I think, before the date of the final survey of the 18th Jan. 1906, but there were one or two afterwards which were relied upon as showing that the plaintiffs had not abandoned and did not intend to abandon the adventure, and that, therefore, they did, through other persons, perform the contract, and that the freight was earned and not lost. I think that what took place then was not a carrying out of the voyage on behalf of the plaintiffs at all, but was an arrangement that was made to make the best of the goods for the benefit of all concerned, and I do not think that what took place in the sale of the ship and the carrying on of the cargo by the cargo underwriters shows that there was not an abandonment of the adventure so far as the carrying on by the plaintiffs went on that date of the 20th Jan. I think at that time they had decided that they would not carry on, and that that was not altered by what took place afterwards. But then it is said that there is no case in which freight has ever been held to be lost where it has been in fact earned, and *primâ facie* that would seem to be a true proposition. It is contended for the defendants and denied by the plaintiffs that the sum of money that was collected in New York was the freight insured, and that as it had been earned by someone, whether by the plaintiffs or not, it is not lost by the perils insured against, and if it is lost to the plaintiffs it is only so lost by their own act of selling the right to it. There are decisions which are very difficult in my mind to reconcile on the question whether under circumstances of this kind where the underwriters, whether on ship or cargo, or where purchasers take possession of the ship and afterwards collect payment for the carriage of the goods, that is the freight that has been agreed upon originally, or whether it is only a *quantum meruit* of the same amount. I find it very difficult indeed to reconcile, if not the actual decisions, at any rate the enunciation of the principles, for I think they are more than dicta, that are comprised in those cases; but in the view I take of the case it is not necessary for me to decide the point. In all the cases to which I was referred of freight being earned and therefore held to be not lost, it had been earned before the action was brought. In this case I am by the agreement of the parties bound to consider the action as begun on the 20th Jan. 1906, and at that date the circumstances, in my opinion, show, as I have said, that there was a loss of freight. If freight was afterwards earned, it becomes therefore, in my opinion, a question of salvage, whether it be taken as the actual freight or whether it be taken to be a *quantum meruit* of the same amount. Now, what was the salvage? It seems to me the plaintiffs would be obliged to account for what they received in respect of the freight or for anything that they ought to and could properly under the circumstances have received; if I can in the 8500 dollars allocate any part of it to freight they must account for that, and even if I cannot, they must account for what they could and ought properly to have received. I cannot on the evidence allocate any particular part of the payment to the freight; I think there is some reason for attributing it, as the plaintiffs say, to the two sums of 3000 dollars and 5500 dollars, to which I have referred. I do not see that anyone was likely to give anything for the right of earning the freight which would cost more to earn than it could amount to when earned. It is true that the cargo underwriters having determined, for other reasons, to carry on the cargo in the ship which they had purchased for the purpose, stipulated that when they did so they should be entitled to recover the freight. That is quite true, but I think if in the course of the negotiations it had been said by the plaintiffs: Now we want a sum of money to represent the profit you are going to make out of the freight, or the benefit you are going to get from the freight, the answer would have been at once: We shall not give you anything for that because it will cost us a great deal more to earn it than it will be worth when we have got it. Therefore I cannot allocate any part of this 8500 dollars to freight, nor do I think if the plaintiffs had gone into the market and tried to get something for the transfer of the right of earning the freight that they would have got it. I do not think it would have been worth while for anybody to give anything for it, although it was worth while to the underwriters on cargo for other reasons to earn that freight at a considerably greater cost than the amount of the freight itself: Under those circumstances I do not think there was any salvage which came to plaintiffs, and therefore I think the plaintiffs are entitled to recover. As it will be seen, I have decided this case entirely on the ground that I am bound to take the date of the 20th Jan. 1906 as the date on which the rights of the parties are to be ascertained. I think I am bound to do so by the authority of the case which I have cited. If I had to ascertain their rights at a different date after the voyage had been performed at New York, different considerations might, I do not say they would, but they might arise; but, deciding it as I do in respect of rights of the parties at that date, on the 20th Jan. 1906, I think there was a loss of freight here, and that the plaintiffs are entitled to judgment with costs.

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

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

Monday, July 19, 1909.

(Before PICKFORD, J.)

RIGGALL AND SON *v.* GREAT GENTRAL RAILWAY COMPANY. (*a*)

Bill of lading—Railway company's steamboat—Conditions—Reasonableness—Liability of company—Railway and Canal Traffic Act 1854 (17 *&* 18 *Vict. c.* 31), *s.* 7—*Railway Clauses Act* 1863 (26 *&* 27 *Vict. c.* 92), *Part* 4—*Manchester, Sheffield, and Lincolnshire Railway (Steamboats) Act* 1864 (27 *&* 28 *Vict. c. cccxx.*), *s.* 2.

A railway company entered into a contract by bill of lading for the carriage of a cargo of sugar

(*a*) Reported by LEONARD C. THOMAS, Esq., Barrister-at-Law.

on one of their steamboats from Rotterdam to Grimsby. The bill of lading contained the following clause :

"*All accidents, loss, and damage of whatsoever nature or kind and however occasioned from machinery, boilers, steam, and steam navigation, or from perils of the seas or rivers, or from any act, neglect, error, misfeasance, or default whatsoever of the master, officers, engineers, crew, stevedores, servants, or agents of the shipowners, or other persons whomsoever in the management, loading, stowing, and transmitting the cargo or in navigating the ship or otherwise, or from any accident through defects or latent defects in hull, tackle, or machinery, or appurtenances, or unseaworthiness of the ship . . . (whether or not existing at the time of the goods being loaded or at the commencement of the voyage) excepted, the shipowners being in no way liable for any of the consequences of the causes above excepted, and it being agreed that the captain, officers, and crew of the vessel in transmission of the goods as between the shippers, consignees, or owners of the goods and the ship or shipowners be considered the servants of such shippers, consignees, or owners of the goods.*"

Owing to negligence on the part of the officers of the ship, the cargo was damaged.

Held, that, as there was no bonâ fide *alternative rate of freight under which the cargo might have been shipped, the condition in the bill of lading was not just and reasonable within the meaning of sect. 7 of the Railway and Canal Traffic Act* 1854, *and that the defendant railway company was liable.*

Manchester, Sheffield, and Lincolnshire Railway Company *v.* Brown (50 *L. T. Rep.* 783 (1883); (1902) 1 *K. B.* 290) *considered.*

COMMERCIAL LIST.

Action tried by Pickford, J. sitting without a jury.

The plaintiffs were indorsees of bills of lading for a cargo of sugar, and the defendant railway company were the owners of the steamboat *Chester* upon which the cargo was shipped.

The plaintiffs claimed damages for injury done to the cargo in consequence of negligence on the part of the defendants' officers.

The material clause in the bill of lading appears in the headnote.

The vessel took a cargo of coals from Grimsby to Rotterdam, in the discharge of which the lid of a water ballast tank at the bottom of the main hold was damaged. This damage was known to the officers of the ship, but without causing the defect to be remedied they allowed the cargo of sugar to be shipped, and the consequence was that when the tank was run out the water soaked into the sugar, thereby causing the damage in respect of which the plaintiffs made their claim.

The defendants pleaded that they were relieved of liability for the damage to the cargo as it was occasioned by an excepted peril—viz., perils of the seas or rivers, and that they were also protected generally by the provisions of the bill of lading.

Leslie Scott, K.C. and *Bateson* for the plaintiffs. The bill of lading contract, on which the defendants rely, is unreasonable within the Railway and Canal Traffic Act 1854 (17 & 18 Vict. c. 31), s. 7, which provides that :—

Every such company as aforesaid shall be liable for the loss of or for any injury done to any . . . goods or things . . . occasioned by the neglect or default of such company or its servants, notwithstanding any notice, condition, or declaration made and given by such company contrary thereto, or in anywise limiting such liability, every such notice, condition, or declaration being hereby declared to be null and void; provided always, that nothing herein contained shall be construed to prevent the said companies from making such conditions with respect to the receiving, forwarding, and delivering of any of the said . . . goods or things as shall be adjudged by the court or a judge before whom any question relating thereto shall be tried shall be just and reasonable. . . . Provided also that no special contract between such company and any other parties respecting the receiving, forwarding, or delivering of any . . . goods or things . . . shall be binding upon or affect any such party unless the same be signed by him or by the person delivering such . . goods or things respectively for carriage . . ."

The defendants' special Act (Manchester, Sheffield, and Lincolnshire Railway (Steamboats) Act (27 & 28 Vict. c. cccxx., s. 2) incorporates Part 4 of the Railway Clauses Act 1863 (26 & 27 Vict. c. 92), which, by sect. 31, provides that the Railway and Canal Traffic Act 1854, so far as the same is applicable, shall extend to steam vessels and the traffic carried on thereby. As the contract is unreasonable the defendants cannot succeed :

Doolan v. *Midland Railway Company*, 3 Asp. Mar. Law Cas. 485 (1877); 37 L. T. Rep. 317; 2 App. Cas. 792.

There was neglect in the management of the cargo and not in the management of the ship. The defendants failed to exercise a proper supervision, and thereby incurred the ordinary liability of a shipowner who fails to appoint an agent to supervise or appoints an incompetent one :

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

Where there is no alternative rate it is unreasonable to insert provisions for protection from the negligence of servants :

Manchester, Sheffield, and Lincolnshire Railway Company v. *Brown*, 50 L. T. Rep. 281 (1883); 8 App. Cas. 703.

Scrutton, K.C. and *Mackinnon* (*Simon*, K.C. with them) for the defendants.—The defendants are not liable because the cargo was damaged by water coming in through the hold, which is a peril of the sea :

Blackburn v. *Liverpool, Brazil, and River Plate Steam Navigation Company*, 9 Asp. Mar. Law Cas. 263; 85 L. T. Rep. 783; (1902) 1 K. B. 290.

The clause is reasonable, and has been in use for the last thirty-five years. The plaintiffs might have protected themselves by insurance. There has never been a case in which it has been decided that a negligence clause is unreasonable where there is competition. If the bill of lading affords protection to the defendants there is no sufficient ground within the meaning of the Railway and Canal Traffic Act 1854 for saying that it is unreasonable.

Bateson in reply.

PICKFORD, J.—This action is brought to recover damages for injury to a cargo of sugar carried on board the defendant company's vessel from Rotterdam to Grimsby. As I understand the facts, the way the damage happened was this: The vessel was in water ballast, and the main holds were covered with iron collars fastened down by bolts or studs. On top were wooden covers with coamings round them about 3in. high, and inside the coamings were wooden covers which kept the iron doors in their places. The vessel took a cargo of coals to Rotterdam, in the discharge of which the wooden covers of three of the main holds were torn away. The iron studs were broken, and the result was that one of the iron doors dropped into the tank. This was obviously discovered by somebody, because the door was taken out, and when the vessel arrived at Grimsby it was found upside down outside the manhole; and therefore when that tank had run out the water soaked into the sugar as there was nothing to keep it down. The damaged condition of the hold was noticed at Rotterdam, and was pointed out to the ship's carpenter; but he said he would not trouble about it then, or words to that effect, but that it should be attended to when the vessel arrived at Grimsby. The chief officer, whose duty it was to exercise supervision, does not seem to have had his attention drawn to the matter, or to have gone into the hold to see if it was all right. If he had done so he would have seen that it was not in a fit condition for sugar, or, at any rate, that the tank should not be run out during the voyage. That seems to me to have been great negligence on the part of the officers of the ship, particularly in allowing the cargo to be stowed there without any warning to anybody that water should not be put into that particular tank. The carpenter to whom the order was given that the tank should be run out apparently did not give any such warning, and the consequence was that the cargo was greatly damaged when the water was run out. It seems to me that this amounted to negligent management of the cargo or negligence in transmitting the cargo, and I should think it would also come within the word "otherwise." I think this very comprehensive exception in the bill of lading did protect the defendants from the negligence which took place in connection with the stowage of the cargo and in the management of it, which occasioned damage to the cargo. I am not satisfied that there was any personal neglect of the shipowners, if there can be any personal neglect on the part of a company. These vessels run for short voyages, carrying coals across on their outward voyages, and bringing home a variety of cargoes. The company leave the examination of the holds at Rotterdam to the officers of the ships, and I have no reason to suppose that they do not appoint competent officers; and therefore I do not think it is negligence not to have some person who is not an officer of the ship to inspect the holds on every voyage. The next question is the important one—namely, assuming the defendants are protected from practically every kind of negligence on the part of their servants—and I think they are—is it a reasonable stipulation such as they can make within the Railway and Canal Traffic Act 1854? There is also a question as to whether the contract was signed, because it must be both signed and reasonable. It was said for the defendants that whether this stipulation is reasonable or not, the plaintiffs are not in a position to sue for damage arising from the breach of contract contained in the bill of lading, and at the same time reject other conditions. If the contract was made by the shipper in the first instance, I can see no inconsistency in his saying, "I sue you on the contract you have made to carry my goods from Rotterdam to Grimsby," and then, when they say, "there is a condition in this contract which excludes our liability," the shipper could reply "That is an objectionable stipulation, and cannot hold good." This is a point which may be avoided with the greatest ease by varying the form of the action. Now, if that is the position of the man who makes the contract, what is the position of the indorsee? His position is defined by sect. 1 of the Bills of Lading Act 1855, as follows: "Every consignee of goods named in a bill of lading, and every indorsee of a bill of lading, to whom the property in the goods therein mentioned shall pass upon, or by reason of such consignment or indorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself." I do not see that there is any reason to suggest that the indorsee is not in the same position as the shipper. The real question is whether such stipulation is contrary to the statute. There is no doubt that sect. 7 of the Railway and Canal Traffic Act 1854, applies, because the defendants' special Act of 1864 incorporated Part 4 of the Railway Clauses Act 1863, sect. 31 of which says that "the provisions of the Railway and Canal Traffic Act 1854, so far as the same are applicable, shall extend to the steam vessels, and to the traffic carried on thereby." There is, therefore, in my opinion, no doubt that sect. 7 of the Railway and Canal Traffic Act 1854 is applicable to vessels of this company.

The question which I have to determine first is whether this contract is signed. Now, I shall assume in favour of the defendants that it is signed. The next question is: If signed, is it reasonable? *Primâ facie* I have very strong authority for saying that a condition which exempts the negligence of the carriers' servants is unreasonable within the meaning of this section. That authority is *Doolan* v. *Midland Railway Company* (*sup.*). In the course of his judgment in that case, Lord Blackburn said (at p. 810), "As the condition now before your Lordships tries to exempt the company from all liability for the negligence of its officers and servants, if any condition can be unreasonable, this is." The matter is also dealt with in sect. 103 of Mr. Carver's book on "Carriage by Sea," which book was written long after the introduction of the negligence clause into bills of lading. It is said it may be unreasonable in the case of land traffic to stipulate that you shall not be responsible for the negligence of your servants, the reason being that in that case there is a monopoly. In one sense there is, but in others there is not, and there is not a monopoly in the sense that you must send consignments by one particular railway. It has been contended here that there is no monopoly, and in a sense there is not, because any

one may run a line of steamers from Rotterdam to Grimsby. I suppose the defendants would be bound to give access to any steamer that might go there; but, according to the evidence, I think they are the only line running from Rotterdam to Grimsby, and, although there may be no legal monopoly, they have preference in the carriage of goods between these two places. It does not seem to me to matter, however, whether they have a monopoly or not, because the Legislature has applied this Act of Parliament to them. It was further contended that the decision in *Doolan* v. *Midland Railway Company* (*sup.*), which is really the only one dealing with this section, was given before the general introduction of the negligence clause into bills of lading, and that as the negligence clause has been included in every bill of lading, at any rate from this port, for the last thirty-five years, it must therefore be reasonable. Now, that is an argument which I confess I cannot follow. Shipping companies have, to a certain extent, a free hand. They have no Act of Parliament to trouble them, and they may stipulate for such conditions as they think fit, and it may be for reasons of business that these conditions are accepted; but that does not seem to me to make them reasonable. I do not think the fact that the premiums in cases where negligence is not excepted would be very little higher is a matter that ought to guide me, because that does not seem to me to decide the question as to whether a condition is unreasonable. I dissent from the proposition that I must consider the question of reasonableness having regard to the way it works out in the insurance world. I think I must regard the matter in the same way that I should if no insurance were effected, and looking at it in that way decide whether such a condition is reasonable or unreasonable. In the case of *Manchester, Sheffield, and Lincolnshire Railway Company* v. *Brown* (*sup.*) it has been decided that if there is a *bonâ fide* alternative rate such a contract is just and reasonable. There is no evidence of any alternative rate here. The only suggestion of there being an alternative rate was that if the shipper wanted his goods carried at company's risk without the negligence clause, the defendants would charge him a higher rate of freight, and that this was an alternative rate because he would be charged more. Whether or not the defendants would be able to do this in face of the competition which they say exists, I do not know; but I have not got to speculate as to whether or not there is an alternative rate. I have to decide the case as a judge, and I must look at it as a stipulation between these two parties and say whether it is unreasonable as between them. Looking at the matter in that way, I hold that the stipulation was unreasonable within the meaning of the previous decision, and therefore there must be judgment for the plaintiffs.

Judgment for plaintiffs.

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

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

Friday, July 23, 1909.

(Before PICKFORD, J.)

MARRIOTT *v.* YEOWARD BROTHERS. (*a*)

Passenger's luggage—Ticket—Printed conditions—Loss of luggage.

The plaintiff, who was a passenger on one of the defendants' steamers, received a ticket upon which the following conditions were printed: "The steamer, her owners and (or) charterers, are not responsible for any loss, damage, injury, delay, detention . . . of or to passengers or their baggage or effects . . . by whatsoever cause or in whatever manner the matters aforesaid may be occasioned and whether arising from the act of God, King's enemies . . . collision, fire, thieves (whether on board or not) . . . or from any act, neglect, or default whatsoever of the master, mariners, or other servants of the steamer, her owners and (or) charterers, or from restriction of quarantine, or from sanitary regulations or precautions which the ship's officers or local government authorities may deem necessary, or the consequences thereof, or otherwise howsoever; the passengers taking upon themselves all risk whatsoever of the passage to themselves, their baggage, and effects, including risks of embarking and disembarking, and whether by boat or otherwise." The ticket was, at the plaintiff's request, not delivered to her until just before the ship sailed. A portion of the plaintiff's baggage was lost owing to the felonious act of one of the defendants' servants.

Held, that in the circumstances of this case the plaintiff was bound by the conditions in the ticket, and that loss occasioned by the felonious acts of shipowners' servants was within such conditions.

COMMERCIAL LIST.

Action tried by Pickford, J. sitting without a jury.

The plaintiff claimed damages for the loss of a portion of her baggage shipped on board the steamship *Ardeola* on a voyage from Santa Cruz to Liverpool.

The defendants claimed protection from liability by virtue of the terms of the contract contained in passenger's ticket, which was in the following form:

Lisbon and Canary Islands Steamers.—Managers: Yeoward Brothers, Liverpool. — No. 3673. — Cabin Passage Ticket.—Mrs. Ada Marriott and Miss Marriott. —Per steamship *Ardeola*.—Sailing date 12th Feb. 1908. —From Liverpool.—To return (unless prevented by unforeseen circumstances).—Passage money, 25*l.* 4*s.* —Berth number 35/36.—This contract is made subject to the following conditions and exceptions: . . . (7) The steamer, her owners, and (or) charterers are not responsible for any loss, damage, injury, delay, detention (or maintenance or expense during same) of or to passengers or their baggage or effects, or for the non-continuance or non-completion of the voyage, by whatsoever cause or in whatever manner the matters aforesaid may be occasioned, and whether arising from the act of God, King's enemies, restraint of princes, rulers or people, disturbances, perils of the seas, rivers, or navigation, collision, fire, thieves (whether on board or not), accidents to or by machinary, boilers or steam, unseaworthiness of the steamer even existing at the time of sailing, or from any act, neglect, or default whatsoever of the pilot, master, mariners, or other

(*a*) Reported by LEONARD C. THOMAS, Esq., Barrister-at-Law.

servants of the steamer, her owners, and (or) charterers, or from restriction of quarantine or from sanitary regulations or precautions which the ship's officers or local government authorities may deem necessary, or the consequences thereof or otherwise howsoever; the passengers taking upon themselves all risk whatsoever of the passage to themselves, their baggage and effects, including risks of embarking and disembarking, and whether by boat or otherwise.

The plaintiff, by her reply, pleaded that she had no knowledge of the alleged contract, and that she was not bound thereby. She also pleaded that the loss was occasioned by the felonious acts of the defendants' servants, and that the clause on the ticket formed no defence to her claim.

The facts and circumstances relating to the issue of the ticket to the plaintiff were stated by the learned judge as follows:—

The plaintiff, who wished to go to the Canary Islands with her daughter, communicated through a Mr. Haghe with the defendants on the subject of the ticket, and the defendants answered that letter on the 4th Feb. 1908 acknowledging receipt of a cheque for 12*l.* 12*s.*, being deposit of return passage money in favour of Mrs. Marriott and her daughter; and they added this: "Kindly note to duly remit balance in exchange for tickets." They wrote on the same day to the plaintiff herself saying that they had received the cheque, that a state-room had been reserved, and inclosing labels and provisional passenger list. They informed her where passengers would embark and as to when baggage should arrive. They said nothing to her about sending the ticket, and, naturally, because they had communicated with Mr. Haghe on that subject. If the balance of the money had been then sent and the ticket asked for, it would have been received by the plaintiff on the 6th or 7th Feb., five days before the steamer sailed. The plaintiff did not answer that letter until the 10th Feb., two days before the vessel sailed. On that date she sent a cheque for 12*l.* 12*s.*, the balance of the passage money, adding this: "Kindly have our tickets ready for me on the ship. We are bringing our luggage with us." On the 11th Feb. the defendants acknowledged the receipt of the plaintiff's letter and cheque, and stated that the ticket would be duly forwarded to the vessel as desired. The vessel was to sail at 7 p.m. on the 12th Feb. The plaintiff arrived at the vessel about five o'clock on that date. The ticket was not then on board; but his Lordship said he was quite satisfied that the defendants intended to send it down by the clerk who goes down before the vessel sails to check the passenger list, and that, if the plaintiff had remained on the ship, the ticket would have come to her in the ordinary course. The plaintiff, not finding the ticket there, made inquiries. The officials of the steamer knew nothing about the arrangement made by the plaintiff and referred her to the office on the quay. That office has nothing to do with passenger business, and the clerk there referred her to the office in the town where the business is done. The plaintiff went there, arriving about six o'clock, and the ticket was handed to her, whether in an envelope or not she did not know. She looked at it, and she said that she saw that it had some writing or printing on it besides her name, but what it was she did not notice. She gave it to the steward when she reached the boat, and it remained in his possession till the vessel arrived at the Canary Islands, when it was given back to and retained by her until she came back on the return voyage, during which the loss took place.

It was agreed between the parties that the case should be argued on the assumption that the loss was occasioned by the felonious acts of the defendants' servants.

Hemmerde, K.C. and *G. A. Scott* for the plaintiff.—The plaintiff is not bound by the condition printed on the ticket, as it was neither seen by her nor brought to her notice by the defendants:

Richardson v. *Rowntree*, 7 Asp. Mar. Law Cas. 482; 70 L. T. Rep. 817; (1894) A. C. 217;
Acton v. *Castle Mail Packets Company*, 8 Asp. Mar. Law Cas. 73 (1895); 73 L. T. Rep. 158.

The defendants are not protected in respect of loss occasioned by the felonious acts of their servants. The words of the condition are ambiguous. The words "act, neglect, or default," relate to matters in connection with the navigation of the ship, as they follow specific words relating to thieves. The clause could be divided into two parts, the first dealing with loss by thieves, which does not cover theft on the part of the defendants' servants:

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

The second deals with risks of passage, and the plaintiff's loss does not fall within that category.

Keogh (*Horridge*, K.C. with him) for the defendants.—The plaintiff is bound by the conditions. The rule has been stated by Stephen, J.: "A great number of contracts are in the present state of society made by the delivery by one of the contracting parties to the other of a document in a common form, stating the terms by which the person delivering it will enter into the proposed contract. Such a form constitutes the offer of the party who tenders it. If the form is accepted without objection by the person to whom it is tendered, this person is as a general rule bound by its contents, and his act amounts to an acceptance of the offer made to him, whether he reads the document or otherwise informs himself of its contents or not."

Watkins v. *Rymill*, 48 L. T. Rep. 426; 10 Q. B. Div. 178, per Stephen, J.

In *Richardson* v. *Rowntree* (*sup.*) the passenger was a steerage passenger, and a person of little or no education. The plaintiff in the present case is well educated. She knew there was writing or printing on the ticket, and had ample opportunities for reading it, had she desired to do so. The language of the condition covers theft by members of the crew. He also referred to

Haigh v. *Royal Mail Steam Packet Company*, 5 Asp. Mar. Law Cas. 47, 189; 48 L. T. Rep. 267;
Shaw v. *Great Western Railway Company*, 70 L. T. Rep. 283; (1894) 1 Q. B. 373.

Hemmerde, K.C. in reply.

Cur. adv. vult.

PICKFORD, J.—This is an action brought to recover damages for the loss of certain articles carried by the plaintiff in her boxes as luggage on a voyage from Santa Cruz to Liverpool. The defendants deny the loss, and they also set up in

their defence certain conditions appearing upon the face of the ticket given to the plaintiff, which, they allege, were conditions of the contract of carriage. The answer to that by the plaintiff is, first, that the conditions do not apply to the contract; and, secondly, that, if they do, they do not protect the defendants in this case, because the loss was occasioned by the felonious act of the defendants' servants. At the end of the case, which was tried some time ago, the plaintiff's counsel applied for liberty to get some further evidence or information from Santa Cruz with regard to the facts of the loss, and I gave him leave to do so—a course about which I have since doubted the wisdom; but I gave him leave, and, of course, that order still stands. The result is that at the moment I am not in a position to determine the question whether the loss was or was not occasioned by the felonious act of the defendants' servants. But I was asked to decide the point of law—namely, whether, even if the loss were occasioned by the felonious act of the defendants' servants, they are protected by the conditions of the contract. For the purpose of the judgment I am about to deliver I assume, therefore, that the loss was occasioned by the felonious act of the defendants' servants—I do not find that it was so occasioned, the evidence not being complete—but I was asked to decide the case now upon the assumption I have stated, and I proceed to do so. The first question I have to decide is one of fact—namely, whether the conditions on the ticket do or not form part of the contract. On this I was referred by the defendants to the well-known case of *Watkins* v. *Rymill* (*sup.*), and I was invited to hold as a matter of law that the acceptance of the ticket with the conditions thereon was, of itself, sufficient to make the conditions part of the contract. That I do not think I am at liberty to do. The case of *Richardson* v. *Rowntree* (*sup.*), I think, clearly decides that the acceptance of the ticket does not of itself necessarily make all the conditions on the ticket a part of the contract; and that case expressly decides that the proper questions to be considered in such circumstances are those which were formulated by the Court of Appeal in *Parker* v. *South-Eastern Railway Company* (37 L. T. Rep. 540; 2 C. P. Div. 416). What those questions were I will mention in a moment. I was also referred on behalf of the plaintiff to *Richardson* v. *Rowntree* (*sup.*) as an indication of the way I ought to decide this question of fact. The defendants, on the other hand, referred me to *Acton* v. *Castle Mail Packets Company* (*sup.*) as an indication of the way I ought to decide the case — namely, in their favour. I do not think those cases—in the former there was a finding of the jury in favour of the plaintiff, and in the second there was a finding of Lord Russell, C.J. in favour of the defendants — help me to decide which way I must decide this question of fact. The one case stands as far on one side of this case as the other stands on the other. I have to look at the circumstances of this case. I find from the case of *Parker* v. *South-Eastern Railway Company* (*sup.*) the proper questions to be left to the jury—and in this case to myself as a jury—are first, did the plaintiff know that the ticket contained writing or printing? Secondly, Did the laintiff know that that writing or printing constituted or contained conditions of the contract of carriage? If she did, and did not choose to read them, she is bound by them as if she had read them. Thirdly, if she did not know that the ticket contained conditions of the contract of carriage, did the defendants take reasonable steps to give her notice of the conditions which appear upon the ticket? That third question was substituted by the Court of Appeal in the case to which I have referred for the question which had in fact been left to the jury, which was this: "Was the plaintiff, under the circumstances, under any obligation, in the exercise of reasonable and proper caution, to read or make himself aware of the condition?" That was held to be wrong, and that the right question was, whether the company did that which was reasonably sufficient to give the plaintiff notice of the conditions. In answering that question, I think the cases of *Richardson* v. *Rowntree* (*sup.*) and *Acton* v. *Castle Mail Packets Company* (*sup.*) show me that I have to consider the class of persons with whom the contract is made. In *Richardson* v. *Rowntree* (*sup.*) great stress was laid at the trial upon the fact that the passenger was an emigrant, and that emigrants as a class are, as mentioned by one of the learned lords, of little or no education. In *Acton* v. *Castle Mail Packets Company* (*sup.*) the passenger was a business man, and that is a fact upon which the Lord Chief Justice relied. In this case the plaintiff is neither a person of little or no education, nor is she a business man; and I have to consider the class of person with whom this contract was made, and whether what was done is sufficient in reason to give that class of person notice of the conditions. *Parker* v. *South-Eastern Railway Company* (*sup.*) shows that I am not to consider the idiosyncrasies of any particular passenger, because I notice that Mellish, L.J. says this (at p. 423): "The railway company, as it seems to me, cannot be entitled to make some assumptions respecting the person who deposits luggage with them; I think they are entitled to assume that he can read, and that he understands the English language, and that he pays such attention to what he is about as may be reasonably expected from a person in such a transaction as that of depositing luggage in a cloak-room. The railway company must, however, take mankind as they find them, and if what they do is sufficient to inform people in general that the ticket contains conditions, I think that a particular plaintiff ought not to be in a better position than other persons on account of his exceptional ignorance or stupidity or carelessness." I think I must conclude also from that judgment that I ought not to take into account any diminution of the means of information which is brought about by the plaintiff herself for her own convenience. Those are the principles I have to apply. [His Lordship here stated the facts and circumstances relating to the issue of the plaintiff's ticket as set out above.] What, then, is the position? In the first place, the class of persons with whom in this case the defendants were dealing are saloon passengers, who may be expected to be able to read and write and to be endowed with sufficient intelligence to understand ordinary sentences of the English language. It was suggested that, being a lady, the plaintiff

was perhaps not able to take in the meaning of these conditions as well as a man—perhaps a somewhat surprising argument or suggestion to be used at this time of day—and also that she was not in the habit of taking her own ticket. But I have seen the lady in the witness-box. She certainly is a person of education and intelligence, and is perfectly capable, if she does read the ticket and sees the printing in letters which are somewhere about ¼in. in height saying, "This contract is made subject to the following conditions and exceptions"—of understanding that that means what it says. What does the company do? What are the steps they ordinarily take? They ordinarily deliver this ticket which has upon it "Lisbon and Canary Islands steamers. . . . Cabin passenger's ticket"; then follows the name of the passenger, the name of the ship, and the sailing dates from Liverpool and return. Then in larger print than most of the ticket, though in smaller printing than the heading, the destination, &c., "This contract is made subject to the following conditions and exceptions." I have no reason to suppose that what the defendants intended to do in this particular case was other than their regular course of business—that is, send the ticket to the person who is going to travel some days before the vessel sails; and the conclusion to which I come is that, if they send a perfectly legible and clear document like this some time before the vessel sails, thus giving every opportunity to the passenger to examine it, they do take reasonable means to bring those conditions to the notice of the passenger. In this case the plaintiff asked that that should not be done, and asked that the ticket should be sent to meet her upon the steamer. No doubt she got somewhat excited in not finding her ticket there as she expected, but I do not think that the defendants can be said not to take reasonable means of giving notice of the conditions, because the ordinary way of giving notice is altered for the convenience of the particular passenger.

Applying to these facts the questions formulated in *Parker* v. *South-Eastern Railway Company* (*sup.*), there is no doubt that this ticket did contain conditions; there is no doubt that the plaintiff did see that the ticket had upon it writing or printing; she says that she did not see or know that the writing or printing contained conditions which were part of the contract of carriage. I accept her evidence upon that point; it may very well be that in the hurry she did not read the words which I have read, although it is difficult to understand how they could have escaped her eye. She says she did not read them, and I accept that. The question then is, Did the company take reasonable steps to bring the conditions to the plaintiff's notice? I think that in the circumstances they did. I therefore answer the question in this way: that as she knew there was writing on the ticket, that as they took sufficient and reasonable steps to bring the conditions to her notice, and as I do not think the fact that the short time the plaintiff had to read the ticket can be imputed to any default of the defendants, I think that these conditions form part of the contract. The next question is, Do the conditions protect the defendants against the felonious act of their servants? In order to see that, I have to apply the well-known principle that a man is not to excuse himself for the wrongful act of his own servants unless he does so in unambiguous language, and if the language is ambiguous it is to be construed against him. Recent decisions have shown us that to some judges of great learning and experience a clause may seem perfectly unambiguous, while to others of equal learning and experience it seems so ambiguous that it cannot be enforced. It is not, therefore, an easy question. The condition with which I have to deal begins thus: "The steamer, her owners and (or) charterers are not responsible for any loss, damage, injury, delay, detention (or maintenance or expense during same) of or to passengers or their baggage or effects, or for the non-continuance or non-completion of the voyage, by whatsoever cause or in whatever manner the matters aforesaid may be occasioned." If it stopped there, I do not think there could be much doubt that it did protect the defendants from everything, and I think that is clearly shown by *Ashenden* v. *London, Brighton, and South Coast Railway Company* (42 L. T. Rep. 586; 5 Ex. Div. 190). The words there were not the same; they were, "will in no case be liable"; but they can hardly be said to be higher than "by whatsoever cause or in whatever manner the matters aforesaid may be occasioned"; and the words were held by the court to be wide enough to cover wilful misconduct of the company's servants. I ought to say that that case arose under the Railway and Canal Traffic Act; and if the condition did protect the defendants from wilful misconduct, it would be unreasonable. What Kelly, C.B., said was this: "The question whether it is a reasonable agreement depends on the terms used. If they are absolute and unconditional to the effect that the company shall not be liable in any event, it is clear on the authority of *Peek* v. *North Staffordshire Railway Company* (8 L. T. Rep. 768) that the plaintiff is entitled to recover. The question, therefore, is whether the agreement when fairly construed is, in its terms, absolute and unconditional, or whether certain qualifications or exceptions such as that the company are to be liable only in case of gross negligence, or for the wilful misconduct or felony of their servants, are to be read as included in the agreement. If a few words had been added importing those qualifications, this would have been a lawful agreement. In the absence of those words, I think the agreement is clearly unreasonable, because it provides not only for the accident that occurred without negligence, but is absolute in its terms that, in no case, shall the company be liable." That case seems to be a clear authority that if the first words stood alone, the condition would cover felony or misconduct of the defendants' servants. But the condition goes on to set out a number of cases from which loss might arise. That enumeration cannot enlarge what has gone before, but may possibly diminish it. The question is whether it does. The condition goes on: "And whether arising from the act of God, King's enemies, restraint of princes, rulers or people, disturbances, perils of the seas, rivers or navigation, collision, fire, thieves (whether on board or not), accidents to or by machinery, boilers or steam, unseaworthiness of the steamer even existing at the time of sailing or from any act, neglect, or default whatsoever of the pilot, master, mariners, or other servants of the steamer, her owners and (or) charterers, or from

restriction of quarantine or from sanitary regulations or precautions which the ship's officers or local government authorities may deem necessary or the consequences thereof or otherwise howsoever; the passengers taking upon themselves all risk whatsoever of the passage to themselves, their baggage and effects, including risks of embarking and disembarking, and whether by boat or otherwise." The words which would apply to this case are "act, neglect, or default whatsoever of the pilot, master, mariners," &c., and on the face of them they seem to be quite unqualified. The condition does not say "any act, unless felonious," but simply "any act." It was suggested that it must mean an act in the navigation of the ship, but any fault in the navigation of the ship would seem to be covered by the words "neglect or default"; and looking at it *primâ facie* I should say that any the act means any act, especially as it follows that very comprehensive clause that they will not be responsible for any loss occurring "by whatsoever cause or in whatever manner the matters aforesaid may be occasioned and whether arising from the act of God," default or neglect of their servants or not.

It was also argued that these are general words and must be read *ejusdem generis* with what goes before. My first answer to that is that I do not think they are general words. I think Mr. Keogh properly pointed out that the general words came very much lower down —"or otherwise howsoever." I think the words in question, "act, neglect, or default," are in another category in the enumeration, and must be read with their own meaning; but if they are to be read *ejusdem generis* with what precedes, we find mention of "thieves (whether on board or not)"—an expression which has been decided not to apply to thieving by the owner's servants, and following that we find "or from any act, neglect, or default whatsoever" of the defendants' servants; and therefore there certainly is in the previous category something which is very like this. But I do not rely upon that, because I do not think they are general words. It was also argued that these words were limited by the later words of the clause: "The passengers taking upon themselves all risk whatsoever of the passage to themselves, their baggage and effects, including risks of embarking and disembarking, and whether by boat or otherwise." It was said that as that speaks of risks of passage it must mean risks incidental to the navigation or to the handling of the ship or the handling of the luggage, and would not include a loss of this description. I do not think that is so, even if the word "passage" is read by itself; it is not, however, to be read by itself, but as the concluding part of the whole of the condition which starts with a broad statement that the defendants will not be responsible for loss by whatsoever cause or in whatever manner it may be occasioned, and goes on to say that that shall apply even if the loss is occasioned by the act, neglect, or default of the master, &c., and winds up by saying that passengers take the whole risk of the passage upon themselves. Reading the whole of it together—although it is a difficult question—it seems to me perfectly clear and unambiguous that its intention was to exempt the defendants from any possible loss whatever or any liability, just as in *Ashenden* v. *London, Brighton, and South Coast Railway Company* (*sup.*) the railway company said they would not be liable in any case. In these circumstances, I think the condition protects the defendants from liability even if the loss was occasioned by the felonious act of their servants. There will be judgment for the defendants with costs.

Solicitors for the plaintiff, *W. Webb-Ware.*

Solicitors for the defendants, *Walker, Son,* and *Field,* agents for *Weightman, Pedder,* and *Co.,* Liverpool.

Judicial Committee of the Privy Council.

Oct. 26 *and* 27, 1909.

(Present: The Right Hons. Lords Macnaghten, Atkinson, Collins, and Gorell, with Nautical Assessors.)

China Navigation Company *v.* Asiatic Petroleum Company. (*a*)

ON APPEAL FROM THE SUPREME COURT FOR CHINA AND COREA.

Collision—Signal not answered—Duty to stop.

When two steamships were meeting in a narrow channel and one whistled to indicate that she was altering her course, and the other did not answer the signal, but appeared to be acting in accordance with the rule of the road, the former vessel was in the circumstances held to be justified in proceeding on her course cautiously at a moderate speed, and was not held partially to blame for a collision which occurred from the fault of the other vessel because she did not stop when she got no answer to her signal.

Judgment of the court below reversed.

Appeal from the judgment of His Britannic Majesty's Supreme Court for China and Corea at Shanghai.

The appellants were the China Navigation Company Limited, the owners of the steamship *Tientsin.* The first respondents were the Asiatic Petroleum Company Limited, the owners of a cargo of oil on board the lighter *Scot,* and the second respondents were the Taku Tug and Lighter Company Limited, the owners of the lighter *Scot* and the tug *Hsinho* which towed the *Scot.*

The action was brought by the Asiatic Petroleum Company Limited against the China Navigation Company Limited to recover damages for the loss of the said cargo caused by a collision between the lighter *Scot* and the *Tientsin* which occurred in the north reach of the river Haiho on the 15th March 1907. In this action the Taku Tug and Lighter Company Limited were added as plaintiffs by order dated the 5th Oct. 1908. The question before the Privy Council was whether the *Tientsin* was partly to blame for the collision in question as well as the tug *Hsinho,* as decided by the acting judge at Shanghai, or whether the *Tientsin* was entirely free from blame.

The Taku Tug and Lighter Company did not appeal from the learned judge's decision that

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

the tug *Hsinho* was partly to blame for the collision.

The collision regulations material to the case are:

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 lies on the starboard side of such vessel.

At. 29. Nothing in these rules shall exonerate any vessel or the owner, or master, or crew thereof, from the consequence 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.

On behalf of the appellants (the owners of the *Tientsin*) it was admitted or proved that shortly before 6.56 p.m. on the 15th March 1907, the weather being fine and clear, the wind north, and tide ebb of 1 to 1½ knots, the *Tientsin* was proceeding down the Haiho, round the bend, from New City Reach into North Reach under port helm. In these circumstances those on board her observed the two masthead lights and later the red light of the tug *Hsinho* and the red light of the lighter *Scot*, roughly about half a mile distant, down river, on the *Tientsin's* starboard side. The engines of the *Tientsin* were reduced to half speed, and one short blast was blown on her whistle to indicate that she was altering her course to starboard, *i.e.*, more into the *Tientsin's* own side of the river. The tug did not at once reply, but kept her red light open, and the *Tientsin* proceeded on until suddenly, and without any previous warning, first the *Scot* and then the tug opened their green lights (the latter giving two short blasts as she did so), whereupon the *Tientsin* gave another short blast and immediately reversed her engines full speed and gave three short blasts on her whistle. The tug at once altered her course again, showed her red light, and then towed the *Scot* across the bows of the *Tientsin*, with the result that the *Scot* was struck amidships on the port side, and had to be beached to avoid sinking in deep water.

The case made by the respondents was that the *Hsinho* and the *Scot* in tow were proceeding up river on their port side of the river, their wrong side, when at the village of Nan Yao those on board the tug first saw the *Tientsin's* masthead light over the land and afterwards saw the green light. The tug then blew her whistle two blasts in order to let the steamer know that the *Hsinho* was going up the west side, which was her wrong side, but the steamer gave no reply. The tug kept on, and after a minute blew her whistle again two blasts, when the steamer answered with one blast and turned to the west bank. The tug answered with one blast and went towards the east bank, but the *Tientsin* struck the *Scot* on her port side.

The action came on for trial before F. S. A. Bourne, acting judge of His Majesty's Supreme Court for China and Corea at Shanghai, assisted by an assessor, and judgment was reserved.

On the 10th Oct. 1908 the learned judge found the *Tientsin* and the tug both to blame, and gave judgment against the defendants (appellants) in favour of the Asiatic Petroleum Company Limited for half the amount of their damage.

The learned judge, in holding the tug to blame, found that she was wrong (*a*) in expecting the *Tientsin* to pass starboard to starboard as a matter of course, and (*b*) because she did not bring her intention to break art. 25 of the Regulations for Preventing Collisions at Sea and to pass on her wrong side to the notice of the *Tientsin* at the earliest possible moment; (*c*) in waiting passively until the *Tientsin* opened her green light without signalling. The learned judge, in holding the *Tientsin* also to blame, found that she neglected to comply with art. 29 of the Collision Regulations, because she did not stop her engines on the tug's failure to answer her one blast signal, and because the *Tientsin* did not use every effort to get clear over to the starboard side of the channel, even at the risk of "grounding on the shelving bank."

Butler Aspinall, K.C. and *A. D. Bateson* appeared for the appellants.

F. P. M. Schiller for the respondents.

No reply was called for.

At the conclusion of the argument for the respondents their Lordships' judgment was delivered by

LORD MACNAGHTEN.—This is an appeal from the Supreme Court for China and Corea at Shanghai in a collision case. The collision took place about 7 p.m. on the 15th March 1907 between the steamship *Tientsin* and the *Scot*, a lighter in tow of the tug *Hsinho* in the north reach of the river Haiho. The *Tientsin* was going down the river on anebb tide of one to one and a half knots. The weather was fine and clear. The wind north. The tug and tow were coming up. When rounding the bend between the New City reach and the north reach on a port helm, those on board the *Tientsin* observed the two mast-head lights, and shortly afterwards the red light, of the tug and the red light of the tow about half a mile off on the west or right hand side of the stream, heading at a slight angle towards the other side, which was the proper side for vessels coming up the river to take. As soon as the tug was observed the *Tientsin's* engines were put at half-speed, and when the red light of the lighter came into sight, the *Tientsin* blew one short blast on her whistle to indicate that she was altering her course to starboard. The tug did not give an answering signal, but she kept her red light open, when suddenly first the lighter and then the tug opened their green lights and the tug gave two short blasts. The *Tientsin* gave another short blast, reversed her engines full speed, and gave three short blasts on her whistle. The tug altered her course again, showing her red light and towing the lighter across the bows of the *Tientsin*. The *Tientsin* escaped the tug, but ran into the lighter, injuring her so severely that she had to be beached, and the cargo of oil which she was carrying was lost. In their Lordships' opinion the tug was solely to blame for this collision and the *Tientsin* was not in fault. The assessors concur in this opinion. The acting judge who tried the case found the tug to blame, but he also found the *Tientsin* to blame, and that on two grounds. In the first place he thought the *Tientsin* ought to have stopped altogether when she got no answering signal from the tug. Their Lordships do not concur in this view. Though no answer was given, the tug seemed to be acting in accordance with the rule of the road, and the *Tientsin* was quite justified in proceeding on her course—moving cautiously at half-speed as she

did. As long as the tug and tow showed their red lights and the vessels were port to port, there was no reason to apprehend danger. Then the learned judge thinks that the *Tientsin* ought to have made every effort to get clear over to the starboard side of the channel "even at the risk of grounding on the shelving bank." He relied apparently on an answer given by the second mate to the effect that "they might have gone further to starboard." The second mate, however, was not in charge of the vessel. It is not quite clear what was meant by this answer or what was the moment of time with reference to which the second mate was speaking. The point does not seem to have been made at the trial, and no question bearing upon it was put to the captain who was in charge of the vessel. It does not appear to their Lordships that the captain of the *Tientsin* failed in his duty in any respect, or that under the circumstances he could have done more to avoid collision than he did. Their Lordships will therefore humbly advise His Majesty that the appeal should be allowed, and the action dismissed with costs, including in such costs any costs of the reference directed by the order of the 10th Oct. 1908 (the costs up to the 5th Oct. 1908 to be paid by the respondent the Asiatic Petroleum Company, and the subsequent costs by both the respondents), and that any costs paid by the appellants should be refunded. The respondents will pay the costs of the appeal.

Solicitors for the appellants, *Waltons* and *Co.*

Solicitors for the respondents, *Indermaur* and *Brown.*

July 21, 22, *and Oct.* 28, 1909.

(Present: The Right Hons. the LORD CHANCELLOR (Loreburn), Lords ASHBOURNE, COLLINS, and GORELL, and Sir ARTHUR WILSON.)

ST. JOHN PILOT COMMISSIONERS *v.* CUMBERLAND RAILWAY AND COAL COMPANY. (*a*)

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Pilotage dues — Exemption — Ship "propelled wholly or in part by steam"—Barge towed by steam tug — Canadian Pilotage Act (Revised Statutes of Canada 1886, *c.* 80), *ss.* 58, 59.

"Ships propelled wholly or in part by steam" are steamships which have either no motive power but their steam engines or have steam-engine power and some sailing power.

By the Canadian Pilotage Act, s. 58 : *"Every ship which navigates within" certain pilotage districts, "shall pay pilotage dues, unless . . . she is exempted under the provisions of this Act from payment of such dues" By sect.* 59 : *"The following ships . . . shall be exempted from the compulsory payment of pilotage dues . . . ships propelled wholly or in part by steam."*

Held, that a barge rigged as a schooner, having masts with gaffs used as derricks for the discharge of cargo, and small sails used to steady her in a strong breeze, which could not be navigated as a sailing vessel in the ordinary way, but was intended to be, and was in fact always, towed from port to port by a tug, was a "ship" which "navigated" within the meaning of the Act, and was not "propelled wholly or in part by steam" so as to be exempt from the payment of pilotage dues when navigating within a pilotage district.

Judgment of the court below reversed.

The Grandee (8 *Exch. Rep. Canada* 54, 79) *disapproved.*

APPEAL from a judgment of the Supreme Court of Canada (Fitzpatrick, C.J., Davies, Idington, Maclennan, and Duff, JJ.) affirming a judgment of the Supreme Court of New Brunswick (Barker, Hanington, and McLeod, JJ., Tuck, C.J. dissenting), refusing to set aside a verdict for the respondents, the plaintiffs below, and to enter a verdict for the appellants, the defendants below, or to order a new trial.

The action was brought by the respondents against the appellants to recover pilotage dues paid by the respondents on vessels belonging to them when entering or leaving the harbour of St. John, and the court of first instance held that they were entitled to recover.

The facts, and the sections of the Act of Parliament on which the question turned, are fully set out in the judgment of their Lordships.

Newcombe, K.C. (of the Colonial Bar), and *A. D. Bateson* appeared for the appellants.

Maclean, K.C. (of the Colonial Bar), and *T. T. Paine* for the respondents.

In addition to *The Grandee* (*ubi sup.*) mentioned in the judgment the following cases were also referred to :

The Mac, 4 Asp. Mar. Law Cas. 507, 555 (1882) ; 46 L. T. Rep. 907 ; 7 P. Div. 126 ;

Union Steamship Company v. *Owners of the Aracan*, (1874, L. Rep. 6 P. C. 127 ;

Elmore v. *Hunter*, 3 Asp. Mar. Law Cas. 555 (1877) ; 38 L. T. Rep. 179 ; 3 C. P. Div. 116.

Bateson was heard in reply.

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

Oct. 28.—Their Lordships' judgment was delivered by

Lord GORELL.—The question for determination on this appeal is, whether certain vessels belonging to the respondents were, when entering and leaving the port of St. John, New Brunswick, liable to pilotage dues under the provisions of the Pilotage Act, Revised Statutes of Canada 1886, c. 80, ss. 58 and 59.

Those sections are as follows :

58. Every ship which navigates within either of the pilotage districts of Quebec, Montreal, Halifax, or St. John, or within any pilotage district within the limits of which the payment of pilotage dues is, for the time being, made compulsory by Order in Council under this Act, shall pay pilotage dues, unless either—(*a*) Such ship is on her inward voyage, and no licensed pilot offers his services as a pilot, or (*b*) she is exempted under the provisions of this Act from payment of such dues. (2) If such ship is on her outward voyage and the owner or master of such ship does not employ a pilot or give his ship into the charge of a pilot, such dues shall be paid, if in the pilotage district of Quebec, to the corporation of pilots for and below the harbour of Quebec, and if in any other pilotage district, to the pilotage authority of such district. 36 Vict. c. 54, s. 57, part.

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

59. The following ships, called in this Act exempted ships, shall be exempted from the compulsory payment of pilotage dues: (*a*) Ships belonging to Her Majesty; (*b*) ships wholly employed in Her Majesty's service, while so employed, the masters of which have been appointed by Her Majesty's Government, either in the United Kingdom or in Canada; (*c*) ships propelled wholly or in part by steam employed in trading from port to port in the same province, or between any one or more of the provinces of Quebec, New Brunswick, Nova Scotia, or Prince Edward Island and any other or others of them, or employed on voyages between any port or ports in the said provinces or any of them and the port of New York, or any port of the United States of America on the Atlantic, north of New York; except only in the ports of Halifax, Sydney pilotage district, Miramichi and Pictou — as respects each of which ports the pilotage authorities of the district may, from time to time, determine, with the approval of the Governor in Council, whether any, and which, if any, of the steamships so employed shall or shall not be wholly or partially, and, if partially, to what extent and under what circumstances, exempt from the compulsory payment of pilotage dues; (*d*) ships of not more than eighty tons registered tonnage; (*e*) any ship of which the master or any mate has a certificate granted under the provisions of this Act and then in force, authorising him to pilot such ship within the limits within which she is then navigating; (*f*) ships of such description and size, not exceeding two hundred and fifty tons, registered tonnage, as the pilotage authority of the district, with the approval of the Governor in Council, from time to time, determines to be exempt from the compulsory payment of pilotage in such district. Provided always, that this paragraph shall not apply to the River St. Lawrence, where all ships registered in Canada, if not more than two hundred and fifty tons registered tonnage, shall be exempt. 36 Vict., c. 54, s, 57, part; 38 Vict. c. 28, s. 1; 40 Vict. c. 20, s. 3.

By sect. 2 (*b*) of the Act the expression "ship" includes "every description of vessel used in navigation, not propelled by oars." In or about the year 1893 the respondents had built for them five vessels for the purpose of carrying coal sent from the respondents' mines at Spring Hill and shipped from Parrsboro, Nova Scotia, to the port of St. John and other ports along the east coast of Canada and the United States of America. The vessels were each of about 440 tons, and were described as "schooners" in the builders' statements and claims for drawback, and the certificates of registry in Nova Scotia certified that they had within themselves the power of independent navigation, though the facts show that this statement cannot be treated as being sufficiently explicit. They were constructed with two short masts, which were fitted as derricks, with gaffs for discharging cargo, and carried small, triangular sails and a jib. These sails were used to steady the vessels and assist them in strong breezes. The vessels could run before the wind, but could not be safely navigated as sailing vessels in the ordinary way, and were intended to be, and, in fact, were towed from port to port. Each had a captain and crew, and was fitted with steering gear and anchors. If they had been fully rigged they would have been navigable by sails as ordinary schooners. The barges or schooners, whichever they are called, were towed by a steam tug from Parrsboro to St. John, and also on the return voyage. In summer there might be two or three in a line, but in winter only one at a time appears to have been towed. The appellant commissioners are the pilotage authority for the pilotage district of St. John and entitled to collect the pilotage dues. The payment of these dues is made compulsory in the cases specified in the Act, but it is not compulsory upon an owner or master of a ship to employ, or give his ship into the charge of, a pilot, either on the ground of his being compelled to pay pilotage dues to any person or otherwise: (see sect. 57 of the Act). From 1893 to 1903 the respondents' said vessels were engaged in carrying coal to St. John in the way above referred to, and a dispute existed between the commissioners and the respondents as to whether the vessels were liable to pilotage dues. During this period it appears that the respondents, while refusing to take pilots on their vessels, were compelled to pay pilotage dues in order to obtain the clearance of the vessels, and, in fact, paid the dues under protest. The amount thus paid between the 24th April 1893 and the 4th May 1903 was 15,680.08 dollars, of which 7487.58 dollars were paid more than six years before the commencement of the present suit, and 8192.50 dollars between Sept. 1897 and May 1903—that is to say, within six years before the commencement of this suit. In consequence of a decision in the case of the ship *Grandee*, hereafter referred to, pilotage dues were not paid in respect of the said vessels after May 1903, but, if payable, the amount thereof in and from May 1903 to the time of the action was 735 dollars. In Sept. 1903 the respondents brought this suit against the commissioners to recover the pilotage dues paid as aforesaid. They sued on the common counts. The defendants pleaded "never indebted" and the Statute of Limitations, and also claimed the said sum of 735 dollars. The trial took place before McLeod, J., and on the 9th Oct. 1905 he found in favour of the respondents that the vessels were not liable to the pilotage dues, and he directed a verdict to be entered for the plaintiffs for the sum of 8192.50 dollars. He held that the rest of the plaintiffs' claim was barred by the Statute of Limitations, and he gave leave to the defendants to move to enter a verdict on their behalf for the 735 dollars. The ground of the decision was that, in the opinion of the learned judge, following the case of the ship *Grandee*, the vessels came within the exemption of sect. 59 (*c*) of the Act of 1886 as ships propelled by steam. The defendants moved the Supreme Court of New Brunswick to set aside the verdict and enter a verdict for the defendants, or for a new trial. The motion was heard before Tuck, C.J. and Barker, Hanington, and McLeod, JJ., and was on the 10th Feb. 1906 refused, the Chief Justice dissenting. He expressed himself as differing entirely from the conclusion that, where a ship is being towed, and has no steam propelling power within herself, she is propelled wholly or in part by steam, within the meaning of the Act. The other judges concurred with the judgment below. An appeal was then taken to the Supreme Court of Canada, and heard before Fitzpatrick, C.J., and Davies, Idington, Maclennan, and Duff, JJ. On the 26th Dec. 1906 the judgment of the court was given by Davies, J., dismissing the appeal on the ground that the vessels either were not vessels "which navigate" within sect. 58, as they had not practically the power of independent motion, or were "ships propelled by steam" within sect. 59. It is to be noticed that the view of the

court upon the first alternative was not that entertained in the court of New Brunswick. Before considering the language of the statute it may be desirable to refer to the case of the *Grandee*, decided in 1902 and reported in 8 Exch. Rep. Canada at p. 54, and on appeal at p. 79. The *Grandee* was a coal barge of about 1000 tons register, employed in carrying coal from Sydney, Nova Scotia, to Quebec. She had no motive power of her own, either by sails or steam, and was towed by a steam collier. She was held exempt from pilotage dues in the pilotage district of Quebec. There does not seem to be any substantial difference between that case and the present, for although in that case it seems to have been stated that the vessel had no motive power of her own, the vessels in the present case had, for practical purposes, no motive power of their own which would enable them to make their voyages in safety. The case was heard before Routhier, J., the local Admiralty judge for Quebec, who gave three reasons for his opinion: First, that a pilot was practically useless on such a vessel. This reason is to be found in some of the judgments in the present case, but it would, if correct, seem to apply equally to any vessel, though fully rigged, which was under the necessity of being towed into port. Second, that the tug (which is exempt) and tow are one vessel. This, however, cannot be correct, though for some purposes—*e.g.*, steering and sailing rules—they may to some extent be so regarded. Third, that the vessel was only an accessory or "chargement"—an object transported or dragged, as a carriage by a horse, and was not, properly speaking, a ship. This reason does not give effect to the term "ship" as used in the Act, and, indeed, the judgment is based on what may be termed practical reasons, and not upon sufficient consideration of the language of the Act. On appeal to the Exchequer Court of Canada, Burbidge, J. affirmed the decision on grounds which are substantially the same as those given by Davies, J. in the present case. It may be observed that the Statutes have been revised and re-enacted with some modifications in 1906. The statute of that year, Ch. 1, sect. 21, sub-sect. 4, provides that: "Parliament shall not, by re-enacting any Act or enactment, or by revising, consolidating, or amending the same, be deemed to have adopted the construction which has, by judicial decision or otherwise, been placed upon the language used in such Act, or upon similar language." The legislation on the subject of pilotage in Canada extends back for many years. The Pilotage Act of 1873 repealed a number of old statues in none of which, so far as their Lordships can trace, is there any enactment which would show any distinction between barges or schooners of the kind and size of those in question used for the purpose of sea-going voyages, and towed in or out of port, and any vessel of the ordinary sailing powers similarly towed. There is a provision in 12 Vict., Ch. 117, sect. 23, which in one case gives a lower rate of pilotage for vessels towed, for under it a Montreal pilot only had half rates when a vessel was towed by a steamer, but the General Act of 1873 does not appear to contain any similar provision. The Act of 1873 was revised in 1886, and some important changes were made by sect. 59 of the Revised Statute with regard to the exemptions which were specified in sect. 57 of the Act of 1873. There would seem to be no reason for placing different constructions upon the words "ships propelled wholly or in part by steam" used in these two sections. In the earlier it may be noticed that these words are used in relation to vessels proceeding on certain lengthy sea voyages upon which, in 1873, vessels without any motive power of their own would probably not be used. In the later section it may be further noticed that the word "steamships" is expressly used in the latter part of sub-sect. (*c*). The statutory provisions in question appear to have originated in times when vessels were either sailing vessels or steamships or river craft, and before barges of such a size as the respondents' vessels were used for sea-going purposes. Exemptions from pilotage of vessels of small size are to be found in the Acts. It would seem from the letter of the 19th Jan. 1903, from the Pilotage Authority of St. John to the Deputy Minister of Marine and Fisheries, Ottawa, that these large barges, or schooners, were a new development, and it is probable that the explanation may be thus found of the fact that no special provision in the Acts is to be found dealing with cases of towage of such vessels.

There is nothing in the evidence which would justify an assumption that the Legislature, in framing the Acts, had in view the relief of a class of large barges moved by towage alone from pilotage dues, and the question is whether the Statute uses language which does or does not do so. Before turning to the actual words of the statute it may be useful to refer to the other Shipping Acts of 1886, Nos. 72 to 80, in which "ship" is defined in a manner substantially the same as that above stated, and "steamship or steamer" is in cap. 73, sect. 1 (*d*), defined as including "any ship propelled wholly or in part by steam or other motive power than sails or oars." Steamboat is defined in cap. 78, sect. 2 (*a*), as including "any vessel used in navigation or afloat on navigable water, and propelled or movable wholly or in part by steam," and in cap. 79, sect. 1 (*c*), the expression "steamship or steamboat" includes "every vessel propelled wholly or in part by steam or by any machinery or power other than sails or oars." Sect. 2 of this Act also provides in arts. 4 and 6 as to the lights to be carried by vessels towing and being towed. In these definitions the word "propelled" is used with reference to the motive power possessed by the vessel, but the attention of the courts below does not appear to have been called to this. The first question is, whether the 58th section imposes the compulsion upon these barges unless they are exempted by sect. 59. It applies to "every ship which navigates within" certain districts, unless exempted under the provisions of the Act, or when there is no opportunity of obtaining a pilot. The word "ship" being defined to include every description of vessel used in navigation not propelled by oars, these barges are ships within the meaning of the section. Then comes the question whether they are ships which "navigate" within the district of St. John. The word "navigates" is, of course, used in the sense of "is navigated." From the context it appears that it is not used as descriptive of any particular kind of ship, or with any reference to her motive power, but is used in relation to something which a ship is caused to do; that is to say, so far as

affects the present case, to perform a voyage into or out of the port of St. John. There is nothing in the words of the section, when the definition of the word "ship" is considered, to indicate that at the time of moving in the pilotage waters a ship, to be under compulsion, must at the time possess independent practical power of moving herself. If that were so, it would seem to follow that any ordinary sailing vessel which was necessarily towed into port would not be within the section, and this can scarcely be the true meaning of the section. The argument that, because the barges are towed, they do not need a pilot, will not alter the express language of the section, and, moreover, it is reasonably clear that, although a pilot may not be so useful on large barges in tow of a tug as he would be if they were capable of making their own way into or out of port, yet the same argument would apply to any case of towage, even of a properly rigged sailing vessel, and yet, wherever pilotage is compulsory, the pilot is usually found on the tow where he can exercise such control of the navigation as is possible, and give such directions and assistance as may be required. The fact that the tug may have more vessels than one in tow does not alter this position. Their Lordships consider that the 58th section applied, and that the vessels in question were liable to the payment of pilotage dues unless exempted by the 59th section. That section exempts "the following ships," and then in sub-sections (*a*), (*b*), (*c*), (*d*), (*e*), and (*f*) it enumerates the ships exempted. It is important to notice again the use of the word "propelled" in the definition of the word "ship," for the second question turns mainly on the use of that word in sub-section (*c*).

In the definition clause the word "propelled" is obviously used in its ordinary sense, and does not embrace the idea of traction It is used as it was by Cicero—"*propellere navem remis*"—with reference to the motive power possessed by the vessel herself, and in this sense it is, in their Lordships' opinion, used in sub-sect. (*c*). "Ships propelled wholly or in part by steam" are steamships which have either no motive power but their steam engines, or have steam-engine power and some sailing power, and this is made plain by the actual use of the word "steamships" in the latter part of the said sub-section, where this word is used as equivalent to "ships propelled wholly or in part by steam."

This express reference to steamships has a very important bearing on the construction of the earlier words of the sub-section, but the arguments and judgments given in the record do not touch upon it. Provision is made in sub-sect. (*d*) for the exemption of ships of not more than 80 tons registered tonnage, and in sub-sect. (*f*) for the exemption in certain cases of ships not exceeding 250 tons registered tonnage. These provisions meet the case of ordinary barges within the limits of tonnage mentioned, but do not assist the respondents owing to the size of their barges. If the masters or mates of the barges had the necessary pilotage certificates, the barges would be exempt under the provision in sub-sect. (*e*). The statutes were again revised in 1906, and the 58th and 59th sections of the Pilotage Act (Revised Statutes of Canada, 1886, c. 80) were re-enacted in the Canada Shipping Act 1906, c. 113, ss. 475 and 477, with some alterations which, however, do not seem to make any alteration with regard to the liability or exemption of such vessels as those in question. If it were material to consider this Act, the language used in the definition clause and other clauses would support the views now being expressed. Their Lordships, after giving very full consideration to the case, have come to the conclusion that they are compelled to differ from the decisions below, which, as they at present stand, have been reached by placing a construction upon the Act which is founded on practical considerations (according to which it might be thought reasonable so to construe the Act that, having regard to the peculiar circumstances attending their navigation, the barges in question should be exempted from pilotage) rather than upon a natural construction of the words used, and for the reasons given above they think that the construction which has been adopted is not in accordance with the proper and ordinary meaning of the language used in the statute. If it be thought right that these large sea-going barges should be exempted from pilotage dues, the matter will have to be dealt with by the Legislature. Their Lordships will therefore humbly advise His Majesty to order that the verdict entered for the respondents and the judgments in the courts below be set aside, and the verdict and judgment be entered for the appellants for 735 dollars with costs in the said courts, to be paid by the respondents to the appellants. The respondents must pay the costs of the appeal.

Solicitors for the appellants, *Charles Russell* and *Co.*

Solicitors for the respondents, *Linklater, Addison,* and *Brown.*

July 13 *and Oct.* 29, 1909.

(Present: The Right Hons. Lords MACNAGHTEN, COLLINS, and GORELL, and Sir ARTHUR WILSON, with Nautical Assessors.)

RICHELIEU AND ONTARIO NAVIGATION COMPANY *v.* TAYLOR. (*a*)

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Collision—Canadian Canal Regulations, sect. 19, *sub-sect.* (*d*)—*Ships entering lock.*

The Canadian Canal Regulations provide by sect. 19, *sub-sect.* (*d*): "*When several boats or vessels are lying by or are waiting to enter any lock or canal, they shall lie in single tier, and at a distance of not less than* 300*ft. from such lock or entrance, . . . and each boat or vessel for the purpose of passing through shall advance in the order in which it may be lying in such tier, except in the case of vessels of the first class to which priority of passage is granted.*"

A steamship was about to enter a lock on a canal when a steamship of the first class came up from behind and claimed a right to priority of passage. The "first vessel" went astern to make room for the second to pass into the lock first, and lay up by the wing wall of the lock. Afterwards a collision occurred between the two vessels owing to the fault of the second.

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

Held, that the first vessel was not obliged under the regulations to go back to a distance of 300ft. from the entrance to the lock, and was not to blame for not doing so.

Judgment of the court below affirmed.

APPEAL from a judgment of the Supreme Court of Canada.

The action was brought by the respondent, the owner of the steamship *Havana*, to recover damages for a collision which took place between that vessel and the steamship *Prescott*, which belonged to the appellants, under circumstances which are set out fully in the judgment of their Lordships.

The judge of the Admiralty Court for the district of Quebec held that the *Prescott* was solely to blame for the collision.

On appeal to the Supreme Court of Canada, Davies, Idington, and Duff, JJ. concurred in the judgment of the court below, but Fitzpatrick, C.J., Girouard, and Maclennan, JJ. were of opinion that the *Havana* was also to blame. The judgment of the judge at the trial was therefore affirmed, and the owners of the *Prescott* appealed.

Angers, K.C. (of the Colonial Bar) and *Geoffrey Lawrence* appeared for the appellants.

Butler Aspinall, K.C., *Holden* (of the Colonia Bar), and *C. Robertson Dunlop* for the respon dents.

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

Oct. 29.—Their Lordships' judgment was delivered by

Lord MACNAGHTEN.—This is an appeal from the Supreme Court of Canada. The action which has given rise to the appeal was brought by the owner of the steamship *Havana*, a lake freight steamboat, or "coarse freighter," as such boats are called in the Upper Lakes, to recover damages for injuries sustained in a collision with a passenger steamer called the *Prescott*. The action was tried before Dunlop, J., deputy local judge for the Admiralty District of Quebec, assisted by a nautical assessor. The trial judge, concurring with the assessor, found the *Prescott* solely to blame, and gave judgment on all points in favour of the *Havana*. The collision occurred at the entrance of the Lachine Canal, in the harbour of Montreal, on the 2nd July 1907, about 7 p.m., while it was yet daylight. The *Havana*, bound from Quebec to Erie with a cargo of pulp wood, was just about to enter the canal. Her bow had reached the north wing wall of the entrance to the south lock, and she had landed two of her men on the wall for the purpose of making fast her lines, when the acting lockmaster ordered her to keep back and let the *Prescott* pass in first. The *Prescott* was coming up immediately behind the *Havana*, but her approach had not been noticed by those on board the *Havana*. She was entitled to priority of passage, ranking as a vessel of the "first class," under the definition contained in the "Canal Regulations of the 1st May 1895" made by the Governor-General in Council. In obedience to the order of the lockmaster, the *Havana* reversed her engines and was going astern. The *Prescott*, without waiting for the *Havana* to get clear out of the way, "crushed past," as some of the witnesses expressed it, between the pier and the *Havana*, scraping hard against the fenders on the side of the pier and jamming the *Havana* against a lumber barge lying up against the south wing wall. She entered the lock at great speed. Some of the witnesses—lockmen who had been employed at the lock for ten years or so—deposed to the effect that they had never before seen a vessel going in so fast. And then, by some accident, owing to defects in equipment and to unskilful management, her speed was actually increased. She went on without stopping and crashed through the upper gates, bringing down the contents of the basin above. The rush of water swept her out of the lock and dashed her against the *Havana*, which had begun to move across to her former position as soon as the *Prescott* was clear of the lower gates. On the appeal to the Supreme Court, the learned judges were all of opinion that the *Prescott* was in fault. On that point they did not call upon the counsel for the *Havana*. But they were divided equally—three to three—on the question whether the *Havana* was also to blame, and so the judgment of the trial judge was affirmed, and affirmed with costs. The leading judgment in support of the decision of the trial judge was delivered by Davies, J., with whom Idington and Duff, JJ. agreed. There are no notes of the opinions of the learned judges who took the opposite view (Fitzpatrick, C.J., Girouard and Maclennan, JJ.). The judgment of Davies, J. is clear and concise, and their Lordships agree with it entirely. On the appeal before this board it was, of course, hopeless for the learned counsel for the appellants to contend that the *Prescott* was not in fault. Their argument was that under the Canal Regulations it was the duty of the *Havana*, when passed by the *Prescott*, to move to some point not less than 300ft. from the entrance to the lock. They said, what was very true, that if the *Havana* had not been there in the way, she would not have been involved in the catastrophe. The regulation on which they relied is sub-sect. (*d*) of sect. 19. It is in these words:

> When several boats or vessels are lying by or are waiting to enter any dock or canal, they shall lie in single tier and at a distance of not less than three hundred feet from such lock or entrance, except where local conditions may otherwise require, and each boat or vessel for the purpose of passing through shall advance in the order in which it may be lying in such tier, except in the case of vessels of the first class to which priority of passage is granted as above.

Assuming that under the circumstances the appellants could shelter themselves under such a defence or counter-charge, the answer to their contention is very simple, as Davies, J. points out. In the first place, the conditions under which the regulation comes into operation were not present on this occasion. There were not several boats or vessels lying by or waiting to enter the lock. The lumber barge, which might have claimed a right to enter before the *Havana*, had waived her turn, and was not going forward at the time. The only vessel then about to enter the lock was the *Havana*. In the next place, the local conditions do not require that vessels waiting to enter should lie by at the distance prescribed so long as there is accommodation at the wing walls. There are snubbing posts along both walls, and it was proved that it was the recognised practice for vessels waiting to enter the lock to lie up there. The south wall was occupied by barges, but there was room against the north

wall, and that was the proper place for the *Havana* to wait for her turn. The regulation in question was intended to preserve order among vessels competing for entrance. It was not designed to secure space and room for the erratic and dangerous movements of a vessel over which those in charge lose all control. The conduct of the *Havana* seems to have been proper in every respect, and such is the opinion of the nautical assessors. Their Lordships will therefore humbly advise His Majesty that the appeal must be dismissed. The appellants will pay the costs of the appeal.

Solicitors for the appellants, *Capel Cure* and *Ball.*

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

Supreme Court of Judicature.

COURT OF APPEAL.

July 21, 22, *and* 30, 1909.

(Before VAUGHAN WILLIAMS, MOULTON and BUCKLEY, L.JJ.)

RED "R" STEAMSHIP COMPANY LIMITED *v.* ALLATINI BROTHERS AND OTHERS. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Bill of lading—Charter-party—Freight—Dead freight—Lien—Construction of bill of lading and charter-party.

Oats and barley were shipped under bills of lading which provided: "To be delivered unto order, he or they paying freight for the said goods and performing all other conditions and exceptions as per charter-party . . . at the rate of freight as per charter-party per ton of 2240lb. gross weight delivered in full."

The charter-party provided that the vessel should load a full and complete cargo of wheat, maize, linseed, or rapeseed, and contained these provisions: (6) *Freight* 12*s.* 6*d. per ton;* (13) *sixpence per ton less if ordered to a direct port;* (14) *for linseed or rapeseed the rate to be* 7 *per cent. per ton more than for wheat or maize;* (15) *all per ton of* 2240*lb. English gross weight delivered;* (16) *charterers have the option of shipping other lawful merchandise, in which case freight to be paid on steamer's dead weight capacity for wheat or maize in bags at the rates above agreed on for heavy grain, but steamer not to earn more freight than she would if loaded with a full cargo of wheat or maize in bags;* (31) *the master to sign bills of lading at any rate of freight that the charterers may require, but any difference in amount between the bill of lading freight and the total gross chartered freight as above to be settled at port of loading before the steamer sails. Vessel to have a lien on cargo for all such bill of lading freight, dead freight, demurrage, and all other charges."*

Only oats and barley were loaded, and, owing to the inability of the charterers to provide cargo, the vessel sailed for a direct port only about half loaded.

Held (affirming the judgment of Bray, J.), that the freight payable by the holders of the bills of lading was at the rate of 12*s. per ton gross weight delivered, and that no dead freight was payable by them.*

APPEAL of the plaintiffs from the judgment of Bray, J. at the trial of the action as a commercial cause without a jury.

The plaintiffs, the owners of the steamship *Ryall*, brought this action claiming that they were entitled to three sums of money, amounting together to 1729*l.*, which the defendants had respectively deposited, under sects. 494-496 of the Merchant Shipping Act 1894, with the Surrey Commercial Dock Company to release their goods from the lien which the plaintiffs claimed for balance of freight and for dead freight. The defendants were the holders of the bills of lading.

The steamship *Ryall* had been chartered from the plaintiffs by L. Willenz and Co., by a charter-party dated the 16th May 1907, to carry "a full and complete cargo of wheat and (or) maize and (or) linseed and (or) rapeseed in bags and (or) bulk" from Buenos Ayres.

The material clauses of the charter-party, which was the "uniform River Plate charter-party, 1904, homewards, steam," were as follows:

Clause 6. Freight twelve shillings and sixpence sterling (12*s.* 6*d.*) per ton.

Clause 13. Sixpence per ton less if ordered to a direct port of discharge within the range of this charter-party, said port of discharge to be declared on signing final bill of lading.

Clause 14. For linseed and (or) rapeseed the rate of freight shall be 7 per cent. per ton more than the rate for wheat and (or) maize.

Clause 15. All per ton of 2240lb. English gross weight delivered.

The above clauses were all under the marginal heading of "Freight."

Clause 16. Charterers have the option of shipping other lawful merchandise, Quebracho wood and sugar excluded, in which case freight to be paid on steamer's dead weight capacity for wheat or maize in bags on this voyage at the rates above agreed on for heavy grain; but steamer not to earn more freight than she would if loaded with a full cargo of wheat and (or) maize in bags. All extra expenses in loading and discharging such merchandise over heavy grain to be paid by charterers.

Clause 16 was under the marginal heading of "Other Cargo."

Clause 31. 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; if in steamer's favour to be paid in cash on signing bills of lading; if in charterers' favour by usual master's bill payable five days after arrival at port of discharge, or upon collection of freight (whichever occurs first), and such bill is hereby made by owners a charge on bill of lading freight and the said freight is hereby hypothecated as security for the said bill. 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 all such bill of lading freight, dead freight, demurrage, and all other charges whatsoever.

Clause 31 was under the marginal heading of "Bills of Lading."

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

Owing to the inability of the charterers to provide cargo, the vessel sailed only about half-loaded; and she sailed for a direct port.

The cargo, which consisted of oats and barley in bulk, was shipped under bills of lading which were in the following terms:

> Shipped . . . being marked and numbered as in the margin . . . to be delivered unto order, he or they paying freight for the said goods and performing all other conditions and exceptions as per charter-party dated at Buenos Ayres the 16th May 1907 at the rate of freight as per charter-party per ton of 2240lb. gross weight delivered in full. . . . Sixpence less if ordered to a direct port on signing last bill of lading.

In some of the bills of lading these last words were struck out.

On arrival of the vessel at London, the defendants, who were indorsees and holders of the bills of lading and receivers of the cargo, admitted and paid to the plaintiffs freight at 12*s.* per ton; but the plaintiffs claimed that a much larger sum was due for balance of freight or for dead freight, and claimed to have a lien upon the cargo therefor. The defendants denied that they were liable for any part of the amount claimed.

In order to release the cargo the defendants deposited three several sums amounting to 1729*l.*; and the plaintiffs thereupon brought this action.

The learned judge gave judgment in favour of the defendants: (11 Asp. Mar. Law Cas. 192 (1909); 100 L. T. Rep. 268).

The plaintiffs appealed.

Bailhache, K.C. and *A. Adair Roche* for the appellants.

Scrutton, K.C. and *D. C. Leck* for the respondents.

Cur. adv. vult.

July 30.—The following judgments were read:—

Vaughan Williams, L.J.—This is not a satisfactory case. The *primâ facie* interpretation of the bill of lading and charter-party would, I think, suggest to anyone that the bill of lading was to impose upon the goods, the subject of the bill of lading, freight and the performance of all other conditions and exceptions as per charter-party at the rate of freight as per charter-party per ton of 2240lb. gross weight delivered in full, and would also suggest that if the goods were other than wheat and (or) maize the freight would be governed by clause 16 of the charter-party. The result of the judgment of Bray, J., which is now on appeal before us, is that the rate of freight as per charter-party in this case is 12s. per ton of 2240lb. gross weight delivered. Bray, J. says: "My reason for coming to that conclusion is that this is the only rate of freight mentioned in the charter-party." This conclusion seems to me to fail to give any effect at all to clause 16. Mr. Hamilton, when he argued before Bray, J., urged that clauses 6, 13, and 15, the clauses by which Bray, J. arrived at the 12*s.* per ton of 2240lb. gross weight delivered, did not apply to oats or barley, but only to wheat, maize, linseed, or rapeseed. To this the learned judge replies: "That is true, because the cargo provided for is only wheat, maize, linseed, or rapeseed; but clause 6 is general in its terms: 'Freight, 12*s.* 6*d.* sterling per ton.' The words of the bill of lading are equally general, 'rate of freight as per charter-party per ton,' &c., without saying for what cargo. In other words, the bill of lading points to a general rate of freight, and in the charter-party you also find a general rate of freight" I cannot agree with the construction put by the learned judge on clause 6. I think it is not general, and that the freight only applies to wheat, maize, linseed, and rapeseed, and clauses 13 and 15 are in the same way limited to thos cargoes. Now, the words of the bill of lading are: "One hundred and fifty thousand kilos oats in bulk to be delivered in like order and condition at the port of discharge unto order, he or they paying freight for the said goods and performing all other conditions and exceptions as per charter-party dated at Buenos Ayres the 16th day of May 1907 at the rate of freight as per charter-party per ton of 2240lb. gross weight delivered in full." What do these words mean? I think that these words were intended to incorporate clause 16. The words are: "He or they paying freight for the said goods and performing all other conditions and exceptions as per charter-party at the rate of freight as per charter-party per ton of 2240lb. gross weight delivered in full." If it were not for the words "at the rate of freight as per charter-party per ton of 2240lb. gross weight delivered in full," I do not think there would be any difficulty in inferring that the bill of lading meant to incorporate clause 16 of the charter. It is the words "at the rate of freight as per charter-party per ton of 2240lb. gross weight delivered in full" which cause the difficulty. It is said that these words refer to clauses 6, 13, and 15 of the charter-party, but in my opinion these clauses are not general and apply only to wheat, maize, linseed, and rapeseed, and not to oats. This seems true. What Bray, J. seems to have done is to have come to the conclusion that the wheat and maize rate of freight —viz., 12*s.*—must be the rate of freight for oats referred to in the bill of lading, because he cannot find any other rate of freight in the charter-party. This may be the right construction, but one must still, in my opinion, see if any and what operation sect. 16 of the charter-party may have on this rate of freight of 12*s.* Clause 16, which is a clause which comes under the marginal head "Other Cargo" and is outside the marginal head "Freight," which runs from 6 to 15 inclusive, is as follows: [His Lordship read clause 16, and continued:] It seems to me that the "other merchandise," in this case oats, is to be carried at "the rates above agreed on for heavy grain"—*i.e.*, 12*s.*, subject to increase or reduction as mentioned in the wheat and maize clauses 11 and 13, and, in accordance with clause 15, all—cargoes of wheat and (or) maize and (or) linseed and (or) rapeseed—per ton of 2240lb. English gross weight delivered. The governing measure in clause 16 of the charter-party, and it seems to me also of the bill of lading, is per ton of 2240lb. gross weight delivered. Bearing these propositions in mind, how is one to control or modify this rate of 12*s.* per ton by the words of clause 16 of the charter-party? Bray, J., as I have already pointed out, deals with the bill of lading just as if clause 16 was in no way incorporated in it, except perhaps that it is the words "at the rates above agreed on for heavy grain" which introduce the 12*s.* 6*d.* rate for wheat and (or) maize into the bill of lading under the words "at the rate of freight as per charter-party per

ton of 2240lb. gross freight delivered in full." Bray, J. reduces the 12*s.* 6*d.* to 12*s.* by application of clause 13 on the ground that the ship was in fact ordered to a direct port of discharge. I think it is plain that clause 16 was, as a whole, intended to control the rate of freight for "other merchandise"—*i.e.*, the 12*s.* rate prescribed for heavy grain.

Now, what are these provisions of clause 16? I will distinguish them by letters. (*a*) Freight to be paid on steamer's dead weight capacity for wheat or maize in bags on this voyage at the rates above agreed on for heavy grain. (*b*) But steamer not to earn more freight than she would if loaded with a full cargo of wheat and (or) maize in bags. I do not think that in par. (*a*) the words "freight to be paid on steamer's dead weight capacity for wheat or maize in bags" mean that the oats are to be carried for a lump sum freight; this would be quite inconsistent, I think, with a freight at per ton of 2240lb. gross weight delivered in full. I think that the words mean that the measure of the freight is to be arrived at in this way: First, you are to ascertain the dead weight capacity of the ship when loaded with wheat or maize in bags. The expression "dead weight capacity" is an expression which is generally used with reference to the description of the cargo to be carried, but in the present case, although the cargo was oats, the freight according to clause 16 is to be paid on steamer's dead weight capacity for wheat or maize in bags at the rate agreed on for heavy grain. Capacity, it will be observed, is dealt with by clause 30: "Owners undertake that the steamer shall not load more than 7250 tons and not less than 5970 tons English weight of wheat or maize." This seems to dispose alike of questions of cubic capacity and buoyancy. The capacity of the ship to carry wheat in bags is to be a material factor in a case in which the rates agreed on are rates per ton. I agree that it is possible to have a lump sum freight calculated at so much a ton on the dead weight capacity for wheat or maize in bags. There is, in such a case, no need to have any contract to load a full cargo, because it would make no difference to the shipowner whether the ship carried a full cargo or not. Such a lump sum freight is quite inconsistent with freight at so much per ton delivered. I think that clause 16 means freight at per ton delivered. I think freight to be paid on steamer's dead weight capacity for wheat in bags at the rates above agreed on means at 12*s.* 6*d.* per ton delivered. But is this freight at 12*s.* 6*d.* per ton delivered not to be in any way affected by the words "freight to be paid on steamer's dead weight capacity for wheat?" Can it mean cargo other than wheat must pay at 12*s.* per ton for cargo occupying a space in the ship which could carry a ton of wheat? Suppose a a cargo of 100 tons of oats occupies a space in the ship which would carry 130 tons of wheat. Can these words be read to mean that the 100 tons of oats measured by steamer's dead weight capacity for wheat must be treated as 130 tons and not as 100 tons? Suppose 80 tons of steel blooms occupied half the space that 80 tons of wheat would occupy in one ship. Can these words mean that the 80 tons of steel are only to be charged as 40 tons and not as 80 tons? The calculation based on cubic capacity may be very difficult, but I shrink from saying that, if one can evolve from the words of clause 16 a rate of freight as per charty-party per ton of 2240lb. gross weight delivered in full, one is to refuse to recognise this rate of freight, varying with the cargo, as the rate of freight per ton of 2240lb. gross weight delivered in full, if so to do would be to ignore and give no effect to the words "freight to be paid on steamer's dead weight capacity for wheat." I think, as I have already said, that one cannot construe clause 16 of the charter-party as constituting a lump sum freight. I agree that there is no lien for dead freight, if any; for under clause 31 the difference in amount between bill of lading freight, if charterers have required the master to sign bills of lading at a rate below the total gross chartered freight as above, shall be settled at port of loading before steamer sails, and, if the shipowners are right here, that is the present case. As to dead freight, I think that this part of clause 31 does not apply as between the shipowner and the indorsee of the bill of lading. On the whole, I think that a rate of freight as per charter-party per ton of 2240lb. gross weight delivered can be satisfied by the freight mentioned in clause 16. I reject the lump sum freight construction, and I think that, if the rate of freight mentioned in the bill of lading is to be found in clause 16 of the charter-party, one must, in ascertaining what the rate of freight is, take into consideration the words "in which case freight to be paid on steamer's dead weight capacity for wheat or maize in bags on this voyage at the rates above agreed upon for heavy grain." I feel the difficulty of the construction of these words, and that there is much to be said against such construction, but I cannot think that these difficulties justify the court in giving no effect whatsoever to the words. Of course, if one adopts the lump sum freight construction, this difficulty does not arise, but I hesitate to adopt that construction. My brethren have adopted this construction, and I have thought it my duty to set forth the difficulties which I have in adopting it.

Moulton, L.J.—In this case the court has to determine the rights of the indorsee of a bill of lading made out in the form and under the circumstances detailed in the judgment just delivered by the president of the court. These rights must depend primarily on the form of the bill of lading, inasmuch as between the indorsee and the shipowner that document is conclusive evidence of the contract of shipment. The question in issue relates to the rights of lien retained under this contract by the master, as the representative of the shipowner, over the goods shipped under the bill of lading. The relevant words in the bill of lading for this purpose are as follows: "He or they [meaning the indorsee] paying freight for the said goods and performing all other conditions and exceptions as per charter party dated at Buenos Ayres the 16th day of May 1907 at the rate of freight as per charter-party per ton of 2240lb. gross weight delivered in full. . . . Sixpence less if ordered to a direct port on signing last bill of lading." I see no difficulty in giving to these words their natural construction, although the order is somewhat clumsy and awkward. There can be no doubt that the words "at the rate of freight as per charter-

party per ton of 2240lb. gross weight delivered in full" have reference to the preceding words, "He or they paying freight for the said goods," and must be read with them. The grammatical construction of the sentence permits no other course. The meaning is therefore the same as it would be if the words "and performing all other conditions and exceptions as per charter-party," &c., were put at the end of the sentence or treated as if in a parenthesis. But such treatment of the words in question is not necessary, as the meaning of the sentence is to my mind clear as the words stand. We have therefore to look to the charter-party to ascertain (1) what is the rate of freight per ton there appearing; and (2) whether there are any and what conditions and exceptions therein which affect the shipowners' lien for freight. Turning, then, to the charter-party, it becomes evident that, like so many mercantile documents, it is ill-drawn and difficult to construe. It is a charter-party for a single voyage from Buenos Ayres with a "full and complete cargo of wheat and (or) maize and (or) linseed and (or) rapeseed in bags and (or) in bulk." By clauses 6 and 15 it fixes the freight at 12*s.* 6*d.* sterling per ton of 2240lb. delivered, but this is by clause 13 reduced by 6*d.* per ton if the ship is ordered to a direct port of discharge as was the case here. I agree with the learned judge that this reduction takes effect in the present case whatever be our view of the rights of the parties in other respects. Indeed, the contrary contention was hardly, if at all, pressed upon us on the part of the appellants. I shall therefore make no further reference to the point, but shall under the circumstances of this case take the effect of clause 13 to be that it alters the 12*s.* 6*d.* into 12*s.* We now come to the first difficulty that presents itself. By clause 14 it is provided that for linseed and (or) rapeseed the rate of freight shall be 7 per cent. more than the rate for wheat and (or) maize. Now, as I have said, the cargo contemplated is wheat and (or) maize and (or) linseed and (or) rapeseed, and the rate of freight to a direct port is 12*s.* per ton. One would naturally have thought that this rate, being stated without qualification, would apply to all these articles, but clause 14 shows that this cannot be so—linseed and rapeseed have to pay 7 per cent. more than wheat or maize. As was pointed out in the argument, this leaves it ambiguous whether it is linseed and rapeseed which must pay 12*s.* and wheat and maize a smaller freight, or whether wheat and maize are to pay 12*s.* and linseed and rapeseed 7 per cent. more than this. This constitutes, no doubt, an ambiguity, and there is some ground for contending that it is theoretically insoluble, but practically there cannot, I think, be much doubt which of these two interpretations we ought to accept. The charter-party is a mercantile document drawn up by men of business. The operation of taking a figure and adding to it a certain percentage is one which has to be constantly performed in business, and is familiar to business minds. The inverse problem of determining what is that figure which when increased by a certain percentage equals a given figure is wholly unfamiliar to business people, and rarely, if ever, performed by them. Indeed, I think that no small proportion of business men would be puzzled to arrive at the figure which when increased by 7 per cent. gives 12*s.* I should therefore not consider that it was pointed to in a commercial document like this, unless the language clearly indicated it. I am therefore of opinion that the normal freight of 12*s.* relates to the wheat and maize, and that the freight for linseed and rapeseed is obtained by adding 7 per cent. thereto. The charter-party therefore contains a stated freight of 12*s.*, which applies to wheat and maize, and a derivative rate of freight, applicable only to linseed and rapeseed, which is obtained by adding 7 per cent. thereto. We now come to clause 16, on which the discussion has chiefly turned. It reads as follows: [His Lordship read the clause, and continued:] The main object and effect of this clause appears to me to be clear, though there may well be difference of opinion as to the meaning of certain terms in it which, as I shall presently explain, do not affect the matter we have to decide. We have seen that the charter-party primarily contemplates a cargo based on wheat and (or) maize and (or) linseed and (or) rapeseed. But clause 16 gives to the charterer the option of shipping other merchandise—*i.e.*, of turning the ship into a general ship, with no restriction on the kind of cargo it may carry, except that it must not contain Quebracho wood or sugar. But if the charterer avails himself of this privilege, the terms of an affreightment are wholly changed. The freight to be paid to the shipowner is no longer so much per ton, but it is a lump sum calculated on the facts of the vessel, and not on the facts of the cargo which she may ultimately be required to carry. It is the same whether much or little cargo is carried and whatever nature it may be. This being so, it is to my mind wholly unnecessary for us to construe the words which fix what that lump sum is to be. The calculation of the lump sum is, no doubt, an important matter as between the shipowner and the charterer, but it cannot affect the rights or liabilities of the indorsee of the bill of lading, because, as the chartering is now for a lump sum and not at a rate per ton, it cannot help us to determine what freight the indorsee must pay on the particular goods to which the bill of lading refers. In other words, it furnishes us with nothing that can be called "the rate of freight as per charter-party per ton of 2240lb. gross weight delivered in full." Under these circumstances it appears to me that we must construe the above words as referring to the sum of 12*s.* per ton, which is by clause 6 and its marginal note the rate of freight per ton in the charter-party. They cannot refer to the larger of the two freights to be found in the charter-party, because that is specifically limited to rapeseed and linseed. The 12*s.*, on the other hand, is expressed generally as being the rate of freight, and though, if we examine carefully the effect of the provisions of the charter-party, it is found to apply to two articles only—namely, wheat and maize—it is treated in that document as the rate of freight under the charter-party. I am convinced that it is this rate which a business man would fix upon if asked what was the rate of freight under the charter-party, and the papers put before us show that this was the view of the charterer and the indorsee of the bill of lading in this case. I am of opinion, as I have said, that this view is the correct one. If I had any doubt as to its correctness, which I have not, it would be

removed by the consideration of the insurmountable difficulties in the way of taking any other view, as is evidenced by the alternatives suggested by counsel for the appellants.

The first alternative is as follows: He contends that you must take the measurement of each part of the cargo and find what would be the weight of wheat in bags occupying the same space. Having totalled this up for the various kinds of merchandise which form the cargo you must divide the lump sum freight by the total of these hypothetical wheat tons. The quotient thus obtained, he contends, is the freight as per charter-party per ton of wheat. To obtain the corresponding figure for other kinds of cargo you must vary that freight in proportion to the measurement of a ton of such merchandise as compared with a ton of wheat. He claims that these are the figures to which the bill of lading refers when it speaks of "the rate of freight as per charter-party per ton." I in vain asked counsel for the appellants what words in the charter-party authorised this prodigious calculation or even any one step in it. He naturally could point to no such words, because there is not the slightest warrant for it to be found in the language of the charter-party. It contradicts the specified freights stated in the clause for wheat, maize, linseed, or rapeseed. I think that the suggestion took its origin in the fact that in a previous case on a similar charter-party, but under a bill of lading differing materially from that which we have in the present case, the same learned judge adopted such a method of adjusting the rights of the parties. We have not to decide whether the judgment in the previous case was or was not correct. The difficulties in the way of giving any construction to the bill of lading in that case were very great, and I cannot but think that the mode adopted by the learned judge was a counsel of desperation accepted by the parties on account of the very great doubt as to what would be the result of insisting on their strict rights. But I am clear that there is no warrant for such a process in the present case. It is based on a series of unsustainable assumptions. Let me take as an example the first step. This is based on the assumption that as a matter of law the freight for merchandise other than wheat or maize must be proportional to the space occupied by a ton of such merchandise as compared with a ton of wheat or maize. There is no such rule of law or custom in business. I pointed out to counsel that this would make the freight of heavy merchandise such as iron something under 2*s.* per ton, which would be absurd. It was then suggested that the rule only applied to goods which were lighter than wheat, though no reason could be given for this. The contention is utterly unsustainable in law. There is not and there can be no rule in law for deducing the freight per ton of one kind of merchandise from the freight per ton of another. These matters are purely contractual, and, if not provided for in the contract, cannot be supplied by any presumption of law. That there is in practice no rule connecting freights in the way suggested is seen by comparing the facts in this case with those in the previous case of *Brightman* v. *Miller and Sons* (unreported) to which I have already referred. In that case under a similar charter-party linseed had to pay about 4 per cent. more than wheat. In the present case it has to pay 7 per cent. more. It is clear that both these increases cannot represent the ratio of the measurement of a ton of linseed to a ton of wheat. Indeed, maize itself differs by about 3 per cent. from wheat, and yet the freights under the charter-party are the same, and a similar inconsistency exists in the case of wheat or maize in bags as compared with the same grain in bulk. Not only does no such rule as is suggested exist either in law or in practice, but there is no general probability that freights will commercially be fixed even in an approximate agreement with any such rule. It depends entirely upon the circumstances of the case whether an excess in measurement per ton in one description of cargo will lead to an increase of the freight charged for it. It is evident that the amount of a particular cargo which a ship can take may be limited in two ways. On the one hand, it may be limited by the ship's power of flotation, because it must not carry more weight than will bring it down to its marks. On the other hand, it may be limited by the cubic contents of the cargo space, because the ship cannot take more cargo than will fill that space. If in any particular case the former limit is the effective one—*i.e.*, the one that comes into play first—there is no necessary reason why lighter merchandise should be charged at a higher freight per ton, because there may be room enough for the same number of tons of that merchandise as of a heavier one. It is impossible to learn from the charter-party what are the facts with regard to the ship in question, though I should conclude from the wide disparity between the maximum and the minimum figures in clause 30 that the question whether the one or the other limit is the effective one depends upon the amount of bunker coal on board at the time. But however this may be, these considerations show the impossibility of fixing the rate of freight of other merchandise under such a charter-party as this, whether that merchandise be oats or wood or anything else. If such merchandise be shipped, the charter-party becomes the ordinary case of the charter of a general ship for a lump sum of money, and in such case there can be no apportionment of that lump sum among the various items of its miscellaneous cargo. The next question is: "Are there conditions and exceptions in the charter-party which throw light upon the responsibilities of the indorsee?" The only clause relied upon by the appellants is clause 31, which reads as follows: [His Lordship read the clause, and continued:] So far from this assisting the contention of the appellants, it appears to me to be against them. In the first place, there can be no dead freight, because the charter-party is for a lump sum. In the next place, it shows clearly that the parties contemplated the possibility of the bill of lading freight not amounting to the total gross freight, and they agreed that in such case the master should protect himself by requiring cash for the difference at the port of loading before the steamer sailed. This negatives the contention that they intended the protection to be given by a lien for the total gross chartered freight, which is one of the principles on which the calculation with which I have been dealing is based. The other alternative suggested

by counsel for the appellants was that they were at all events entitled to claim a lien for the freight on as much wheat as would fill the space occupied by the oats to which the bill of lading relates. It is not necessary to deal with this contention separately as I have already dealt with it as the first step in the more elaborate calculation. But the fact that two such different interpretations can be argued for with equal ease by counsel for the appellants points to the danger of leaving the language of the charter-party and speculating as to modes of arriving at what might be considered an equitable adjustment of freight. For these reasons I am of opinion that the freight as per charter-party per ton referred to in the bill of lading is 12*s.* per ton, and that the decision of the learned judge in the court below was correct, and that this appeal should be dismissed with costs.

Buckley, L.J.—The question here arises between the shipowner and the indorsee of the bill of lading. The charterer is not in a position to pay, and under those circumstances the shipowner is naturally desirous of obtaining payment of all he can from the holder of the bill of lading. The question for determination is as to what is the contract between the shipowner and the indorsee of the bill of lading as found in the bill of lading. The obligation expressed in the bill of lading is to pay freight for the goods and perform all other conditions and exceptions as per charter-party at the rate of freight as per charter-party per ton of 2240lb. gross weight delivered in full. In my opinion this means that the holder of the bill of lading is to pay freight as per charter-party at the rate of freight as per charter-party per ton. The words "as per charter-party" the first time they occur in the bill of lading qualify, I think, not the words "performing all other conditions and exceptions" only, but the words "paying freight for the said goods" also. Under art. 31 of the charter-party the master was to sign bills of lading as presented at any rate of freight that the charterer might require. It was competent for the charterer to have tendered for signature by the master a bill of lading fixing as the freight for oats 9*s.*, 12*s.*, 15*s.*, or any sum that he thought proper to insert. The words which he did insert were, "at the rate of freight as per charter-party per ton." In order to give effect to those words, I must assume that both the person who tendered the bill of lading for signature and the master who signed it were contemplating that the charter-party did contain some tonnage rate which they were going to adopt for the cargo mentioned in that bill of lading, being as it was oats. Having got thus far, I turn to the charter-party to see what was the tonnage rate to which they can in the bill of lading have referred. The first fifteen clauses of the charter-party deal with the case in which the charterer loads the vessel with some one or more of four classes of goods—wheat, maize, linseed, or rapeseed—and it names in art. 6 a tonnage rate of 12*s.* 6*d.* a ton, reducible under art. 13, in an event which happened, to 12*s.* a ton, and subject to increase in the case of linseed or rapeseed, for that, I think, is the more sound view, to 12*s.* a ton plus 7 per cent. By art. 15 the ton is for this purpose to be the ton of goods, not as shipped, but the ton of goods as delivered. Art. 16 then takes up a new subject of contract; it contemplates the case in which the charterer ships merchandise other than the four named articles, and provides what is to happen as regards freight in that case. It is upon the next following words of art. 16 that the whole difficulty arises. In my opinion the article provides that in this case there shall be paid in a lump sum freight to be arrived at as there mentioned; you have to ascertain what is the dead weight capacity of the steamer if you load her with wheat in bags. This will be measured by (*a*) her cubic capacity, and (*b*) her buoyancy. It may be that if you load with wheat to her total cubic capacity she would be brought down below her marks. If so, she must be loaded with wheat to less than her cubic capacity. On the other hand, if loaded to her total cubic capacity with wheat she may not be brought down to her marks. In that case, if a cargo heavier per cubic foot than wheat be shipped she may be brought down to her marks. The last clause of art. 16 provides that in this last case she is nevertheless not to earn more freight than if she had been loaded with wheat and not with iron. Another purpose for these last words may be this, that, if she be loaded with a full cargo of wheat, the weight of the cargo as delivered will by reason of shrinkage on the voyage be less than the weight was as shipped. But for the purpose of calculating the lump sum freight you are to calculate freight only upon the wheat as delivered and not upon the wheat as shipped. By following these directions it will be possible to calculate a certain sum which art. 16 says is, in the case there dealt with, to be the freight to be paid. It results that in the case to which art. 16 relates there is no tonnage rate at all. There is a lump sum freight. The appellants then contend that this lump sum freight is by calculation to be attributed to the different subject-matters of which the mixed cargo is composed so as to arrive at a tonnage rate for each of them. The answer, I think, is this, that as between the shipowner and the charterer it cannot be intended that art. 16 should involve that a tonnage rate as distinguished from a lump sum freight is to be evolved by a calculation, for as between shipowner and charterer there is no reason for ascertaining what tonnage rate is to be attributed to the different subject-matters which make up the full cargo. There is a lump sum freight, and that is enough. If the ship be filled half with wheat and as to the rest with oats a calculated lump sum freight is payable, and as between shipowner and charterer there is no reason for saying that oats are carried at any tonnage rate. In other words, so far as the charter-party is concerned there is no tonnage rate for oats.

Further, let me see how the appellants' contention, if right, would work as matter of commercial probability. Suppose that 1000 tons of wheat are first put on board and a bill of lading signed in the present form. At that moment it is not known how the rest of the ship may be filled. Suppose the next shipment is of oats. As between the shipowner and the charterer art. 16 will have taken effect, but the holder of the bill of lading of the 1000 tons of wheat first shipped will naturally want to know what freight as between himself and the shipowner he is to bear, without regard to the possibility of

art. 16 subsequently taking effect so as to vary the obligations in respect of freight as between the shipowner and the charterer. These are considerations which lead me to the conclusion that a bill of lading in this form, referring to this charter-party, must by the words "at the rate of freight as per charter-party per ton" mean some fixed and determinate rate per ton which is to be found in the charter-party, and not a rate to be evolved by calculation with reference to events of which the holder of the bill of lading can necessarily not be informed. The contest is thus reduced to this simple form: Does the bill of lading by the words "at the rate of freight as per charter-party per ton" mean at the rate of freight as per charter-party for oats per ton as ascertained by a calculation to be made under art. 16, or does it mean "at the rate of freight as per charter-party per ton," notwithstanding the fact that the tonnage rate named in the charter-party is there named not for oats, but for something else? In my opinion it means the latter. A subsidiary difficulty is this, that there are two rates named—viz., 12*s.* for wheat and 12*s.* plus 7 per cent. for, say, linseed; but there is no substantial difficulty, I think, in this. The rate named per ton is 12*s.*, and for particular subject-matters—viz., linseed and rapeseed—7 per cent. is to be added to that named rate. The tonnage rate in the charter-party is, I think, 12*s.*, and for this, and this only, I think the holder of the bill of lading is liable. There remains the fact that the vessel was not fully laden, and that as between shipowner and charterer there was or might be dead freight. First, there was, I think, no dead freight even as between shipowner and charterer, for in the event which happened the freight was a lump sum freight under art. 16, and there is no dead freight. Further, if this be not so, then still as between shipowner and holder of the bill of lading there is, I think, no lien for the dead freight, if any, which was payable as between shipowner and charterer. For under art. 31 the difference between the total gross chartered freight and the bill of lading freight ought to have been settled at port of lading before the steamer sailed, and, if it was not so settled, then the holder of the bill of lading is not liable, upon the authority of *Gardner* v. *Trechmann* (5 Asp. Mar. Law Cas. 558 (1884); 53 L. T. Rep. 518; 15 Q. B. Div. 154). For these reasons I think that the decision of Bray, J. is right, and that this appeal should be dismissed with costs.

Appeal dismissed.

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

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

Wednesday, Oct. 27, 1909.

(Before Lord ALVERSTONE, C.J., BUCKLEY and KENNEDY, L.JJ.)

THE EGYPTIAN. (*a*)

Collision — Negligence of defendants' servant causing collision — Negligence of plaintiffs' servant contributing to loss—Liability of defendants—Measure of damage.

A man in the employ of the defendants so negligently navigated their vessel that a third vessel was forced into collision with the plaintiffs' vessel, causing it to leak. The leak might easily have been stopped. The man in charge of the defendants' vessel, whose negligence had caused the collision, was also employed by the plaintiffs as a watchman to tend their vessel. After mooring the defendants' vessel he went on to the plaintiffs' vessel and resumed his duty as their watchman, but though he was on the vessel for a great part of the time before she sank, he never discovered anything was wrong with her until about one and a half hours before she sank. In an action for damage in the Admiralty Court, Bargrave Deane, J. held that the defendants were liable for the sinking of the vessel, as the initial negligence which caused the loss was the negligence of a servant of the defendants. The defendants appealed to the Court of Appeal.

Held (*reversing Bargrave Deane, J*), *that the watchman on the plaintiffs' vessel was negligent in not discovering that the vessel was making water, and that if the discovery had been made the leak could easily have been stopped; the negligence of the watchman was negligence which contributed to the sinking of the vessel, and the plaintiffs could not recover the damage caused by the sinking of the vessel.*

APPEAL by the owners of the steam trawler *Eyyptian* from a decision of Bargrave Deane, J., by which he held them liable for the damage occasioned by the sinking of the steam trawler *Nelson*.

The case made by the owners of the *Nelson* in the court below was that at about 3 p.m. on the 7th Nov. 1908 the *Nelson*, a steam trawler of 134 tons gross and forty-four tons net register, was lying moored in No. 1 Fish Dock at Grimsby, with her head at right angles with Campbell's Jetty on the east side of the dock. There was a water-boat named the *Aqua* lying close under the starboard quarter of the *Nelson*. The wind was south-east, a light breeze; the weather was fine and clear, and the tide was flood of no force in the dock.

The *Nelson* was coaled and iced ready to proceed to sea on a fishing voyage. There was no one on board the *Nelson* at the time. In these circumstances the *Egyptian* entered the No. 1 Fish Dock, and was so negligently navigated or managed that with her stem she struck the port quarter of the *Aqua*, forcing the forward part of the *Aqua* against the starboard quarter of the *Nelson* under her counter, and doing damage to the *Nelson* in consequence of which she afterwards sank.

The owners of the *Nelson* charged those on the *Egyptian* with not keeping a good look-out; with failing to keep clear of the *Aqua* and the *Nelson*;

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

and with failing to slacken their speed or stop or reverse. The man in charge of the *Egyptian* was employed by the plaintiffs as workman to tend the *Nelson*, and, after the collision, went on board the *Nelson*, but failed to discover that she was sinking.

The owners of the *Egyptian* admitted liability for the damage occasioned to the *Nelson* by contact with the *Aqua*, but denied that the *Nelson* sank in consequence of such contact. They alleged that the plaintiffs could, by the exercise of reasonable skill and care, have avoided the sinking, and alleged that the plaintiffs were negligent in having no one on board the *Nelson* and in keeping no proper watch on her, and in taking no measures at all to prevent any consequential loss.

The action was tried before Bargrave Deane, J. and Elder Brethren on the 28th and 29th June 1909, and on the 29th June the following judgment was delivered:—

Bargrave Deane, J.—This is a peculiar case, because the whole question centres in the position that an individual occupied—namely, a man called William Barron. Barron in this case has two entities. He is an entity as servant of the plaintiffs, and an entity as servant of the defendants, and the defendants admit that they are responsible for his negligence in the matter of this collision; they have pleaded it and they cannot be heard to say that he was not their servant at that time. For this purpose I will call him Barron the Egyptian, and I am satisfied that Barron the Egyptian at the time of the collision knew that he had driven the *Aqua*, the water-boat, against the starboard quarter or counter of the *Nelson*, and he went on to the *Aqua* to see what damage had been done to the *Nelson*, and in my opinion he was guilty of considerable negligence at that time in not thoroughly investigating the damage he had done (if any) to the *Nelson*. Having satisfied himself, apparently, that he had done no damage to the *Nelson*, he imparted that piece of information to Barron the Nelson, and Barron the Nelson was perfectly satisfied with the information given to him by Barron the Egyptian, that no damage had been done to the *Nelson*, and Barron the Nelson was quite content in his own mind that all was well. Now, we have got to look at what happened. The plate with the lug in it, which had been fastened from inside on the starboard quarter of the *Nelson* by the force of the collision of the *Egyptian* with the *Aqua*, had been driven right into the hull of the *Nelson*. It had sheared off the bolts by which the plate was fastened to the hull and the plate with the lug had fallen down in between the skin of the ship and the lining of the cabin. That left four holes where the bolts had gone into the plating and also a large centre hole where the lug had gone through. We are told that owing to the draught of this vessel at the time the result would be that one of the holes left by one of the bolts would get the lip of the water in the dock, and so a very small amount of water would begin to get into this vessel's hold. I am told by the Elder Brethren that if this accident had been discovered by Barron the Egyptian at the time that he ought to have investigated it and discovered it, the hole could have been stopped up by him with perfect ease at the time and nothing would have happened. He did not look, and he did not discover it, and the result was that this water went slowly into the vessel until she had sunk deep enough for the bigger hole to be submerged, and she would then rapidly take in water and fill. Now, let us look at the evidence of Barron. He says that the collision happened somewhere about a quarter and half-past three in the afternoon, that he boarded the *Nelson* off the *Aqua*, and though he did not look round her counter before boarding her, he did so after he got on board. It stands to reason that he would not see, looking over her quarter, what had happened beneath the counter. He says, "I saw no signs of damage. Then I boarded the foreign trawler which was alongside the *Nelson*. I could see no damage from her. The whole thing took no more than half an hour. I then boarded the *Nelson*, I went into her cabin, I mended the fire, I could see no sign of damage in the cabin. I then boarded the *Aqua* again. We watered the *Egyptian*, and I was satisfied then that there was no real damage. The *Aqua* left, and a lighter came to coal the *Egyptian*." Apparently after that he boarded the *Nelson* again. He said I went down into the engine room of the *Nelson* to trim the lamp, at a quarter to six I went to look for the *Weelsby*. Barron was a watchman engaged by the plaintiff company to look after both their vessels, the *Weelsby* and the *Nelson*, and as the *Weelsby* was lying on the opposite side of the dock, he would have to go round along the dock and over the bridge to get to where the *Weelsby* was lying. He says: "I went to her, I locked her up, and I returned to the *Nelson* at a quarter past six." And there he was doing his duties, apparently perfectly satisfied that nothing had happened, up to a quarter past six, away from the *Nelson*. "I then lay down in the *Nelson* on the locker till 8.20 p.m. I had no idea then that she was making any water." I am of opinion that he would probably not hear the water just running down the side of the skin of this vessel, running down, as it was, at that time through the one rivet hole which had been exposed to the lip of the water in the dock. "I then locked up the cabin. In the course of the night I made five trips to the *Weelsby*. I was only on the deck of the *Nelson* during the night, and not below, I first thought something was wrong about 2.30 a.m. on the Sunday. When I came back to her I used to board her over her bows, but then I found that her bows were up, and I had to board her by first going on board the *Griffen*. I then found on her after-deck a pool of water 3ft. in breadth and 6in. deep." Now, he says that that satisfied him for the first time that there was something wrong with this vessel. He says he went off at once to his superintendent engineer's house, a mile away, he tried to rouse him but failed, he came back and went to the *Nelson*. He then looked out for another superintendent, Mr. Baxter, and then he went somewhere else and so on. He seems to have spent his time trying to find somebody. I do not accept defendant's counsel's suggestion that this is all an invention. The man has sworn to it, and there is no evidence to the contrary, except the evidence of persons who did not happen to see him. Well, you may call a heap of people from amongst them who might have said that they did not see him, although they were about from time to time. I am unable to say that he was guilty of negligence after the time when he discovered that

this boat was sinking. He says the vessel sank at four o'clock, or shortly after, and that he did all he could. I am advised that there was practically nothing which could be done in the short time then available. From 2.30 to 4 o'clock is the only time during which I am able to put my hand upon Barron on the *Nelson* with a view to saying he was guilty of negligence, and I do not find that he was. Now I come back to the original view, which I still hold—namely, that when you have got one man to deal with in a dual capacity, and you find that the initial negligence was done by him when he was the servant of the defendants, and that that negligence pervaded the whole of the rest of his conduct, then I attribute the negligence which caused the vessel to sink to negligence which happened at the time he was in the defendants' service. Therefore, in my opinion, the plaintiffs are entitled to recover not only the damage occasioned by the actual collision, but also the damage occasioned by this vessel sinking in the dock, and the necessary expenses which follow from that.

On the 5th July 1909 the defendants delivered a notice of appeal from the judgment of Bargrave Deane, J. by which they sought to get the judgment reversed or varied in so far as it held them liable for the loss caused by the foundering of the *Nelson*, and that it might be held that the damage consequent on the foundering of the *Nelson* was caused solely by the fault of the watchman in charge of the *Nelson*.

The appeal was heard on the 27th Oct. 1909.

Batten, K.C. and *A. D. Bateson* for the appellants the owners of the *Egyptian*.—The owners of the *Egyptian* employed William Barron, who was also employed by the owners of the *Nelson*, as a watchman to watch the *Nelson*. Barron after mooring the *Egyptian* returned to the *Nelson*. The sinking of the *Nelson* was not the reasonable consequence of the collision, but was due to the negligence of Barron. The collision took place at 3 p.m., but although he was on the *Nelson* shortly after that he did not discover that anything was wrong until 2.30 a.m on the next day, eleven hours after the collision. Putting aside the negligence of which he was guilty when examining the vessels just after the collision, the facts show that he was negligent after he returned to the *Nelson*. It is suggested that he could not have been on the *Nelson* at all during the night, or he must have found out something was amiss. Further when he did find out something was wrong instead of applying to the harbour master for help he went to various houses and got no help. [Lord ALVERSTONE, C.J. —We must assume that different men were on the different ships. *Prima facie*, the owners of the *Egyptian* are liable, but if there ought to have been a watchman on board the *Nelson*, the question is whether there was such contributory negligence on the part of the *Nelson's* watchman as to disentitle the owners of that vessel from recovering the damage.] Anyone who was on board the *Nelson* ought to have noticed the stern being slowly depressed, and the bows being gradually raised, and they could then have gone and pumped the water out, and stopped the hole. Barron was not the defendants' servant, he owed no duty to them after he had moored the *Egyptian*. If he owed a common duty to both owners then neither can recover from the other. [Lord ALVERSTONE, C.J.—Is there any evidence that a watchman on the *Nelson* ought to have discovered the damage?] Yes, and the judge has found that at the time the hole ought to have been discovered it could have been easily stopped up. If reasonable skill and care had been used by the plaintiff's watchman, this vessel would not have sunk.

Laing, K.C. and *R. H. Balloch* for the respondents the owners of the *Nelson*.—There is no duty on the respondents to have a skilled mariner on board as a watchman when their vessel is moored in dock. [Lord ALVERSTONE, C.J.—That may be; but can you say that any ordinary watchman on board the *Nelson* ought not to have found out this damage if he had notice that there had been a collision?] To answer that question the circumstances which surround the accident must be looked at. The collision happened on a November afternoon with darkness rapidly approaching; there was very little chance of finding any hole of this size, and it was in a very difficult position for anyone to see it under the counter. If Barron had gone on to the *Aqua*, he might from the deck of that vessel have seen this hole, but it is extremely unlikely. The collision was not of a character to make anyone suspect damage, the other vessels only had a little paint scraped off them. When Barron was making the examination, he was doing it on behalf of the owners of the *Egyptian*, and it was therefore the negligence of the appellants' servant which caused the loss of the vessel. *Primâ facie*, the appellants are responsible, and it is for them to satisfy the court that the owners of the *Nelson* could have prevented the sinking of the vessel. The evidence leaves this matter in doubt, so they ought not to succeed.

Lord ALVERSTONE, C.J.—This case is a very peculiar one so far as the facts are concerned, because there was, as Bargrave Deane, J. pointed out in his judgment, this one single servant, whose duties shifted at a certain time when he ceased to be an agent of the defendants, the owners of the *Egyptian*, as far as discharging any duty to them was concerned, and returned to his duty as a servant of the plaintiffs. In our opinion, there is no question of navigation in this case really; it is a question for us on the one point. We think the watchman, knowing there had been a collision, and knowing there had been this kind of a smash, ought, by going on the *Aqua*, to have found the injury to the *Nelson*. I cannot take the view that at three o'clock on the 7th Nov. it can be said that any darkness or difficulty in the time or circumstances prevented the watchman from doing his duty, and it seems to me that the learned judge, with great deference to him, has put the wrong question to himself. He seems to have thought that there was negligence on the part of the watchman after he resumed his duty as a servant of the plaintiffs, and that arose, as he himself described it, from the original negligence which he had been guilty of when a servant of the defendants. There is this passage in his judgment: "When you have got one man to deal with in a dual capacity, and you find that the initial negligence was done by him when he was in the service of the defendants, and that that negligence pervaded the whole of

the rest of his conduct, then I attribute the negligence which caused this vessel to sink to negligence which happened at a time when he was in the defendants' service, and not after." With very great deference, I think the learned judge has argued wrongly, because that statement assumes that the contributory negligence of the man, as a watchman, is negligence for which the plaintiffs are not in any way responsible, and that the responsibility must be borne by the defendants, because he had also been guilty of negligence at the time when he was in their service.

I think the real question is, Could the damage beyond that actually caused by the collision have been avoided by reasonable care on the part of those for whom the plaintiffs are responsible? I think that will be found to be laid down over and over again. It is assumed that the sinking of the vessel was caused by water coming into the ship; it is a question of who is responsible for that sinking. Looking at the findings of fact in this case, I cannot come to the conclusion that the judge has rightly appreciated the legal position of the parties. In any event, it seems to me that the learned judge ought to have considered the question on a broader basis. From four o'clock in the afternoon after the collision to two o'clock next morning, knowing that the collision had taken place, had the watchman been able to discover the condition of the vessel and taken reasonable care this damage to the vessel, which allowed her to sink, might have been stopped at once. For these reasons, I think the learned judge has not evolved the real question. We are obliged to answer it ourselves. I do not think that the negligence of which Barron had been guilty, while he was a servant of the defendants, relieved him from the consequences of his conduct as plaintiffs' servant, so as to make the defendants responsible for what his negligence did. I come to the conclusion that Barron, as the plaintiffs' agent, by exercising reasonable care would have discovered the condition of the ship; and that the further damage was due to the plaintiffs' agent not taking reasonable steps to ensure the safety of the vessel after she sustained the damage for which the defendants admit responsibility. I think the appeal must be allowed.

BUCKLEY, L.J.—I agree. When Barron returned on board the *Nelson* after the performance of his duty to the defendants he was aware she had sustained a severe blow. I say so as a result of the evidence. The wound was to a large extent above the water-line, one of the bolt heads was below, but the main wound was visible and above the water-line. When Barron returned on board the *Nelson* it seems to me that it was his duty to ascertain whether or not there was a serious injury. All he did was to look from the deck of the ship from a point at which the wound was not visible, and that satisfied him that the ship had not received a severe wound. There were means —he could readily have ascertained the damage by getting on to the water-boat and looking for himself. In point of fact he had been there in the employment of the *Egyptian*, and he had not seen it. He ought to have seen it then. After he had resumed his duty on the *Nelson* it was his duty to ascertain that. I suppose he did not because he had already been in that position, and negligently failed to do so. The watchman of the *Nelson* did not take steps to ascertain that, and certainly it was his duty to stand by the ship and wait and see. He did neither. He neither went to look nor to stand by and see, and I think that is the negligence which caused the sinking of the ship.

KENNEDY, L.J.—I am of the same opinion, and I only want to add one thing, and to try to test the argument put by counsel for the respondents. I put the matter in this form. Suppose that the plaintiffs had sued this man Barron for negligence in his duty as watchman in allowing this vessel to sink, what answer would have been afforded by the fact that he had been employed by the *Egyptian*? It seems to me that he could not possibly have put in any defence, on any ground, relating to his employment by the *Egyptian*. It would have been no answer to say "I was the servant of the *Egyptian* and I saw the damage done and thought there was no harm." It would have been no defence, and no excuse for his non-performance of duty as watchman, that he had thought, when navigating the *Egyptian*, that no injury was done. Then it would have come back to the question: "Did you, as our servant, as watchman, use reasonable care to discover the damage and prevent the sinking of the vessel?" And it seems to me that directly you put the matter in that form the plaintiffs' case fails and they must be content to recover the damage directly caused by the collision. The appeal will be allowed.

Solicitors for the appellants, *Deacon* and *Co.*, agents for *Grange* and *Wintringham*, Great Grimsby.

Solicitors for the respondents, *Woodhouse* and *Davidson*.

Wednesday, Oct. 27, 1909.

(Before Lord ALVERSTONE, C.J., VAUGHAN WILLIAMS and BUCKLEY, L.JJ., and Nautical Assessors.)

THE FRANKFORT. (*a*)

Collision—Navigation of Goole Reach, river Ouse —Causes contributing to the collision—Both to blame—Whistle signals—By-laws for the Navigation of the River Ouse 1886, *arts.* 15, 16, 18, 19, 27, 28, *and* 1908 *Additional By-laws, art.* 1—*Collision Regulations* 1897, *arts* 28, 30.

A steamship was proceeding up Goole Reach at an improper rate of speed, having improperly neglected to turn and dredge up stern first on the flood tide. A down-coming vessel, having ported and blown a short blast, later starboarded and collided with the up-coming vessel.

Held, that the up-coming vessel by proceeding up river as she did hampered and impeded the navigation of the down-coming vessel, and that in the circumstances both vessels were to blame for the collision.

APPEAL by the owners of the steamship *Frankfort* from a decision of Sir John Bigham, President, by which he held the steamships *Frankfort* and *Thornley* both to blame for a

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

collision which took place in Goole Reach, river Ouse, on the 21st March 1909.

There was a cross-appeal by the owners of the *Thornley* by which they sought to get the *Frankfort* held alone to blame.

The case made by the appellants, the owners of the *Frankfort*, who were the defendants and counter-claimants in the court below, was that shortly before 6 p.m. on the 21st March 1909 the *Frankfort*, a screw steamship 240ft. in length, of 1155 tons gross and 731 tons net register, was in Goole Reach of the river Ouse, on the west side of the channel, in the course of a voyage from Goole to Antwerp with general goods, manned by a crew of nineteen hands all told. There was no wind, the weather was fine and clear, and the tide last quarter flood of the force of about five knots. The *Frankfort* was on a down-river course, about abreast of the Ouse Lock, making about six to seven knots through the water, and a good look-out was being kept on board of her. In these circumstances those on board the *Frankfort* saw about three-quarters of a mile away and bearing slightly on the port bow the *Thornley* coming up the west side of the reach. The *Frankfort* gave one short blast, to which the *Thornley* replied with one short blast, and the engines of the *Frankfort* were reduced to slow. Later the *Frankfort* gave another short blast, to which the *Thornley* replied with one short blast. The *Thornley* still continued to come up at excessive speed on the western side of the river, and when she approached so as to cause risk of collision the engines of the *Frankfort* were put full speed astern. Immediately after, her engines and helm were manœuvred to prevent contact with the west wall, and then her engines were put full speed astern again. The *Thornley*, however, coming on at great speed, still on the western side of the river, instead of avoiding the *Frankfort* as she could and ought to have done, angling with her head to the northward, struck the bluff of the port bow of the *Frankfort* a heavy blow with her port side, doing damage. She then collided with the Victoria Promenade.

Those on the *Frankfort* charged those on the *Thornley* with not keeping a good look-out; with neglecting to keep to her own starboard side of the channel; with proceeding at an excessive speed; with failing to ease, stop, or reverse her engines; with failing to let go her anchor or take any measures to keep clear of the *Frankfort*; and with neglecting to swing head to tide and get under proper control.

The case made by the respondents and cross-appellants, the owners of the *Thornley*, the plaintiffs in the court below, was that shortly before 6 p.m. on the 21st March the *Thornley*, a steel screw steamship of 1327 tons gross and 683 tons net register, manned by a crew of seventeen hands all told, was in Goole Reach, in charge of a duly licensed pilot, in the course of a voyage from Hartlepool to Goole in water ballast. There were a number of vessels anchored on the east side of the channel throughout the reach, and several vessels outward bound were following each other down on the west side, which made it impracticable for the *Thornley* to swing and drop up stern first. She accordingly proceeded up, keeping close to the vessels on the east side, and making about three knots through the water. A good look-out was being kept on board of her. In these circumstances, when the *Thornley* was approaching the Dutch river, the *Frankfort* was observed lying at the Victoria Pier, bearing a little on the starboard bow and distant about half a mile. The *Thornley* continued on, and as she passed the Dutch river the engines were put full speed ahead for a few turns, under a hard-a-port helm, to counteract the in-draught, and were then slowed again, and just afterwards the *Frankfort*, which was then bearing on the port bow, was observed to be canting away from the Victoria Pier as if with the intention of proceeding down river. A long, warning blast was sounded on the whistle of the *Thornley*, to which the *Frankfort* replied with one short blast, and continued to come ahead. The *Thornley* blew one short blast and her helm was ported a little, and she continued on, keeping as close as possible to the vessels anchored on the east side of the channel. The *Frankfort* continued to come ahead, and when a short distance off she took a sheer to port, causing danger of collision with the port side of the *Thornley*. The engines of the *Thornley* were at once put full speed ahead and her helm was starboarded to try and throw her quarter clear, but the *Frankfort* came on, and with her port bow struck the port side of the *Thornley*, abreast of No. 3 hatch, a heavy blow, doing damage. The force of the collision threw the *Thornley's* head to port, and she headed straight for a vessel lying at the Victoria Pier. Her anchor was at once dropped to avoid colliding with this vessel, and her engines were put full speed astern. The anchor dragged a little, and the ship swung round and with her stern struck the piles of the Victoria Promenade, damaging her stern frame and breaking all the blades of her propeller.

Those on the *Thornley* charged those on the *Frankfort* with not keeping a good look out; with coming away from the pier at an improper time, and neglecting to wait until the *Thornley* had passed; with improperly starboarding; with neglecting to stop or reverse their engines; with neglecting to let go their anchor; and with neglecting to give way to the *Thornley*, which was going with the tide.

The case was heard before the President on the 21st, 22nd, and 24th May, and the following judgment, by which he held both vessels to blame, was delivered on the 28th May:—

THE PRESIDENT.—This action arises out of a collision between the steamship *Thornley* and the steamship *Frankfort* in Goole Reach of the river Ouse, about 6 p.m. on the 21st March last. The wind at the time was northerly, the weather was fine and clear, and the tide was last quarter flood, running five to six knots. The place of the collision was the upper part of the reach. The *Thornley* was bound from Hartlepool to Goole. She was in ballast, and she entered the Goole Reach at a little before 6 p.m. on the day in question, intending to wait there until she got her stem in dock. Now, in rounding the point, or Ness, it is the practice to turn, then to drop anchor, and to dredge up stern first until the vessel comes to an anchor, and there to await her stem. This course the *Thornley* did not follow, though it is admitted to be the proper and seamanlike thing to do. It is said that she could not on this occasion follow the invariable

practice because the river was already full of craft and there was no room; but I am quite satisfied that this was not so. In particular, it is said that a ship called the *Spen* was swinging at the time the *Thornley* entered the reach, and was so low down the reach as to leave no space for the *Thornley* to turn. But the evidence from the *Spen* itself and from the *Calder*, a vessel which entered the reach immediately after the *Thornley*, is inconsistent with this contention, and is, in my opinion, to be relied on. This evidence shows that the *Spen* had finished swinging and was riding at anchor further up the reach—namely, opposite the green light—leaving plenty of room for the *Thornley* to turn and come to an anchor in the ordinary way. Why the *Thornley* proceeded past the *Spen* and up the reach as she did I do not know. She may have thought that by so doing she would get an advantage over the other ships waiting to enter the dock. It is not, however, necessary to speculate as to this. It is sufficient to say that she improperly steamed up the reach at a speed of eight knots or more, when she ought to have come to an anchor. Steaming up in this way brought her opposite the Dutch river, where the navigation becomes more difficult. I leave her there for a moment, and turn to the *Frankfort*. This vessel was coming out of the Victoria Lock stern first, preparatory to going to sea. She came in this way alongside the Victoria Pier, thus clearing the dock walls. She then steamed ahead on her course down the reach. It was just at this time that the two vessels sighted each other. I do not think that the look-out on the *Frankfort* was negligent, or that the *Thornley* could have been seen sooner than she was. The crowded state of the river prevented it. But I do think that the master of the *Frankfort* became confused and lost his head when the unexpected *Thornley* came in view, with the result that, having given a port-helm signal, he starboarded his helm, causing his port bow to strike the port side of the *Thornley*. I blame both the vessels. The *Thornley* ought not to have been where she was at all. She was improperly coming up the reach at a considerable speed, in circumstances in which it was difficult, if not impossible, to see her until she was close up to the point of collision. On the other hand, the *Frankfort* was carelessly navigated at the last moment. I think that both causes contributed to the accident, and that, as both were negligent, I must hold both ships to blame.

On the 19th July the owners of the *Frankfort* served a notice of appeal from so much of the above judgment as decided that the *Frankfort* was partly to blame for the collision, and sought to obtain an order that the *Thornley* was alone to blame for the collision.

On the 28th July the owners of the *Thornley* served a notice of appeal from so much of the above judgment as decided that the *Thornley* was partly to blame for the collision, and sought to obtain an order that the *Frankfort* was alone to blame for the collision.

The appeal was heard before the Court of Appeal on the 27th Oct. 1909.

The following By-laws of the River Ouse 1886 and 1908 and Collision Regulations 1897 were referred to during the hearing of the appeal.

By-laws made under the Ouse (Lower) Improvement Act 1884 (47 & 48 Vict. c. clxi.).

15. Every vessel while under weigh . . . shall during the daytime have one person, and during the night time, or in time of fog or snow, one or more persons properly qualified, stationed at the bow as a look-out, and to give notice in due time of any obstruction or danger.

16. Every vessel when under weigh shall when proceeding seaward or down the river be kept to the south of mid-channel, when the direction of such channel is east and west, and on the western side thereof when such channel is north and south, and when proceeding inward from sea or up the river to the north of mid-channel, when the direction of such channel is east and west, and on the eastern side thereof when the channel is north and south, and so that in either case such vessel shall with a port helm always be, and be kept, clear of any vessel proceeding in the opposite direction. When vessels proceeding in opposite directions approach each other, they shall at a proper distance put their helms to port, and when within 150 yards steamships shall ease their engines sufficiently to pass in safety; vessels going against the tide in all cases giving way, where practicable, to vessels going with the tide, so as to afford all possible facility for passing each other.

18. All vessels under weigh requiring to pass over a part of the channel of the river which is not within that half reserved for their navigation for the purpose of proceeding to or from landings, moorings, or other places, must take upon themselves the responsibility of doing so in safety with reference to passing traffic; and any vessel continuing its navigation after reaching such landing, mooring, or other place, must again proceed to the side of the river specified as the proper side for its navigation, so soon as practicable, and take upon itself the responsibility of doing so in safety with respect to the passing traffic.

19. Every vessel navigating the river shall be navigated with care and caution and at a speed and in a manner which shall not involve risk of collision by causing a swell, or endanger the safety of other vessels or cause damage thereto, or to the banks of the river. Special care and caution shall be used in navigating such vessel where there is much traffic, and when passing vessels employed in dredging, or removing sunken vessels or other obstructions. If the safety of any vessel or moorings is endangered or damage is caused thereto, or to the banks of the river, by a passing steam vessel, the onus shall lie upon the master or owner of such vessel to show that she was navigated with care and caution, and at such a speed and in such a manner as directed by these by-laws.

27. Every vessel must be properly navigated in or moored clear of the navigable channel of the river, and not allowed to drift otherwise than under control, or to drift athwart or abreast. Vessels proceeding to any dock, and arriving off the entrance of such dock before the signal for admission is hoisted, must keep on the east side of the navigable channel, and out of the fairway of the river or dock traffic, until the signal is hoisted for their reception.

28. Every vessel when navigating the river shall have its anchor and chain ready to be let go, in the event of any emergency requiring their use for the safety of such vessel or of any other vessel.

Additional By-laws 1908:

1. When a steam vessel is commencing to turn round or for any reason is not under command, and cannot get out of the way of an approaching vessel, she shall signify the same by four short blasts of the steam whistle in rapid succession, and it shall thereupon be the duty of the approaching vessel to keep out of the way of the steam vessel so situated, but the vessel not under

command shall, as speedily as possible, get fore and aft the river head to tide, and under command.

Collision Regulations 1897:

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.: Two short blasts to mean, "I am directing my course to port."

30. 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 water.

Aspinall, K.C. and *J. B. Aspinall* for the appellants, the owners of the *Frankfort*—The practice for vessels leaving the docks on the flood tide is to come out of the docks into the river stern first, and, after getting head to tide, to proceed down river, keeping to their starboard-hand side of the stream. Vessels coming up the river on the flood tide should drop their anchor, and, after getting head to tide, drop up the river stern first, keeping to their starboard-hand side of the river. The *Thornley* is alone to blame for the collision, for not following this practice, which the President finds was the invariable practice, and she is also to blame for proceeding at an excessive speed. Her speed over the ground was at least eight knots, for the tide was flood of the force of five knots. The *Thornley* was light, being in ballast, and therefore likely to sheer, which made it desirable that she should follow the usual course and come up stern first. The speed of the *Frankfort* was reasonable. With a five-knot tide against her, the five to seven knots she was travelling at would do little more than give her steerage way. As to the starboarding of the helm, for which the President has held her to blame, it was done in the agony of collision. Those on the *Frankfort* saw the *Thornley* at the earliest possible moment, but they were confused by her unexpected appearance and her excessive speed. To meet this unexpected difficulty they ported and sounded an appropriate whistle signal, but this manœuvre took them too near the river wall on their starboard hand, so they had to starboard to avoid it. The *Frankfort* did not infringe art. 28 by not sounding a starboard-hand signal then, for the starboarding was not done to avoid the *Thornley*, but to avoid the wall. It is not obligatory to signal in such circumstances as these. [Lord Alverstone.—You are really held to blame for starboarding into the *Thornley*, not for omitting the signal.] The answer to that is that it was done in the agony of the collision. For a mistake made under such circumstances the *Frankfort* should not be held to blame:

The Bywell Castle, 41 L. T. Rep. 747; 4 Asp. Mar. Law Cas. 207 (1879); 4 P. Div. 219.

The finding that the master of the *Frankfort* was confused and lost his head is correct, but under the circumstances that does not amount to negligence.

Laing, K.C. and *Dawson Miller*, for the respondents the owners of the *Thornley*, were not called on, but argued as follows in support of the cross-appeal: The *Thornley* was not to blame for the collision. Once the *Thornley* got into the reach she had to keep on as the number of vessels in it prevented her swinging. Assuming this to be improper, it did not cause the collision. [Lord Alverstone, C.J.—You have got to excuse your speed.] Before the *Thornley* can be held to blame for speed it must be shown that it contributed to the collision:

The Margaret, 44 L. T. Rep. 663; 4 Asp. Mar. Law Cas. 375 (1881); 6 P. Div. 176.

The *Thornley* was seen some time before the collision, and the *Frankfort* might have avoided the collision if she had not starboarded her helm; the failure to get head to tide and the speed of the *Thornley* did not affect the collision. The sole cause of the collision was the starboarding of the *Frankfort*.

Aspinall, K.C. and *J. B. Aspinall* for the owners of the *Frankfort*, the respondents on the cross-appeal.—The starboarding of the *Frankfort* was not the sole cause of the collision. The *Thornley* did not satisfy the judge that she would have gone clear of the *Frankfort* if the latter had not starboarded. She was held to blame for improper speed as well as for not getting head to tide. Coming up as she did, she could not fail to gather such a speed that it would be difficult to cope with the ordinary incidents of navigation further up the reach. When there are two contributing causes to a collision both vessels are to be held to blame:

The Clutha Boat No. 147, 100 L. T. Rep. 198; 11 Asp. Mar. Law Cas. 199; (1909) P. 36;
The Blue Bell, 72 L. T. Rep. 540; 7 Asp. Mar. Law Cas. 601; (1895) P. 242.

In this case the speed of the *Thornley*, as well as the starboarding of the *Frankfort*, contributed to the collision. The President found this as a fact.

Dawson Miller in reply.

Lord Alverstone, C.J.—In this case there are two appeals against the judgment of Sir John Bigham finding both vessels to blame for a collision in the Goole river. The vessel going out of dock and down river was the *Frankfort*, and she was cast because, being in a position in which she had to navigate with reference to the *Thornley*, she starboarded her helm at the last moment, and, as a matter of fact, the collision occurred, as shown by the diagram put in, by the port bow of the *Frankfort* striking the port side of the *Thornley*, which vessel was coming up river. It was contended before us, though not very strenuously, that even if it was negligence to starboard it was one of those cases of the character described by James, L.J. in *The Bywell Castle* (*ubi sup.*)—namely, due to the difficulty in which the captain of the *Frankfort* was put by the action of the *Thornley*, and that, therefore, although there was error of judgment and something which did contribute to the collision, it was not to be taken as negligence. We could not take that view, and we did not call upon counsel for the *Thornley* to argue against that view. In the first place the two manœuvres taken at the last moment were starboarding and hard-a-starboarding and putting the engines full speed ahead, and, speaking for myself, I certainly should expect that if those manœuvres were going to be justified, either on the ground that they were something done at the last moment, in the agony of the collision, or, what would be still more important to my mind, on the ground that they were adopted in order to avoid going into

the wall, and that, to a certain extent, the *Frankfort* had been obliged to get near the wall because of the *Thornley*—I should expect that those manœuvres would be in the preliminary act. With reference to the suggestion as to acting in the throes or agony of the collision, we have seen no evidence to justify us in coming to that conclusion, and it seems to us that upon the ground that after giving a port-helm signal she starboarded her helm, and when she starboarded her helm she gave no signal to the vessel which was approaching—a signal which under art. 28 of the Collision Regulations she ought to have given—there is no reason at all for interfering with the judgment of the learned President, that the *Frankfort* was to blame.

The *Thornley's* cross-appeal has certainly given me more difficulty, and I should have been better satisfied if I had been able to see it expressed in clear language, in the judgment of the President, that he had cast the *Thornley* either for negligent navigation at the place in which she was or for hampering and impeding the navigation of the *Frankfort* after she had come away from the pier in ignorance of the immediate proximity of the *Thornley*. From this point of view I think it is not immaterial to consider that the case made by the *Thornley* in the court below was that at a time when she was in sight the *Frankfort* came away from and canted out from the Victoria Pier; and if that case had been made out, then no doubt the *Frankfort* would have been to blame quite independently of the starboarding. What I feel is that great stress is laid in the judgment upon the fact that the *Thornley* did not turn where she ought to have turned, a considerable distance down river, and did not, in accordance with the practice—instead of going up on the flood tide, as she did, at a substantial rate of speed—round and get head to tide and put herself under perfect control, and gradually dredge up with her anchor down. The learned judge undoubtedly laid great stress upon that fact, and looking at his judgment I have very little doubt that it was strenuously argued by counsel for the *Thornley* that the position of the *Thornley* with regard to the *Spens* and other vessels made it impossible for the *Thornley* to round when she got to the green light; and I have no doubt that was the reason why so much attention was paid to it in the earlier part of the judgment. If I had thought that the learned President had only decided against the *Thornley* on the ground that she did not round head to tide after entering the reach, and therefore was up above the Dutch river in contravention of the usual practice, certainly I should not think the judgment could be supported, especially when there was a distinct act of bad navigation on the part of the *Frankfort* in starboarding into the *Thornley* just before the collision; but after what has been frankly stated by counsel for the *Thornley* and pressed by counsel for the *Frankfort*, I have no doubt that other points were strenuously argued before the President. I have no doubt that the learned President was pressed to say that coming up the river wrongly as she may have been, that did not make her responsible for the collision simply because she was in a wrong part of the river. It was not a question of a statutory rule or local written rule, but a question of seamanlike navigation, having regard to the practice, and, that being so, what did the learned President find? The words he used are these: "I blame both the vessels. The *Thornley* ought not to have been where she was at all. She was improperly coming up the reach at a considerable speed, in circumstances in which it was difficult, if not impossible, to see her until she was close up to the point of collision. On the other hand, the *Frankfort* was carelessly navigated at the last moment. I think that both causes contributed to the accident." I think we should be reading into this judgment a meaning which it ought not to have if we were to hold it merely meant that because the *Thornley* was in a place where she ought not to have been she must have contributed to the collision. We must remember that had she turned round she would have been going up under great command, with her head on tide and her anchor down, dredging up, and able to check herself and at any rate to prevent herself swaying about, whereas in the way she was going up it is certainly in evidence that she would be liable to be drawn in towards the Dutch river, and then when she came out would have the tide upon her starboard quarter; and she would have to go up at such a speed as to retain steerage way. In these circumstances we cannot come to the conclusion that the learned President was not right in the view which I think he took that this vessel, going up as she was and as she need not have been, did in fact hamper and impede the navigation of the *Frankfort*. I think the learned President has found improper navigation on the part of the *Thornley*. Both the appeal and the cross-appeal must therefore be dismissed.

Buckley, L.J.—I agree, and I only wish to add a word as to the cross-appeal. The conclusion that the *Thornley* was to blame rests upon two propositions. The first is that the learned President concluded as a matter of fact that she had an opportunity of swinging, so as to put herself head to tide below the bend, and did not do so. The second is that in consequence of her not doing so she necessarily came up at great speed and then found herself in a place where, with a five-knot tide running, it would be very dangerous to try to pass; and so by failing to put herself head on tide at the Ness she placed herself in a position in which she was occasioning danger to the other ship. I think those two propositions are to be found in the judgment of the President.

Kennedy, L.J.—I am of the same opinion. With regard to the *Frankfort's* appeal it is unnecessary to say anything. I think the judgment of the President is clearly right. I have felt considerable doubt in the course of the argument upon the cross-appeal. The learned President in his judgment says, "The *Thornley* ought not to have been where she was at all." Had those words stood alone they would have seemed to me to justify the argument which counsel for the *Thornley* has so clearly put before us. I was rendered still more doubtful by certain remarks which the learned judge during argument is reported to have uttered; but upon the whole I think one ought to construe the judgment as finding that which it certainly was open to the learned judge to find—namely, not merely that

this vessel ought not to have been where she was, because, according to local practice and proper seamanship, vessels ought to come round in the way described and go stern up past a certain point, but that the fact of her not doing so on a tide like this makes a vessel coming up an object of danger. How far that may have contributed to this particular collision it is impossible to say, but that there was evidence upon which it could be held that a vessel in those circumstances might have contributed to the collision cannot, I think, be denied.

Solicitors for the appellants, *Hill* and *Aspinall*, for *A. M. Jackson* and *Co.*, Kingston-upon-Hull.

Solicitors for the respondent, *Downing, Handcock, Middleton*, and *Lewis*, for *Bolam, Middleton*, and *Co.*, Sunderland.

HIGH COURT OF JUSTICE

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

July 12 *and* 19, 1909.

(Before BARGRAVE DEANE, J.)

THE YARMOUTH. (*a*)

Limitation of liability—Ship owned by railway company—Actual fault or privity—Evidence—Affidavit by general manager — Merchant Shipping Act 1894 (57 *&* 58 *Vict. c.* 60), *ss.* 59, 503, 695, 719.

A steamship owned by a railway company was lost at sea. Owners of cargo brought or threatened to bring actions against the railway company for loss of cargo. The railway company instituted proceedings to limit their liability under the provisions of sect. 503 *of the Merchant Shipping Act* 1894.

The plaintiffs tendered an affidavit by the general manager of the railway company. The defendants contended that the affidavit should have been made by the managing owner of the steamship, that he was an owner within the meaning of the word in sect. 503 *of the Merchant Shipping Act* 1894, *and that, as he was at fault for the loss, the plaintiffs were not entitled to limit their liability.*

Held, that the affidavit by the general manager was sufficient, and that the plaintiffs were entitled to limit their liability.

LIMITATION ACTION.

The plaintiffs were the Great Eastern Railway Company, the owners of the steamship *Yarmouth;* the defendants were Faudels Limited, owners of certain cargo on the *Yarmouth*, and all and every person whomsoever claiming or being entitled to claim in respect of loss of life, goods, or merchandise on board the steamship *Yarmouth.*

The plaintiffs alleged in the statement of claim that on the 27th Oct. 1908 the *Yarmouth*, while on a voyage from the Hook of Holland to Harwich, was lost with all hands, that they were at the time of the loss the owners of the *Yarmouth*, that the loss occurred without their actual fault and privity, that an action had been instituted against them, claiming damages for the loss of cargo on board the *Yarmouth*, and that they expected other actions might be brought for damage to goods arising out of the same loss.

They alleged that the registered tonnage of the *Yarmouth* for the purpose of limiting their liability ascertained in accordance with the terms of the Merchant Shipping Act 1894 to 1906 was 743·73 tons, that the claims in respect of loss of goods would exceed the sum of 8*l.* per ton on that tonnage, and that they were ready and willing to pay into court the sum of 5949*l.* 16*s.* 10*d.* being the aggregate amount of 8*l.* a ton on the 743·73 tons, with interest thereon at 4 per cent. from the date of the loss until payment, and to give security for 5206*l.* 2*s.* 2*d.*, being the amount of 7*l.* a ton on the 743·73 tons, together with interest thereon at 4 per cent. The plaintiffs claimed (1) A declaration that they were not liable in damages in respect of loss of life or damage to goods beyond the aggregate of 15*l.* a ton on the 743·73 tons. (2) A declaration that the tonnage of the *Yarmouth* for the purposes of limiting their liability was 743·73 tons, and that the amount for which the plaintiffs were liable is no more than 11,155*l.* 19*s.* (3) Permission to pay the sum of 5949*l.* 16*s.* 10*d.* into court with interest thereon from the date of the loss until payment, and to give security for 5206*l.* 2*s.* 2*d.*, together with interest from the date of the loss until payment, and that upon payment being made and security given all proceedings in the claim made against them might be stayed. (4) A declaration that the plaintiffs are entitled to relief against any other actions being brought against them in the High Court, and that persons should be restrained from bringing any action against the plaintiffs in respect of the loss other than in the High Court. (5) That proper directions might be given for ascertaining the persons who had claims. (6) That the sum might be rateably distributed among them, and that directions might be given for the exclusion of claimants who did not bring in their claims within a certain time.

The defendants delivered a defence denying every allegation in the claim, and especially that the loss occurred without the actual fault or privity of the plaintiffs.

Before the case came on for trial all the claims for loss of life had been settled with by the owners of the *Yarmouth*, so the action proceeded with reference to the cargo claims.

The defendants consented to the evidence the plaintiffs being given by affidavit, and the plaintiffs filed an affidavit by Mr. Gooday, the general manager of the Great Eastern Railway Company, verifying the allegations in the statement of claim and exhibiting a certified copy of the register of the *Yarmouth.*

The following sections of the Merchant Shipping Act 1894 (57 & 58 Vict. c. 60) were referred to during the course of the trial.

Sect. 59 (1). The name and address of the managing owner for the time being of every ship registered at a port in the United Kingdom shall be registered at the custom house of that port. (2) Where there is not a

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

managing owner there shall be so registered the name of the ship's husband or other person to whom the management of the ship is entrusted by or on behalf of the owner; and any person whose name is so registered shall, for the purposes of this Act, be under the same obligations and subject to the same liabilities as if he were the managing owner.

Sect. 503 (1). The owners of a ship, British or foreign, shall not, where all or any of the following occurrences take place without their actual fault or privity; (that is to say) (*a*) Where any loss of life or personal injury is caused to any person being carried in the ship; (*b*) Where any damage or loss is caused to any goods, merchandise, or other things whatsoever on board the ship . . . be liable to damages beyond the following amounts; (that is to say) (i.) in respect of loss of life or personal injury, either alone or together with loss of or damage to vessels, goods, merchandise, or other things, 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. (2) For the purposes of this section (*a*) The tonnage of a steamship shall be her gross tonnage without deduction on account of engine room; . . . provided that there shall not be included in such tonnage any space occupied by seamen or apprentices and appropriated to their use which is certified under the regulations scheduled to this Act with regard thereto.

Sect. 695 (1). Where a document is by this Act declared to be admissible in evidence, such document shall, on its production from the proper custody, be admissible in evidence in any court or before any person having by law or consent of parties authority to receive evidence, and, subject to all just exceptions, shall be evidence of the matters stated therein in pursuance of this Act or by any officer in pursuance of his duties as such officer. (2) A copy of any such document or extract therefrom shall also be so admissible in evidence if proved to be an examined copy or extract, or if it purports to be signed and certified as a true copy or extract by the officer to whose custody the original document was intrusted.

Sect. 719. All documents purporting to be made, issued, or written by or under the direction of the Board of Trade, and to be sealed with the seal of the Board, or to be signed by their secretary or one of their assistant secretaries, or, if a certificate, by one of the officers of the Marine Department, shall be admissible in evidence in manner provided by this Act.

Aspinall, K.C. and *A. D. Bateson*, for the plaintiffs, stated the facts, read the affidavit of Mr. Gooday, general manager of the Great Eastern Railway, verifying the allegations in the statement of claim, and asked for a decree.

Noad for the defendants.—The plaintiffs are not entitled to a decree. The affidavit in support of the application is insufficient; it should have been sworn by the managing owner of the ship; he is the person to whom the management of the ship is intrusted by and on behalf of the owners within the meaning of sect. 59 of the Merchant Shipping Act 1894. Mr. Gooday is only swearing to hearsay. The case is an unusual one, there has been no collision, and there is no statement as to how the liability arises. [BARGRAVE DEANE, J.—If no evidence is offered by the defendants, the plaintiffs' affidavit sworn by the general manager that the loss occurred without the actual fault or privity of the owners would be sufficient. Your point is that the person to whom the management was intrusted was actually at fault or privy to the loss.] That is so. The managing owner is the proper person to make this affidavit; if he was at fault the company cannot limit their liability. [BARGRAVE DEANE, J.—If this point is to be raised the case may be adjourned for a week for you to call evidence.]

A. D. Bateson in reply.—The plaintiffs will object to evidence by affidavit, the evidence cannot be given by affidavit without the consent of the plaintiffs.

July 19.—Mr. Dalmon, a clerk in the Board of Trade Office, was called on behalf of the defendants to produce the report of the court of inquiry made to the Board of Trade in respect to the loss of the vessel.

Aspinall, K.C. objected to its admission; it was inadmissible, it was not sealed and did not come within the provisions of sects. 695 and 719 of the Merchant Shipping Act 1894.

Mr. Howard, managing owner of the *Yarmouth*, was called by the defendants on subpœna. He admitted he was the managing owner of the *Yarmouth*, and managed the vessel before her loss. He gave notice to the Board of Trade of the loss of the *Yarmouth*. He had to do that as managing owner. He was present at the court of inquiry held as to cause of the loss. He gave evidence at it; he did not receive a copy of the report. He was present when judgment was given.

Aspinall, K.C. objected to the witness being asked whether he was personally blamed, and what the judgment of the court of inquiry was. The witness was not the owner of the vessel. He had received no instructions from Mr. Gooday as to the loading of the vessel. In reply to Bargrave Deane, J., the witness stated he held no shares in the *Yarmouth*; she was owned by the Great Eastern Railway Company. He was a paid servant of the company, and a superintendent of their steamers.

Noad.—The word "owner" in the Merchant Shipping Act 1894 has various meanings; it does not only mean registered owner. The charterer is for some purposes the owner:

> *The Hopper No. 66*, 98 L. T. Rep. 464; 11 Asp. Mar. Law Cas. 37; (1908) A. C. 126;
> *Meiklereid* v. *West*, 34 L. T. Rep. 353; 3 Asp. Mar. Law Cas. 129 (1876); 1 Q. B. Div. 428.

So is an equitable owner:

> *The Spirit of the Ocean*, 12 L. T. Rep. 239; 2 Mar. Law Cas. O. S. 192; Br. & L. 336.

The owner was actually at fault in this case or privy to the loss:

> *The Diamond*, 95 L. T. Rep. 550; 10 Asp. Mar. Law Cas. 286; (1906) P. 282.

BARGRAVE DEANE, J.—I am of opinion that this action should succeed, and that the plaintiffs are entitled to limit their liability. The pleadings say that the *Yarmouth* was lost with all hands; that the loss occurred without the actual fault or privity of the plaintiffs; that an action has been instituted against the plaintiffs as owners of the *Yarmouth*, claiming damages for loss of or damage to goods; that the plaintiffs have reason to believe that other claims may be brought against them in respect of loss of or damage to goods, &c., arising out of the said loss, that is, as common carriers; that the tonnage of the ship

was 743·73 tons, and the claims in respect of loss of or damage to goods, &c., exceed the aggregate amount of 8*l.* per ton; and that the plaintiffs are willing and offer to pay into court the sum of 5,949*l.* 16s. 10d., with interest. That being so, it is quite clear it is an admission that they are liable as common carriers for the loss of these goods, which they contracted to carry, and they say "Give us relief under sect. 503 of the Merchant Shipping Act by limiting our liability to 8*l.* per ton." I understand there was loss of life, but that matter has been settled by the owners of the *Yarmouth*. Now, counsel for the defendants says "There is an admission of liability here from the fact that you ask for a limitation of liability." I agree with him that there is an admission of liability in the sense that as common carriers they failed to carry out their contract to carry these goods, but they say that liability is limited by Sect. 503. Now, the company cannot be protected unless the loss occurred without the actual fault or privity of the owners. The owners are the general body of shareholders of the company, and it has been decided that if the loss is occasioned by the actual fault of one of several part owners his co-owners are not thereby precluded from a right to the limited liability given by statute: (*The Spirit of the Ocean, ubi sup.*). Therefore, here we have got to see whether it is clearly established in evidence that no co-owner was actually in fault in respect of or privy to the loss. Counsel for defendants suggests—and attempts to prove it by putting in a document which I do not think is admissible in evidence, not being under the seal of the Board of Trade—that Mr. Howard was guilty of fault and privity which rendered the owners liable. Mr. Howard has been called by the defendants, and has sworn that he is not an owner in the true sense of the word, but nothing but a paid servant of the company, managing their business at the port of Parkeston, near Harwich. As he is a paid servant he is not an owner, and in order to bring Mr. Howard within the section as a person who is the owner and guilty of fault or privity you must show that he owns shares. He does not own a share. The section refers to the actual fault or privity of the owner, and not of "the owner or his agent or servant," and it seems to me it is not for me to read into the Act of Parliament words which are necessary to carry the argument raised by counsel for the defendants. Therefore I am of opinion that Mr. Howard is not an owner within the meaning of the Act of Parliament. As I have said, the owners are the shareholders. Who is the person who represents the shareholders? Why, the general manager and secretary of the company. He is defined by law as being the proper person to make statements and affidavits and give evidence on behalf of the company. Mr. Gooday, the general manager, has made an affidavit, and that affidavit was the only evidence in the case up to the time this action came on. Defendants consented that the plaintiffs should prove their case by affidavit, and Mr. Gooday has made a sufficient affidavit. Is he the proper person? As I have already said, I think he is the proper person. If counsel for defendants did not accept his statement he might have required an affidavit by somebody else, whom he could point out as being a more proper person to make it. He says it should have been made by Mr. Howard. I have already said I think Mr. Howard was not the proper person to make it. For these reasons I am of opinion that the defendants' contention cannot stand, the limitation must be granted, and any extra costs occasioned by the adjournment are not to fall on the plaintiffs.

Solicitors for the plaintiffs, *E. Moore.*
Solicitors for the defendants, *Waltons* and *Co.*

Oct. 21, 22, *and* 26, 1909.

(Before Sir J. BIGHAM, P. and Elder Brethren.)

THE TRYST. (*a*)

Collision—Crossing vessels—Duty to keep clear—Duty to keep course and speed—Failure to stand by—Statutory presumption of fault—Proof to the contrary—Merchant Shipping Act 1894 (57 *&* 58 *Vict. c.* 60), *s.* 422.

Where a collision has been caused solely by the negligent navigation of one of two vessels, the court will not deem the other in fault because she has failed to stay by and render assistance as required by sect. 422 *of the Merchant Shipping Act* 1894, *as there is in fact "proof to the contrary."*

DAMAGE ACTION.

The plaintiffs were the Royal Mail Steam Packet Company, the owners of the steamship *Ortona*; the defendants and counter-claimants were the owners of the steamship *Tryst*.

The case made by the plaintiffs was that shortly before 7 25 a.m. on the 16th April 1909 the *Ortona*, a steel screw steamship of 7945 tons gross and 4115 tons net register, manned by a crew of 260 hands all told, was in the English Channel between twenty and twenty-five miles south by west of the Eddystone in the course of a voyage from Gibraltar to Plymouth with a general cargo and passengers.

The weather was fine and clear, the wind west-south-west, a light breeze, and the tide setting to the westward of little force.

The *Ortona*, steering N. 28° E. true, was making about fourteen knots through the water. A good look-out was being kept on board of her.

In these circumstances those on the *Ortona* saw the *Tryst* about four miles off and about three points on the port bow. The *Ortona* kept her course and speed, and the *Tryst* approached without taking any steps to keep out of the way, and, when she had drawn so close that a collision could not be avoided by her action alone, the helm of the *Ortona* was put hard-a-port and her whistle sounded one short blast and her engines were kept working full speed ahead as the only means of averting collision.

Notwithstanding these measures the *Tryst* came on at great speed, and with her starboard bow struck the port side about midships of the *Ortona*, and directly afterwards again struck her further aft, causing her damage.

Those on the *Ortona* charged those on the *Tryst* with not keeping a good look-out; with neglecting to keep out of the way of the *Ortona*; with improperly attempting to cross ahead of the *Ortona*;

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

and with neglecting to slacken her speed or stop or reverse her engines

The case made by the defendants and counter-claimants was that the *Tryst*, a steel screw steamship of 750 tons gross and 210 tons net register, manned by a crew of thirteen hands all told, was about 7.30 a.m. on the 16th April in latitude 49° 51′ N. and longitude 4° 43′ W. in the course of a voyage from Swansea to Honfleur. The wind was moderate from the south-westward, the weather cloudy but clear, and the tide ebb of the force of about two knots. The *Tryst* on a course of S.E. by E. ¾ E. was making about eight knots an hour, and a good look-out was being kept on board her. In these circumstances the *Ortona* was seen close to on the starboard quarter overtaking the *Tryst* at very great speed. As the overtaking ship took no measures to keep clear, the helm of the *Tryst* was put hard-a-starboard just before the collision, but the overtaking vessel, although she gave a short blast just before collision, continued her high speed, and with her port side struck the starboard bow of the *Tryst*, causing the *Tryst* to fall alongside her, so that her port propeller struck the starboard side of the *Tryst*, doing so much damage that the *Tryst* sank about two hours afterwards. After the collision the *Ortona* steamed away from the *Tryst* without slackening her speed or rendering or attempting to render any assistance, notwithstanding that repeated signals were made on the steam whistle of the *Tryst*.

Those on the *Tryst* charged those on the *Ortona* with not keeping a good look-out; with neglecting to keep clear of the *Tryst*; with improperly porting; and with failing to ease, stop, or reverse their engines.

The following Collision Regulations were referred to during the hearing 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,

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.

24. Notwithstanding anything contained in these rules, every vessel, overtaking any other, shall keep out of the way of the overtaken vessel.

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.

The following section of the Merchant Shipping Act 1894 (57 & 58 Vict. c. 60) was also referred to:

Sect. 422 (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 and 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, and also (*b*) to give to the master or person in charge of the other vessel the name of his own vessel and of the port to which she belongs, and also the names of the ports from which she comes and to which she is bound; (2) if the master or person in charge of a vessel fails to comply with this section, and no reasonable cause for such failure is shown, the collision shall, in the absence of proof to the contrary, be deemed to have been caused by his wrongful act, neglect, or de ault; (3) if the master or person in charge fails without reasonable cause to comply with this section, he shall be guilty of a misdemeanour, and if he is a certified officer an inquiry into his conduct may be held and his certificate cancelled or suspended.

The evidence as to not standing by is set out in the judgment.

Aspinall, K.C., *Stephens*, and *H. M. Robertson*, for the plaintiffs.—The *Tryst* was the give way ship and brought about the collision by bad look-out. The *Ortona* was in no way to blame; it has not been shown that she should have taken action sooner than she did:

The Albano, 96 L. T. Rep. 335; 10 Asp. Mar. Law Cas. 365; (1907) A. C. 193.

Laing, K.C. and *Noad* for the defendants.—The collision must be deemed to have been caused by the wrongful act of the master or person in charge of the *Ortona*, for she failed to stand by after the collision, and so committed a breach of sect. 422 (2) of the Merchant Shipping Act 1894:

The Queen, 20 L. T. Rep. 855; 3 Mar. Law Cas. O. S. 242; L. Rep. 2 A. & E. 354.

Aspinall, K.C. in reply.—The section only applies in the absence of proof to the contrary. In this case we have proved the collision was the fault of those on the *Tryst*, so the collision cannot be deemed to be the fault of the master of the *Ortona*, and her owners are not liable for the damage which is the result of it:

The Sussex, 90 L. T. Rep. 549; 9 Asp. Mar. Law Cas. 578; (1904) P. 236.

THE PRESIDENT.—I think I must hold the *Tryst* solely to blame for the collision. It was at first contended that these were overtaking and not crossing ships, but that contention was abandoned. It is clear that they were crossing ships. The *Ortona* was steering a course of N.E. magnetic, and the *Tryst* a course of S.E. by E. ¾ E. magnetic, and the ships were approaching each other. The *Tryst* had the *Ortona* on her starboard side. In these circumstances it was the duty of the *Tryst* to give way and to keep clear of the *Ortona*, under rule 19, while it was the duty of the *Ortona* to keep her course and speed, under rule 21. The *Tryst's* look-out was bad. She failed to give way, and to this neglect of her duty the collision is, in my opinion, attributable. It was then said that even if the *Tryst* were to blame in this respect, yet the *Ortona* did wrong in porting her helm, and that if she had not so ported she would have passed safely under the stern of the *Tryst*. This contention was also abandoned. It was obvious that

when the order to put her helm hard-a-port was given there was an imminent risk of collision, and I am advised by the Trinity Masters, and I believe, that the best thing then to do was to attempt to get the *Ortona* on a parallel course with the *Tryst*. For the *Ortona* to have reversed her engines would only have made matters worse, as there was not sufficient time to have stopped her way, and it would have prevented the head of the *Ortona* canting so quickly. The putting of the *Ortona's* helm hard-a-port was a seaman-like thing to do in the circumstances, and that it failed to prevent the collision cannot be attributed to any negligence on the part of those in charge of the *Ortona*. At all events it had the effect of rendering the impact much less serious than it would otherwise have been. Then it is said that the *Ortona* should be held partly to blame because she might and ought to have reduced her speed, and it is pointed out that according to the engineer's evidence an interval of three minutes elapsed between the order from the bridge to stand by and the collision, but in my opinion those in charge of the *Ortona* acted all through for the best. There may have been some error of judgment, something might have been done which would seem wiser when considered after the event, but there was in my opinion nothing which could be described as negligence on the part of those in charge of the *Ortona*. The death-blow to the *Tryst* was dealt just under the water by the port propeller of the *Ortona* striking the *Tryst's* starboard side as she was clearing her. An attempt was made to stop this propeller. An order was given from the *Ortona's* bridge, but it did not reach the engine-room. This was probably due to the lever on the bridge not having been pulled sufficiently sharply; but whatever the cause we cannot attribute the failure of the lever to act to any negligence. In sudden emergencies the best of us are apt to make what may afterwards be called mistakes. The conclusion of fact at which I arrive is that no blame attaches to the *Ortona*. There remains a point taken by counsel for the plaintiffs at the end of the plaintiffs' case. It was said that the master of the *Ortona* was guilty of statutory negligence, inasmuch as he failed to stay by the *Tryst* until he had ascertained that she had no need of further assistance, as required by sect. 422 of the Merchant Shipping Act; and that therefore the collision ought to be deemed to have been caused by the wrongful act or default of the master of the *Ortona*. The facts are these: that when the vessels came together the force of the two blows was slight and the visible damage to the *Tryst* was neither serious nor such as to lead either those on board the *Ortona* or those on board the *Tryst* to suppose that the *Tryst* was in need of assistance. The evidence satisfies me that those in charge of the *Ortona* suspected that the *Tryst* might have sustained, as in fact she had, damage under water from the action of the *Ortona's* port propeller. I will refer to the evidence of the chief officer. He was asked:

After she struck you the second time what happened?—She slid off. We went full speed on the engines again. I put the telegraph back to full speed again, instead of stand-by, and we righted her helm again.

The vessels having passed clear, what did you do? In the first place did you hear any signal from the other vessel?—We saw a blast given on the steam whistle. I could not understand; it was not an authorised signal of distress. We hoisted a signal asking if she required assistance, and got no answer.

Why, then, did you stop your port engine?—That was after the first collision, when she was coming in again, knowing very well she came in on top of our propellers.

It was to avoid doing damage to the propellers?—She might have done that.

Your object was to avoid doing damage to the revolving propeller?—If possible, and also to help the ship back to get the stern round again.

To counteract the swinging out of the port quarter?—Yes, but there was no time after that.

No order was carried out; your port propeller continued ahead all the time?—I gave the order and it was put on the telegraph.

Was it answered from the engine-room?—I could not say. I gave the order. The third officer who was standing by the telegraph gave the order to stop, and before the action had time to have effect she was then again on top of us.

There was no answer from the engine-room as far as you know, and the propeller continued going full speed from first to last?—As far as I know.

Did the master come on deck without being called?—Yes.

And he was on deck how soon after the collision?—Within a minute

Was he on deck when the two whistle signals were heard on the other vessel?—No, he had just gone down. I sent down to him and told him I would hoist a signal.

He had gone again?—Yes, gone down again, and he just came up in his pyjamas. I sent down immediately I h isted the signal.

How long was the interval between the two blasts she gave?—It might have been a minute or two.

How many times did she blow her whistle in all?—I only saw steam coming out twice.

Notwithstanding that you maintained your course and full speed?—I went down and asked the captain if he would turn back.

Did you think it was necessary to turn back?—No, because he had no signals up and did not answer our S.G.C.

What does that mean?—Do you require assistance?

How long would it be before you were out of sight of him for distinguishing signals?—Do you mean reading signals or seeing flags?

Reading flags?—On that day you could read one three miles off, and you could see flags further than that by a good long distance, but she had no flags up at all; we could see if she had hoisted flags.

Did you look?—All the time, for a long time until you could not see her at all scarcely.

It was a good bump, the collision?—Yes, but she only seemed slightly damaged.

What do you mean by slightly?—We could not see any holes above the water on the bows.

No holes near the water level?—She seemed to be more dented than holed; she certainly did not look as if she had been damaged below water.

Had you any communication from the engine-room as to what had happened to your port propeller?—We wondered whether it had stuck or not afterwards. We could not see very well at Plymouth.

I was not talking about that. I meant, did you get any information from the engine-room after the collision?—I asked them if they had felt anything, and they said no.

When did you say that?—how long after?—I asked the chief engineer somewhere about perhaps half-past eight, when I went to my berth.

Not close to the collision?—I did not ask him then; the captain, I believe, went down.

You had in your mind the possibility of the propeller having struck her?—Yes, I certainly had in my mind the possibility of it.

What did the captain reply when you asked him whether you should turn back?—"No, she has no signals of distress; go on."

Do you not think a long blast on the whistle is a signal of distress?—It is not recognised.

If you were to hear a vessel blowing a number of long blasts on the whistle, would you not think there was something the matter with her after you had been in collision with her?—Certainly not.

You have been in collision with a vessel; according to you, she was passing away astern blowing long blasts on her whistle; do you mean to say it conveyed to you nothing?—It certainly conveyed nothing.

And you took no measures?—We hoisted the signal to her.

You know, of course, she sank afterwards?—We heard that afterwards.

Then the third officer said:

After the vessels parted, can you tell me what took place?—We, of course, brought back to our course, and the other steamer kept on hers, as far as we could see.

Did she make any signal?—She blew her whistle twice.

What kind of blasts?—Short blasts, so far as I could make out; five or six seconds.

Did you take any steps?—We hoisted up signals asking her if she required assistance.

Did you get any answer?—No, we did not see any flags at all.

And you continued on your course?—We continued on our course.

Then there is the evidence of the master. He was asked:

Then what was done with your vessel?—Immediately she got well clear I altered the helm; it was hard-a-port; I proceeded to bring her back to her course.

Could you see or hear any signals from the other vessel?—No, I saw very little damage to her. The starboard side was very slightly indented. I thought there was nothing the matter with him.

Did they make any signal to you?—After I got below he blew two blasts, and we sent up a signal, "Do you want assistance?"

Was any answer made?—Not the slightest; no ensign pulled up, or anything.

Did you yourself consider there was any reason for taking further steps?—No, there did not seem to be much the matter with her. The top-work was slightly bent—very little bent.

You considered it prudent and safe to proceed?—Quite so. I sent for the chief engineer to ask him if there was any chance of the propeller hitting him, and he said no, the propellor was not touched.

Later on the master was asked:

All you did was to keep on at full speed, and because he did not hoist flags you assumed he wanted nothing?—Because, seeing the damage on the bows, and feeling myself a slight bump—not so much of a bump as you often get along a dock wall.

You do not think it was part of your duty to give to the master or person in charge of the other vessel the name of your vessel and of the port which she belongs, and also the names of the port from which she comes and into which she is bound? You did not do so?—No.

You are an experienced seaman?—Yes, I have been to sea a number of years.

Did you in the whole course of your experience ever hear of a collision between two steamers where the one maintained her course and speed throughout the whole business—in this case 14½ knots?—I did not think it was necessary to stand by.

That is another matter. I am asking you, Did you ever hear in your whole life——I have not inquired into cases of collision. You hear of cases where ships do go on.

Then there was something said about motor-cars, and the witness was asked, "Were you in any particular hurry to get to Plymouth?" and his answer was, "We naturally want to get in."

Then there is the evidence of a man named Matherson, who was asked:

Were you able to see the vessels part after the collision?—Yes.

Were you able to see or hear any signals made to the other vessel?—I saw the *Ortona* put up three or four flags, and the *Tryst* sounded two blasts—long blasts. I think that was all.

Which happened first?—The flags.

I think you then continued on your course?—Yes.

I think the fair conclusion to be drawn from this evidence is that those on board the *Ortona* suspected that damage might have been caused by the port propeller. I think, too, that, although the flag signals on the *Ortona* were not answered by any flag signals from the *Tryst*, the blowing of the latter's whistle ought to have conveyed to the *Ortona* that assistance was in fact needed. Instead of staying by the *Tryst* to clear up the doubt or to ascertain what the whistle was intended to indicate the *Ortona* steamed right away. I am quite satisfied that no staying by the *Tryst* on the part of the *Ortona* would have made any difference in the result. The *Tryst* would have gone to the bottom as she did whether the *Ortona* had been there or not, and in this sense the *Tryst* may be said to have had no need of further assistance; but that is not what the statute means. One vessel is not to steam away from the other merely because nothing can be done to prevent the other vessel from sinking. The lives of those on board are to be thought of, and in this case it is impossible to say that the danger to life would not have been lessened by the *Ortona* standing by. Fortunately no lives were lost, but there was undoubtedly great peril. What are the statutory consequences, so far as the ship and shipowner are concerned, of the master's failure to stand by? They are that in the absence of proof to the contrary the collision shall be deemed to have been caused by the master's wrongful act, neglect, or default, thus rendering the ship and shipowner liable. But in this case it is proved to my satisfaction that the collision was due entirely to the fault of the *Tryst*, or, in other words, that it was not caused by wrongful act or default of the master or person in charge of the *Ortona*. The section therefore does not apply. It may be that the master is guilty of a misdemeanour under sub-sect. 3 of sect. 422, which reads as follows: "If the master or person in charge fails without reasonable cause to comply with this section he shall be deemed to be guilty of a misdemeanour." That is a sub-section which deals only with the personal liability of the master or person in charge, and it does not contain the words "in the absence of proof to the contrary", which are found in sub-sect. 2. It does not affect the liability of the ship or her owner. I therefore express no opinion as to the responsibility

under this sub-section. There will be judgment for the plaintiffs.

Solicitors for plaintiffs, *Holman, Birdwood,* and *Co.*

Solicitors for defendants, *Thomas Cooper* and *Co.*, agents for *Hill, Dickinson,* and *Co.*, Liverpool.

House of Lords.

Nov. 10 *and* 12, 1909.

(Before the LORD CHANCELLOR (Loreburn), the Earl of HALSBURY, Lords ATKINSON, GORELL, and SHAW.)

ELDER, DEMPSTER, AND Co. *v.* DUNN AND Co. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Charter-party—Damages for breach of charter-party—Indemnity.

The appellants chartered a ship belonging to the respondents. By the charter-party the charterers were bound to present bills of lading which threw upon the ship no greater liability than that contemplated by the charter-party.

The charterers loaded a cargo of cotton on the ship to be delivered in France, and bills of lading were signed by the master which specified the marks on the bales of cotton shipped. When the ship arrived at her port of discharge, the marks on some of the bales of cotton did not correspond with the marks specified in the bill of lading. The consignees refused to accept them, and the respondents had to pay damages for short delivery.

Held, that the respondent shipowners were entitled to recover from the appellants the amount so paid, it being the duty of the charterers under the charter-party to load bales properly marked as specified in the bill of lading.

Judgment of the court below affirmed.

APPEAL from a judgment of the Court of Appeal (Vaughan Williams, Moulton, and Buckley, L.JJ.), delivered on the 28th July 1908 reversing a judgment of Walton, J. in the Commercial Court in favour of the appellants, the defendants below.

The action was brought by the respondents, as owners of the steamship *Foxton Hall*, against the appellants, who were the charterers, to recover 163*l.* 18*s.* 2*d.* by way of damages which the respondents had to pay to consignees of a cargo of cotton for short delivery under French law. The respondents said that, as they had to pay these damages, having regard to the terms of the charter-party and the bill of lading which was prepared and presented by the charterers, Messrs. Elder, Dempster, and Co., and signed at their request by the master of the ship, they were entitled to be indemnified by Messrs. Elder, Dempster, and Co. and to sue them for breach of contract, as their obligation was to present a bill of lading which should throw upon the ship no larger liability than that contemplated by the charter-party. The charter-party was upon a form called the "Net Grain Basis," and incorporated the American "Harter Act," and also making it conclusive evidence of the shipment of the goods.

The ship loaded a cargo of cotton at Galveston for delivery at Havre, and when she arrived at Galveston the appellants issued, without any authority from her captain or the respondents, "Elder-Dempster" bills of lading, representing 7,797 bales of cotton, and when the cargo was discharged at Havre the captain handed over to the Cunard Company, as agents of the appellants, all his copies of the master's receipt bills of lading in order that the Cunard Company might give delivery of the cargo to the holders of the Elder-Dempster bills of lading or the master's receipt. When this came to be done it appeared there were some errors as regards the marks entered by the appellants in the master's receipt bills of lading, and nine consignees refused to accept 124 bales, said to be wrongly marked, and claimed their value from the Cunard Company.

The Cunard Company had been instructed by the appellants that in the event of this happening they were to retain out of the freight due to the respondents sufficient to pay any claim for short delivery.

Eventually the respondents without prejudice paid the claims of the consignees, and had the 124 bales brought to Liverpool and sold.

The respondents commenced this action against the appellants to recover the amount paid, alleging that it was an implied term of the charter-party that they should not be liable for errors in the master's receipt bills of lading.

At the trial Walton, J. found in favour of the appellants.

The Court of Appeal reversed this decision, and gave judgment for the respondents.

Atkin, K.C. and *Leslie Scott*, K.C., for the appellants contended that the bill of lading was signed without prejudice to the charter-party, and ought not to have imposed any more onerous conditions on the charterers; but it contained the "conclusive evidence" clause, which is more onerous, and it was under it that the respondents had to pay this money. The Court of Appeal relied on the decision in *Krüger* v. *Moel Tryfan Ship Company* (10 Asp. Mar. Law Cas. 465; 97 L. T. Rep. 143; (1907) A. C. 272), but it is distinguishable. The principle does not extend to a bill of lading, which throws additional obligations on the shipowner, for the master is not bound to sign it. It was his duty to see that the marks on the bales corresponded with the marks in the bill of lading, and if not he might have refused to sign. The shipper does not warrant the accuracy of the marks set out in the bill of lading. The master signed on his own responsibility, and there was no contractual obligation on the appellants. As to the principles of indemnity see

Corporation of Sheffield v. *Barclay*, 93 L. T. Rep. 83; (1905) A. C. 392.

They also referred to

Lishman v. *Christie and Co.*, 6 Asp. Mar. Law Cas. 186 (1887); 57 L. T. Rep. 552; 19 Q. B. Div. 333;

Parsons v. *New Zealand Shipping Company*, 9 Asp. Mar. Law Cas. 33; 82 L. T. Rep. 327; (1900) 1 Q. B. 714; affirmed on appeal, 9 Asp.

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

Mar. Law Cas. 170; 84 L. T. Rep. 218; (1901) 1 K. B. 148;
Smith v. *Bedouin Steam Navigation Company*, (1896) A. C. 70;
Stumore v. *Breen*, 12 App. Cas. 698.
Childers v. *Wooller*, 2 E. & E. 287.

The suggested liability is too wide, and comes within no known rule of law.

Scrutton, K.C. and *Mackinnon* supported the judgment of the Court of Appeal.

Leslie Scott, K.C. in reply.—It was the duty of the ship to check the marks on the bales. The charterers had done all that was required of them when they had seen that bales properly marked were deposited on the quay.

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

The LORD CHANCELOR (Loreburn).—My Lords: To my mind there is no ground whatever for this appeal when once you arrive at the facts. I shall not enter upon a minute examination of them, but will merely state summarily what the result of the evidence seems to me to be. The trouble in this case arose from the fact that certain bales were placed in this ship not corresponding in marks with the bill of lading, and hence by the law of France the ship was obliged to compensate the consignees, and now seeks to recover against the charterers. Now every element of this mistake was in the charterers themselves in what they did which they ought not to have done, and in what they omitted to do which they ought to have done. They alone knew the proper bales to be placed upon the ship, and also what were the marks. They alone loaded the ship and checked the marks. The American Act does not impose upon the ship any obligation as between the ship and the charterers to check these marks. The charterers alone supplied the marks where defective, although the master, in excess of his duty, paid the cost of it. The charterers alone put the marks on the mate's receipts, and did so at a time when it was too late for the master to check them with the bales. The charterers entered these marks upon the bills of lading, and presented those bills of lading to the master, who accordingly signed them. Now, in paragraphs 10 and 11 of the statement of claim the complaint against the defendants is that "the defendants in presenting the bills of lading with the marks therein specified" requested the master "to sign them, and the defendants are liable to indemnify the plaintiffs from the consequent liability incurred by them as aforesaid." Then there is a further alternative stated in paragraph 11: "In further alternative the defendants by presenting the said bills of lading to the captain and (or) by certain documents called daily reports which were prepared by defendants and produced to the captain on Dec. 20, 1906, represented and warranted to the captain that the marks specified therein correctly specified the various marks on the bales that the defendants had shipped, and the defendants made such representation and warranty, intending that the captain should thereon sign the bills of lading, and that the plaintiffs should thereby incur liabilities thereunder. And the captain signed in reliance on such representation." In my opinion, both those paragraphs are fully proved, and there is no ground whatever for disturbing the judgment which has been arrived at by the Court of Appeal. I therefore move your Lordships that the appeal should be dismissed with costs.

Earl of HALSBURY.—My Lords: I think that when once the facts of this case are understood it is clear of all doubt. Assuming that the charterers were under an obligation both in respect of the marks and the loading, as I think they were, there can be no doubt as to the true result of this case. I am bound to say that I think that it need not have lasted so long if we had understood originally what the actual facts were. Speaking for myself, I misunderstood them. I was not aware of the peculiarity of the charter-party in this case; I did not know that it was the duty of the charterers under this particular charter to have loaded the vessel and taken care that the proper marks were there. Once I understand that, I have no doubt whatever, and I entirely concur with the judgment which the Lord Chancellor has suggested.

Lord ATKINSON.—My Lords: I concur.

Lord GORELL.—My Lords: I concur. I think that the evidence establishes the cause of action which is to be found set out in the 11th paragraph of the statement of claim.

Lord SHAW.—My Lords: The mistake in respect of which these proceedings occurred was a mistake which, as I gather from the argument, occurred in this way: That between the time of the marking, which is assumed or argued to have been correct, on the quay side and at the time of the ultimate delivery of these goods in the hold of the vessel, certain discrepancies arose. The time of the marking was not the conclusion of the duty of the charterers at the quay side. By the charter-party the charterers had upon them the responsibility of loading this vessel. If, therefore, the mistake arose between the time when the goods were on the quay side and the time when they were loaded, the clearing up of that mistake lies within the area of responsibility of the charterers. I think, therefore, that the appeal cannot be maintained.

Judgment appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellants, *Field, Emery, Roscoe*, and *Medley*, for *Batesons, Warr*, and *Wimshurst*, Liverpool.

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

Supreme Court of Judicature.

HIGH COURT OF JUSTICE

KING'S BENCH DIVISION.

Friday, Oct. 22, 1909.

(Before HAMILTON, J.)

MENTZ, DECKER, AND CO. *v.* MARITIME INSURANCE COMPANY LIMITED. (*a*)

Marine insurance—Barratry—Deviation—Notice of deviation—Amount of premium fixed after breach of warranty—Marine Insurance Act 1906 (6 *Edw.* 7, *c.* 41), *s.* 49 (1) (*g*), *and schedule, r.* 11.

A policy effected on commissions on the Viduco *included barratry of the master among the insured perils. The policy also contained the following clause: "In the event of the vessel making any deviation or change of voyage, it is mutually agreed that such deviation or change shall be held covered at a premium to be arranged, provided due notice be given by the assured on receipt of advice of such deviation or change of voyage." The master made two voyages for his own benefit without the knowledge or consent of the assured, who remained in ignorance of them until after the loss of the vessel. Notice of the deviation was not given to the underwriters until after the loss.*

Held, in an action on the policy, that both voyages were barratrous, and, although deviations, they did not put an end to the policy, and the assured were entitled to recover.

Semble, *that the notice of deviation was good, although not given until after the loss, and that the amount of additional premium must be paid on the assumption that the fact of the deviation was known to both parties at the time it took place.*

COMMERCIAL COURT.

Action tried by Hamilton, J. sitting without a jury.

The plaintiffs claimed on seven policies of assurance effected by the defendants on commissions expected to be earned in respect of the barque *Viduco*. The policies were in the usual form, and included among the perils insured against, barratry of the master and mariners. The policy contained the following marginal clause:

> In the event of the vessel making any deviation or change of voyage, it is mutually agreed that such deviation or change shall be held covered at a premium to be arranged, provided due notice be given by the assured on receipt of advice of such deviation or change of voyage.

By the policies and indorsements the assured were to be held insured whilst at San Juan del Sur from the 26th April 1907 to the 25th Aug. 1907, and thence to a port or ports of loading in Costa Rica, and thence to a port of discharge in the United Kingdom or on the continent of Europe between Bordeaux and Hamburg.

In July 1907 the *Viduco* sailed from San Juan del Sur to Punta Arenas for orders, and there received orders to load a cargo of timber at Cocos Bay, in Costa Rica. At Punta Arenas the master of the *Viduco* made an arrangement with one Captain Gissler to take him and some cargo to Cocos Island, which is about 250 miles south-west of Punta Arenas.

The *Viduco* accordingly left Punta Arenas and arrived at Cocos Island on the 19th Sept., and whilst there she grounded, but no damage was sustained. A second agreement was then entered into between the master of the *Viduco*, and Captain Gissler, whereby the former undertook that after loading at Cocos Bay he would again proceed to Cocos Island for the purpose of returning with Captain Gissler to the mainland.

The *Viduco* left Cocos Island on the 28th Sept.; arrived at Cocos Bay on the 4th Oct., and remained loading there until the 15th Dec. On the 16th Dec. she left Cocos Bay and arrived at Cocos Island on the 27th Dec., anchoring in the same place as on the former occasion.

For these two voyages the master received from Captain Gissler 40*l.* and 50*l.* respectively.

While there she grounded and finally became a total loss on or about the 26th Feb. 1908. The facts that these two voyages were made and that payments had been received by the master in connection therewith, were not communicated to the owners, although the charterer was aware of the deviations. The captain's conduct in connection with the loss of the *Viduco* was subsequently inquired into by a marine court at Hamburg, resulting in the suspension of his certificate.

By their statement of claim the plaintiffs pleaded that the loss of the vessel was occasioned by the barratrous conduct of the master, and, alternatively, by perils of the sea.

The defendants pleaded that the alleged deviation was not barratrous, and, alternatively, that there was no loss by barratry; that the policies were dissolved by such deviation; and that no due notice of the deviation was given.

Horridge, K.C. and *F. T. Bigham* for the plaintiffs.—The master committed the offence of barratry by making the two voyages to Cocos Island, and therefore by sect. 49 of the Marine Insurance Act 1906 the deviation is excused. The term barratry is defined in rule 11 of the schedule to the Act as including "every wrongful act wilfully committed by the master or crew to the prejudice of the owner, or, as the case may be, the charterer." Here the voyages were made for the master's own benefit, but, apart from that, his act, being prejudicial to the owner, was barratrous. Lord Ellenborough has described "a gross malversation by the captain in his office" as being barratrous. *Heyman* v. *Parish* (1809, 2 Campb. 149) and in Arnould's Marine Insurance (8th edit.), sect. 847, there is a statement to the effect that "where . . . the captain deviates from the proper course of the voyage in fraud of his duty to his owners and for his own private purposes unknown to them, this is an act of barratry from the moment the ship is carried out of her course." The charterer's consent was immaterial, as there was no demise of the vessel so as to create the relationship of master and servant between the charterer and the captain:

M'Intyre v. *Bowne*, 1 Johns. N. Y. 219;
Hobbs v. *Hannam*, 3 Campb. 93;

(*a*) Reported by LEONARD C. THOMAS, Esq., Barrister-at-Law.

Small v. *United Kingdom Marine Mutual Insurance Association*, 8 Asp. Mar. Law Cas. 255, 293; 76 L. T. Rep. 828; (1897) 2 Q. B. 42;
Cory v. *Burr*, 4 Asp. Mar. Law Cas. 480, 559 (1881); 49 L. T. Rep. 78; 8 App. Cas. 393.

A premium can be paid for the deviation, if it was not barratrous, on the assumption that both parties were aware of it at the time it took place:

Greenock Steamship Company v. *Maritime Insurance Company*, 9 Asp. Mar. Law Cas. 364, 463; 88 L. T. Rep. 207; (1903) 1 K. B. 367.

Leslie Scott, K.C. and *Simey* for the defendants.—In order to establish barratry something in the nature of a criminal act on the part of the master must be established:

Earle v. *Rowcroft*, 8 East 126;
Arnould's Marine Insurance, sect. 846.

Negligence is not barratry, nor does deviation of itself amount to barratry. There is no barratry unless the master does that which he wilfully believes to be wrong, although it may not be necessary to show that the act was criminal in the sense of rendering the master liable to prosecution under the criminal law. There is no evidence in the present case to show that the master intended to defraud his owners. The marginal note in the policy refers to notice before loss. The plaintiffs cannot recover, as no notice was given until after the loss, and the underwriters had no opportunity of effecting a re-assurance.

Horridge, K.C. in reply.—The marginal clause simply means that the owners must give notice of deviation when they receive it themselves, and that they will not be covered unless they give such notice. In *Greenock Steamship Company* v. *Maritime Insurance Company* (*sup.*) Bigham, J. held that the clause might be relied upon after loss.

Hamilton, J.—This is an action brought by a German firm upon seven policies of insurance effected with the Maritime Insurance Company in this country upon commissions in respect of a foreign sailing vessel, of which the plaintiffs were the managing owners at the time of the occurrences in question. The policies were effected to cover an interest which they had on commissions expected to be earned, and it is common ground in the action that these commissions have been lost to them owing to the total loss of the vessel; and no question arises in any way as to their right to recover on the policies, or as to the amount to be recovered subject only to this, that in consequence of the captain having made two voyages from the coast of Costa Rica to Cocos Island, the defendants have a defence, which they relied upon, as a breach of warranty not to deviate, unless the act of the captain in making those two short voyages could be said to have been barratrous, in which case under the Marine Insurance Act, sect. 49 (1) (*g*) deviation would be excused as a breach of warranty. There is a further question, even if it was a deviation, there was a deviation clause in the policy to the benefit of which the plaintiffs would be entitled unless the defendants were in a position to show that the proviso in that deviation clause had not been complied with. The facts are relatively short. The captain was to proceed to a place on the coast of Costa Rica called Punta Arenas. There he was to get orders for a loading port under a charter to load timber for Europe. The charterer was not immediately ready with his cargo. The captain met at Punta Arenas a fellow-countryman, who had been for some twenty years concessionnaire of various rights of the Costa Rica Government in its possession Cocos Island, who was anxious to get transported to Cocos Island with some of his goods at the earliest possible moment. Accordingly, the captain took the vessel, which was then light, across to Cocos Island, and made a voyage which occupied, I think, some thirty-nine days in the latter part of August and in September. He returned from Cocos Island to the mainland, and there, at a place called Bahia de Cocos, loaded his homeward cargo of timber, with a small quantity of ballast, and then again, at the instance of the German concessionnaire, returned with a quantity of goods to Cocos Island, where the vessel stranded, and received so much injury that eventually it was found impracticable to keep her afloat. The conduct of the captain in hazarding his vessel under those circumstances was such that, when it was inquired into before a marine court at Hamburg, to which he was subject, his right to continue the profession of a maritime commander was taken away on the ground of his misconduct; but I think the details of his misconduct are not material to this case, except to this extent: that they show him as a seaman in a very unfavourable light, and it may be, therefore, that a person so ill qualified to discharge his duties as a captain in one respect might have been prone to forget them in another. About the end of February the vessel broke her back where she lay, and thereupon became a total loss.

The fact of the loss was known in Europe before the owners were aware that the vessel had been to Cocos Island on the first occasion, and the owners were not aware of her having been to Cocos Island at all until they learned that she was in trouble there. I find as a fact that the owners were entirely unaware that the captain was going to take the vessel to Cocos Island; I find as a fact that the owners had never really given any authority to him which would cover him in his voyages to Cocos Island, and that they did not become aware of the first voyage until the captain returned to Hamburg, and made a confession at the beginning of May of the circumstances of the second voyage to Cocos Island; and of that fact they only became aware at a time when the underwriters, who were also unacquainted with the facts, could, as it turned out, do nothing to avert a total loss. Now, there is no doubt at all, having regard to the terms of the policy, which I need not read, that the voyages to Cocos Island were deviations. The question, therefore, which arises first of all is: In deviating did the captain commit a barratrous act? The Marine Insurance Act in the schedule in par. 11 states that, "The term 'barratry' includes every wrongful act wilfully committed by the master or crew to the prejudice of the owner, or, as the case may be, to the charterer." The authorities prior to the Act show that where a captain is engaged in doing that which he must, as an ordinary man of common sense, know to be a serious breach of his duty to his owners, and is

engaged in doing it for his own benefit, then he is acting barratrously. He may act quite barratrously in many other ways, but I think it is quite clear that if he is disregarding his duty to his owners and breaking his duty to them for the sake of private purposes and ends, his conduct is barratrous. Now the captain has not been called as a witness, and his whereabouts are not known. The letter that he wrote in May 1908 to his owners containing his account of the transaction has been read as part of the admitted correspondence, and I do not think that the captain's case, or the case of those who are interested in presenting his case, suffers by this mode of presentation, because it may very well be that cross-examination might have produced an unfavourable impression of his conduct even more quickly then than that conveyed by a scrutiny of his letter. But what I find is this: according to his letter of the 5th May 1908, on arriving at Punta Arenas on the 11th Aug. he made the acquaintance of the sole inhabitant and explorer of Cocos Island, a person called Gissler. Gissler was at that time particularly anxious to get to the island as soon as possible before some competitors landed there, and he opened negotiations, apparently at once, with Captain Stoltz of the *Viduco*. Captain Stoltz, at any rate, had time to consider the fact that his chart of the island was a very small one, and to communicate with Mr. Frederico Solrado of Siberia, the charterer, to see if he had any objection to the voyage being made. Accordingly I think it is not too much to assume that by the 16th Aug. 1907, five days after his arrival, the project of his going to Cocos Island had been mooted between himself and Gissler, and the negotiations were getting on. Nevertheless, he wrote a letter of that date to his owners which makes no allusion whatever to that prospective voyage, and announces that he does not yet know what he will do. What he did in fact was to sail for Cocos Island on the 27th Aug., some time having been lost in having some small leaks repaired. He wrote again to his owners on the 25th Aug. from Punta Arenas, this time only two days before actually sailing, and again he makes no allusion to the voyage he is about to undertake, but suggests that he will require an advance of 200*l.* Then he went to Cocos Island, and, in a manner which struck the German court of inquiry as unseamanlike, allowed his vessel to ground. Although she does not appear to have taken any harm, it is not at all uncommon for captains whose vessels have been on the ground to notify their owners to that effect for average purposes. I have difficulty in believing that any experienced captain, and none the less when that captain is a German, should be unaware of the elementary fact that both from the point of view of a charter and from the point of view of a policy of insurance a deviation is a very serious matter; that it ought not to be undertaken on the responsibility of the captain alone without consultation with his owners unless he has clear authority. If he does undertake it it is extremely desirable that he should report it at once. The captain returned from Cocos Island, and proceeded to load at Bahia de Cocos, from there wrote to his owners, quite fully, mentioning that the loading of the vessel was proceeding very slowly, mentioning his effort to obtain a new crew, and mentioning that he had drawn on them for 200*l.* on the Compania de Agencias de Costa Rica, but not saying one word about the fact that he had made a voyage to Cocos Island, and not saying one word about the fact that he had been promised money, which was subsequently paid to him in the form of a cheque, and not saying one word about the fact which he alleged in the following May that in making this trifling profit for his owners he considered he was acting on authority which arose out of a voyage as long ago as the year 1900. After he had loaded his cargo of timber for home, he went once more to Cocos Island, and this time managed to lose both the ship and the cargo. But again there is no communication from him to his owners of the circumstances of this voyage as I understand the telegram sent from Panama, when he left the vessel in difficulties at Cocos Island and was seeking assistance on the mainland. He sent telegrams relating to the position of the vessel, but no communication at all relating to the circumstances of these two voyages. He says that 40*l.* for the one voyage and 50*l.* for the other voyage was what he was to receive from Captain Gissler, the concessionnaire. It has been shown to me by evidence from the owners, which I accept, that the ship's expenses for the time of the first voyage, apart from the amount of the premium which would be due for the deviation which was to be covered, would greatly exceed 40*l.* I have not had it cleared up by any detailed evidence as to exactly how the cost of remaining on the coast pending loading of cargo would compare with the cost of going over to Cocos Island; but I am not at all satisfied that he could possibly have considered 40*l.* an adequate remuneration for his owners for the risk and expense of going over to Cocos Island, or 50*l.* for the risk and expense of the second voyage. The inference which I draw in fact, therefore, is that whatever was to be paid in respect of those two voyages was going to be paid in the first instance for his own benefit, and I think Mr. Horridge's explanation with regard to the log is a reasonable one to adopt—that is to say, that, having regard to the fact that he must produce a clean log when he got home, he did enter all the actual circumstances of the voyage—or his mate did—as they took place. Had that not been so, and had there been no entries or had the entries been fraudulent I should have expected the Marine Court at Hamburg, who had the log, and have it still, to have drawn attention to it. I therefore assume that the log was regularly kept. I remark, however, that it appears from the Marine Court's report that the mate who subsequently came home with him was with him on the first voyage. That appears on the correspondence, but the Marine Court made a mistake in thinking the mate was with him on both voyages. The German seamen appear to have been paid off in Central America, and the evidence of two of them before the court was evidence by deposition only. It seems to me not at all unlikely that the captain would be all the more prone to take advantage of the opportunity that arose from the fact that the old mate was leaving the ship, and his new mate was only coming out to Bahia de Cocos before loading, and that as regards other people, if they were paid off anywhere but in Germany it was not likely that anything would be heard of them any longer.

I have come to the conclusion that the only reasonable explanation of the captain's conduct is that he was going to make an advantage for himself; that the log was allowed to be written up as usual, because, after all, if the thing had to be explained he would let the worst come to the worst, and might take his bill and write down 60*l.* instead of 100*l.*, and it may be that he received a good deal more than 40*l.*; but he might escape by owning up to 40*l.* and stating that he thought he was acting under the authority given to him in respect of different circumstances in a voyage between Valparaiso and Pisagua in 1900. Having come to the conclusion that both these adventures were barratrous, it follows that although they were deviations they did not either of them put an end to the policies. The policies are on foot, and the deviations do not afford any answer at all.

There has been an argument on the deviation clause, and I think I ought to say a word upon it. I regard it as applicable to all the forms of the maritime insurance policy, and I think, therefore, I am bound to consider it in the light of a clause which may be intended for the protection of cargo-owners as well as of shipowners. On that I think I am bound by the judgment of the present President of the Probate, Divorce, and Admiralty Division in the case of the *Greenock Steamship Company* v. *Maritime Insurance Company* (*sup.*). The premium must be calculated upon the assumption that the parties had known of the breach at the time it happened, and I do not see that the proviso added to the clause since, which makes this clause differ from the clause in the Greenock Steamship Company's case, makes any difference in that regard. I cannot construe the clause as either giving an option to the assured to claim to be covered or not, as he will, nor do the words "due notice" create a limitation. In order to be "due" the notice must be given at the time when the underwriter can still reinsure and protect himself. It is plain to me that the clause involves some risk to both parties, considerable risk in a case like this to the underwriters, and, on the other hand, it enables the underwriters to get business which I imagine it would otherwise be rather difficult to arrange. At any rate, the clause must be read as it stands, and I think that is a mutual agreement to hold covered, subject to a proviso which is satisfied in the present case by the giving of such notice which the assured could give after the receipt of advice, and that, there being nothing practicable to be done on the receipt of the advice, the notice was given sufficiently early for the purposes of the present case at the time when it was given. I think I ought to dispose of all the issues of fact, although it is not necessary for my judgment. If it had been necessary for the assured to bring himself within the protection of the deviation clause the premium which I think —following the rule laid down in the *Greenock Steamship Company* v. *Maritime Insurance Company* (*sup.*)—he would have had to pay would have been twelve guineas per cent. for the two voyages, because I think the evidence of Mr. Walton, although uncontradicted, shows that there was sufficient uncertainty and hazard about the Cocos Island trip to justify me in saying the higher of the two premiums mentioned is probably the right one. There will be, therefore, judgment for the plaintiffs for the amount of the claim, which I think is 70*l.*

Solicitors for the plaintiffs: *Lightbound, Owen,* and *MacIver.*

Solicitors for the defendants: *Batesons, Warr,* and *Wimshurst.*

Dec. 9 and 20, 1909.

(Before Bray, J.)

Moel Tryvan Shipping Company Limited v. Andrew Weir and Co. (*a*)

Charter-party — Cancelling clause — Option to cancel—Time when option must be exercised.

A charter-party, dated the 18th March 1907, contained the following clause: "The charterers or their agents have the option of cancelling this charter-party, provided the ship is not arrived as within described at Newcastle, New South Wales, by the 15th Dec. 1907."

Shortly before the 15th Dec. 1907 the charterers were informed by the shipowners that the ship was detained and could not arrive by the cancelling date, and they were asked to state whether they would exercise their option to cancel or not. This they refused to do, and required the shipowners to send the ship to Newcastle in accordance with the charter-party.

The ship arrived at Newcastle in June 1908, when the charterers exercised their option to cancel, and refused to load her.

In an action by the shipowners for damages for the defendants' refusal to load:

Held, that the charterers were entitled to exercise their option to cancel on the arrival of the ship at the port of loading, and were not bound to do so prior thereto.

Liverpool Assizes.

Action tried by Bray, J. sitting without a jury.

The plaintiffs were the owners of the steamship *Langdale* and the defendants were the charterers of the vessel.

The plaintiffs claimed damages for the defendants' refusal to ship any cargo.

The defendants pleaded that they had cancelled the charter-party by virtue of a clause contained therein which entitled them to do so.

The charter-party, which was dated the 18th March 1907, provided in the usual form that the ship should with all convenient speed after discharge of certain cargo on the West Coast of Africa, sail and proceed to Newcastle, New South Wales, and there load a cargo of coal to be shipped by the charterers. It contained the usual clause excepting certain perils and accidents, and also the following clause:

> The charterers, or their agents, have the option of cancelling this charter-party provided the ship is not arrived as within described, at Newcastle, New South Wales, by the 15th Dec. 1907.

Shortly before this date the charterers were informed by the shipowners that the ship was detained and could not arrive by the cancelling date, and were asked to state whether they would exercise their option to cancel or not. They refused to accede to this request, and required the shipowners to send the ship to Newcastle in

(*a*) Reported by Leonard C. Thomas, Esq., Barrister-at-Law.

accordance with the charter-party. The ship arrived in June 1908, when the charterers exercised their option to cancel. At this time freights were lower than the rate mentioned in the charter-party, and the plaintiffs claimed damages in respect of loss sustained by employing the ship at a lower rate of freight.

Horridge, K.C. and *Keogh* for the plaintiffs.—The covenant to proceed to the loading port must be read with the cancelling clause, and the option must be exercised within a reasonable time after the 15th Dec., the date when it accrued. No time is expressed; therefore the law implies a reasonable time. The American authorities seem to be contrary, but they proceed upon a misapprehension of the decision in *Shubrick* v. *Salmond* (3 Burr. 1637). The cancelling clause in that case expressly provided that the charterer might exercise his option after the vessel's arrival. Similarly in *The Progresso* (50 Fed. Rep. 835) the clause itself provided when the option was to be exercised. Carver on Carriage by Sea, sect. 222, proceeds upon the same misapprehension of *Shubrick* v. *Salmond*. The only English authority is *Bucknall Brothers* v. *Tatem and Co.* (9 Asp. Mar Law Cas. 127 (1900); 83 L. T. Rep. 121), and the remarks there on this point are *obiter*.

Leslie Scott, K.C. and *W. Norman Raeburn* for the defendants.—All the authorities proceed on the principle that the ship is bound to proceed to the loading port, and they are directly in the defendants' favour. In *The Samuel W. Hall* (49 Fed. Rep. 281) the cancelling clause was practically in the same words as in the present case, and the court held that the option was to be exercised at the place where the ship was to load, and that the shipowner had no right to call upon the charterer to exercise his option elsewhere. There is nothing in the cancelling clause to affect the fundamental undertaking of the shipowner In exercising the option the charterer is not bound to consider the benefit or otherwise of the shipowner:

Tharsis Sulphur and Copper Company v. *Morel and Co.*, 7 Asp. Mar. Law Cas. 106.; (1891) 2 Q. B. 650.

The plaintiffs are seeking to read into the cancelling clause a term which is not expressed, but the courts will not imply a term unless it clearly appears that the parties must have so intended. They also referred to

Karran v. *Peabody*, (1906) 145 Fed. Rep. 166.

Horridge, K.C. in reply.—The plaintiffs are not seeking to imply any term; they are relying upon the language of the clause.

Bray, J.—The facts in this case are undisputed and very simple, but an important point of law is raised. The plaintiffs, the owners of the steam ship *Langdale*, sued the defendants the charterers, for breach of contract in not loading her when she arrived at Newcastle, New South Wales, the port of loading. The defendants' answer was that the charter-party gave them the right of cancelling if she did not arrive at Newcastle on the 15th Dec. 1907, and that they exercised that option when the ship arrived at Newcastle in June 1908. The plaintiffs replied that they could only exercise their option to cancel within a reasonable time after the 15th Dec., and, not having exercised their option when called upon to do so, the option was gone. The charter-party was dated the 18th March 1907, and provided in the usual form that the ship should with all convenient speed, after discharge of the cargo on the West Coast of Africa, sail and proceed to Newcastle, and there load a cargo of coal which the charterers had bound themselves to ship. There was the usual clause excepting certain perils and accidents, and towards the end there was a cancelling clause in these words: "The charterers, or their agents, have the option of cancelling this charter-party provided the ship is not arrived as within described at Newcastle, New South Wales, by the 15th Dec. 1907." The charterers were informed shortly before the 15th Dec. 1907 that the ship was detained, and could not arrive by the cancelling date. They were asked by the shipowners to say whether they would exercise their option to cancel or not. They refused to state whether they would or not, and required the shipowners to send the ship to Newcastle in accordance with the charter-party. At one time the shipowners stated that they would not send her, but eventually they said they would, and in fact did so, and she arrived in June 1908. On arrival, the charterers exercised their right to cancel the charter-party and refused to load her. Freights had fallen, and the shipowners were only able to employ the ship at a lower freight, and they claimed damages. The question is thus neatly raised whether the shipowners could call upon the charterers to exercise their option before the ship arrived at the loading port, and whether the option was gone if the charterers failed to exercise it when called upon to do so. The plaintiffs' contention was that under this charter-party the defendants were able to exercise their option within a reasonable time after the cancelling date, and, failing to do so, the option was gone. The defendants contended that this question was really concluded in their favour by authority, and that apart from authority they were right on the true construction of the charter-party.

It will be convenient to examine the authorities. The first authority is the case of *Shubrick* v. *Salmond* (*sup.*), decided by Lord Mansfield and Wilmot, J. in the year 1765. The action was by the charterers against the shipowner for breach of contract in not sending the ship to the port of loading, and the question arose on demurrer to two pleas of the defendants. The cancelling clause was not in the same form as here, for it was expressly provided that the charterer might exercise the option to cancel after the ship's arrival. The importance of the decision was that the court held that there was an absolute covenant by the shipowner to sail the ship to the port of loading, and that the proviso for cancellation could not excuse him for not going because he could not get there by the cancelling date, he having expressly covenanted to go to that port. This case was followed by two American decisions: *The Samuel W. Hall* (*sup.*) and *The Progresso* (*sup.*). In the former case the cancelling clause was practically in the same words as in the present case, and the court held that the option was to be exercised at the place where the ship was to load, and that the shipowner had no right to call upon the charterer to exercise his option elsewhere. In the latter case the decision was the same, but the cancelling clause provided that the option was to be declared when the ship was ready to

load. The question does not seem to have arisen again in the English courts until the case of *Bucknall* v. *Tatem* (*sup.*) in the Court of Appeal in the year 1900. In that case the charterer asked for an injunction to restrain the shipowner from employing his ship elsewhere than in sending her to Bussorah, the port of loading. The cancelling clause provided that the charterers should be at liberty to cancel if the ship was not ready to load at Bussorah by the 18th June. It was found impossible to send the ship to Bussorah by the time named, and the charterers were called upon to say whether they would or would not load the vessel, and they refused to answer, whereupon the shipowner refused to send the ship there. The Court of Appeal refused the injunction upon the ground that the charterers, the plaintiffs, would have their remedy in damages, and that they had so acted as to disentitle them to an injunction. The importance of that case was that Smith, L.J. in his judgment stated that the shipowners were bound to send the vessel to Bussorah, and that if they did not send her there they must pay damages, with which Vaughan Williams, L.J. agreed. As the injunction was refused, the above statement of law was only a dictum, but it was a clear expression of opinion. There was a further decision in the year 1902 or 1903 in the case of *Karran* v. *Peabody*, in the United States circuit court, to the same effect, a manuscript report of which has been furnished to me by the parties. These were the only authorities brought to my attention. Cancelling clauses seem to have existed for upwards of 150 years, and in every case, so far as I am aware, that can be found in the books, the decision was that the ship must go to the port of loading, and that the charterer could not be called upon to exercise his option before the ship's arrival. Mr. Carver, in art. 222 of his work on Carriage by Sea, states the law thus: "Moreover, the shipowner cannot require the charterer to declare his election whether he will load or not before the ship has arrived at the loading place, although the date for arrival may have already passed." Mr. Scrutton, on p. 871 of his work on Charter-parties, 1904 edit., states the law thus: "Where there is a cancelling clause, and the ship cannot get to the port of loading by her cancelling date, she is yet bound to proceed unless delay by the excepted perils is such as to put an end to the charter;" but in a note he says, after quoting *Shubrick* v. *Salmond* as an authority for this statement of the law: "*Quære*, however, whether now if the shipowner asks the charterer on the cancelling date to exercise his option, the latter must do so?" No authority is cited by him in support of the *quære*. I should be very much disinclined to give a decision that would conflict with what seems to be a settled interpretation of the cancelling clause. In the case of *Tharsis Sulphur and Copper Company* v. *Morel and Co.* (*sup.*), Lord Esher, M.R. says: "That was decided nineteen years ago, and as it was a decision on a question of frequent mercantile interest we could not interfere with the decision unless we were fully convinced it was wrong." That expresses my feeling, and the fact that the wording of the cancelling clause has differed in some of the cases does not seem of much importance.

If, after the decisions I have referred to, the parties had wished to provide that the charterer should be bound to exercise his option before the ship arrived at the port of loading, I think they would have inserted an express provision to that effect; but, however that may be, I consider the question apart from authority. Now the contention of the plaintiffs, as I have said, is that there is an implied condition that the option should be exercised within a reasonable time after the cancelling date. I think it is a settled rule of construction that a term not expressed should not be implied unless it can be clearly seen that the parties must have so intended. It is not sufficient that they may have intended, nor that the insertion of the term will make a more reasonable contract. Now we find that there is in the charter-party an express covenant or promise for the shipowner to go to the port of loading. If he has to do this, why should not the charterer be entitled to wait until the ship arrives before he exercises his option? The option is given for the benefit of the charterer. He is not bound, as Lord Bowen says in *Tharsis Sulphur and Copper Company* v. *Morel and Co.* (*sup.*) to consider the benefit or otherwise of the other party. He is bound to exercise his option in a reasonable manner, but not, so far as appears from the clause, in a reasonable time from the cancelling date. He is bound to be ready to load as soon as the ship is ready. That is his earliest obligation, and he must exercise his option before that time arrives. Subject to that, the longer the time he has for exercising his option the better for him, and if the ship has to go to the loading port that is the most favourable time for the charterer to exercise his option. These considerations seem to me to afford good reason for not implying the suggested limitation of time. But there are further difficulties. What is a reasonable time? Is the charterer entitled to have time to make inquiries where his ship is, and how long it is likely to be before she arrives? Surely he is. Is he entitled to have time to make inquiries as to whether he can obtain another ship at the port of loading and upon what terms? Surely he is. These and other necessary inquiries may take a long time if the port, as it often is, is a distant one, and who can say with any certainty when the reasonable time will have elapsed? When can the shipowner safely say that he is entitled to go elsewhere because the time for exercising the option has elapsed? Would the parties, if they really considered the matter, ever enter into such an uncertain contract? I can understand the parties agreeing that the option must be exercised, say, in fourteen or any other number of days after the cancelling date, but I cannot imagine them intending to enter into such an uncertain and unbusinesslike contract as is suggested. It is said, on the other hand: But look at the position of the shipowner. What a hardship it is upon him to have to go to the port of loading when it is perhaps almost certain that the charterer will cancel. There are several answers to this. If freights have fallen he can refuse to go, and the damages will be nominal. If it is uncertain that it will be beneficial to the charterer to exercise his option because the position at the port of loading is uncertain, then that is a good reason for the charterer waiting until he can ascertain his position. Further,

looking at it from a practical point of view, the risk of the shipowner failing to get his cargo, or earn his chartered freight, is a risk easily and very commonly insured against. These considerations, among others, lead me to the conclusion that I ought to make no such implication, and that, finding no express words to limit the time for exercising the option, I ought to hold that the charterers were entitled under this charter-party to exercise their option on the arrival of the ship at Newcastle, and, that being so, the action fails, and there must be judgment for the defendants with costs.

Solicitors for the plaintiffs, *Weightman, Pedder, and Co.*

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

Jan. 26 and 27, 1910.

(Before BRAY, J.)

BRAEMOUNT STEAMSHIP COMPANY LIMITED *v.* ANDREW WEIR AND CO. (*a*)

Time charter-party—Strike clause—Mutuality—Commercial frustration—Liability of charterers.

By a time charter-party the owners agreed to let and the charterers agreed to hire a steamship for the term of one trip from N., N. S. W., to the west coast of S. A. It was provided that the charterers "shall" pay hire at the rate of 1000l. per calendar month, commencing twenty-four hours after the vessel was placed at the charterers' disposal and to continue until the hour of her redelivery to the owners. Payment of hire was to cease under certain events, but strikes were not included. The charter-party provided: "The act of God, perils of the seas, fire, barratry of the master and crew, enemies, pirates, robbers, arrests and restraints of princes, rulers, and people, strikes, collisions, strandings, and accidents of navigation, and all losses and damages caused thereby, are always excepted, even when occasioned by the negligence, default, or error in judgment of the pilot, master, mariners, or other persons employed by the owners, or for whose acts they are responsible, but nothing herein contained shall exempt the owners from liability to pay for damage to cargo occasioned by bad stowage . . . or by causes other than those excepted, and all the above exceptions are conditional on the vessel being seaworthy when she enters on the charter, but any latent defects in the machinery shall not be considered unseaworthiness, provided the same do not result from want of due diligence of the owners. . . . This clause is not to be construed as in any way affecting or cancelling the provisions for cessation of hire as provided in this charter-party."

When the vessel was placed at the disposal of the charterers there was a strike in operation at N., N. S. W., which prevented the loading of coal.

It was in the contemplation of both parties that the purpose of the employment of the ship was to load coal at N., N. S. W., to carry it to the west coast of S. A.

Held, that the exception of strikes was not mutual, and did not protect the charterers; and that the commercial object of the charter-party had not been frustrated by the existence of the strike.

SPECIAL case stated by an umpire on an arbitration as to the effect and meaning of a charter-party.

The following facts were found:—

The charter-party was made between the Braemount Steamship Company Limited, the owners, and Messrs. Andrew Weir and Co., the charterers, on the 5th Nov. 1909.

The *Braemount* was then at Durban, and was due to reach Newcastle, New South Wales, where she was to come on hire to the charterers, about the 18th Dec. 1909.

About the 8th Nov. 1909 a strike occurred at Newcastle, which had the effect of preventing the loading of coal there. That strike was in operation when the *Braemount* arrived on or about the 18th Dec. 1909. It has continued without intermission, and still continues.

No suggestion was made by either party for cancellation of the charter-party before the *Braemount* left Durban, but while she was on her way out correspondence passed between the parties to the effect that the charterers stated that, should the strike continue and thereby frustrate or cause delay in the carrying out of the contemplated voyage, they would rely on the strike clause as excusing them; while the owners stated that as the vessel was on her way to Newcastle they could only agree to cancel the charter for consideration, and that they would expect to be paid the hire when the vessel was placed at the charterers' disposal, as per clause 2 of the charter-party.

The *Braemount* was placed at the disposal of the charterers at Newcastle on some day about the 18th Dec. 1909. The umpire who stated the case was asked by the charterers not to fix the date with precision, and did not do so, but he assumed, for the purpose of the legal questions that arose, that the date was the 18th Dec. 1909.

He further found that in the contemplation of both parties the purpose for which the charterers intended to employ the *Braemount* was to load coals at Newcastle and to carry them to and deliver them at the west coast of South America.

Under normal conditions the time occupied in so doing would have exceeded one month, and would probably not have exceeded two months.

The owners, under these circumstances, asked for a declaration that the *Braemount* was on hire to the charterers.

The questions submitted to the umpire as determining the right of the owners to that declaration were: First, whether the exception of "strikes" in clause 26 of the charter-party was mutual or only for owners' benefit, and, if mutual, what was its effect; secondly, whether the commercial object of the charter-party had been frustrated, and, if so, from what date.

He found that the exception of "strikes" was not mutual. If this had been a voyage charter he should have held otherwise in deference to the modern decisions, particularly that of Bigham, J. in *Newman and Dale Steamship Company* v. *British and South American Steamship Company*

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

(87 L. T. Rep. 614; 9 Asp. Mar. Law Cas. 351; (1903) 1 K. B. 262).

He found no substantial difference between the clause in that case and clause 26 in the present charter-party, but in his view that decision did not apply to a time charter-party.

He found that the doctrine of commercial frustration of the adventure had no application. The charterers were no doubt prevented from using the *Braemount* for the purpose for which they intended to use her, but in this case that was not, in his opinion, enough.

He therefore declared that the *Braemount* was on hire to the charterers from the date at which she was placed at their disposal at Newcastle in Dec. 1909.

The question for the court is whether he was right or wrong in law in making that declaration.

The material portions of the "time charter-party" were as follows:

It is this day mutually agreed between Messrs. Braemount Steamship Company Limited, for and on behalf of the owners (hereinafter called "the owners") of the steamship called the *Braemount* . . . and Andrew Weir and Co., London, charterers.

2. That the owners agree to let and the charterers agree to hire the said steamship for the term of one trip from Newcastle, N.S.W., to W.C. of South America, Talachuano Pisagua range. The hire to commence twenty-four hours (Sunday and holidays excepted) after written notice from captain has been given charterers or their agents during office hours that steamer is at their disposal at Newcastle, N.S.W., in such ready accessible dock, wharf, or place, where she can safely lie always afloat as charterers may direct, she being then ready with holds clear and clean and fit for the reception of general merchandise, tight, staunch, strong, and being in every way fitted for the service and with full complement of officers, seamen, engineers, and firemen for a vessel of her tonnage, and to be so maintained.

7. That the charterers shall pay for the use and hire of the said steamer at and after the rate of 1000*l.* per calendar month, payment to be made at London, in cash, in advance monthly, commencing from time of delivery as aforesaid; hire to continue until the hour of her redelivery to owners (unless lost or charter be cancelled) at . . . Thirty days hire to be paid to owner on redelivery.

22. In the event of loss of time from deficiency of men or stores, breakdown of machinery (whether partial or otherwise), collision, stranding, damage, or interference by authorities preventing the working of the vessel for more than twenty-four running hours, the payment of hire shall cease until she be again in an efficient state to resume her service, with all cargo and bunkers (if any discharged) reloaded, at the place where the accident occurred; and should the vessel, from any of the above-mentioned causes, put back or put into any other ports than those to which she is bound, the coals consumed and the port charges, pilotages, and other expenses at those ports, and all other expenses, consequent on putting back or putting in, shall be borne by the owners, and the hire shall be suspended from the time of her putting back or deviating to enter port until she be again in the same position and the voyage (with all cargo and bunkers reloaded) resumed therefrom; but should the vessel be driven into port or to anchorage by stress of weather, such detention or loss of time shall be at the charterers' risk and expense. If upon the voyage her speed be reduced by breakdown, casualty, or inefficiency of crew, the time lost and the cost of extra coal, if any consumed in consequence thereof, shall be borne by the owners. The charterers shall not be responsible for any damage to the steamer arising from any cause whatever.

24. That should the steamer be lost, the hire to cease and determine on the day of her loss, and if missing from the date when last heard of, and any hire paid in advance and not earned shall be returned to charterers. If missing or under repair at time when monthly hire becomes payable, payment of said hire shall be suspended until safety ascertained or service resumed.

26. The act of God, perils of the seas, fire, barratry of the master and crew, enemies, pirates, robbers, arrests and restraints of princes, rulers, and people, strikes, collisions, strandings, and accidents of navigation, and all losses and damages caused thereby, are always excepted, even when occasioned by the negligence, default, or error in judgment of the pilot, master, mariners, or other persons employed by the owners, or for whose acts they are responsible, but nothing herein contained shall exempt the owners from liability to pay for damage to cargo occasioned by bad stowage, by improper or insufficient dunnage or ventilation, or by improper opening of valves, sluices, and ports, or by causes other than those excepted; and all the above exceptions are conditional on the vessel being seaworthy when she enters on the charter, but any latent defects in the machinery shall not be considered unseaworthiness, provided the same do not result from want of due diligence of the owners, or any of them, or by the ship's husband or manager. This clause is not to be construed as in any way affecting or cancelling the provisions for cessation of hire as provided in this charter-party. Charterers are not answerable for any negligence, default, or error in judgment of trimmers or stevedores employed in loading or discharging the cargo.

29. The hire shall not commence before the 1st Dec., unless with charterers' consent, and charterers have liberty to cancel this charter should the steamer not be ready, in accordance with the provisions hereof, before the 31st Dec., the said option of cancelment to be declared on notice of readiness being given. Should steamer meet with accident or detention before delivery, which would make it impracticable to keep her cancelling date, charterers to have power to cancel the charter forthwith; or should the steamer after delivery meet with an accident which delays her more than four weeks, charterers have option of cancelling this charter, when the cargo on board at the time of accident shall have been finally delivered, abandoned, or transhipped. Owners to promptly advise charterers of the occurrence of any accident. In the event of war preventing, or interfering with, the employment of the steamer in the trades for which the steamer may be engaged, or detention of the steamer by the authorities at home or abroad, in consequence of legal action against the owners of the steamer, whereby the steamer is rendered unavailable for charterers' service for a period of four weeks, the charterers have the liberty of cancelment of this charter or suspension of the charter until the service can again be resumed, without prejudice to any right of claim for damages which the charterers may possess by reason of the detention. In the event of the nation to which this vessel belongs becoming engaged in hostilities, charterers are to have the option of cancelling charter-party and taking out again at charterers' risk and expense all cargo that may have been shipped.

Scrutton, K.C. and *Raeburn* for the owners.

Atkin, K.C. and *Rowlatt* for the charterers.

Bray, J.—This was a special case stated by an umpire, and in the case he has stated the points which were raised before him. They are stated as follows: "The questions submitted to me as determining the right of the owners to that declaration are, first, whether the exception of

'strikes' in clause 26 of the charter-party is mutual or only for owners' benefit, and, if mutual, what is its effect; second, whether the commercial object of the charter-party has been frustrated, and, if so, from what date." The owners sought a declaration that the vessel was on hire at a date about the 18th Dec. That declaration involves two things: one that the charter-party was still an enforceable document; and, secondly, that hire was accruing due. That is what the owners seek by their suggested declaration, and those are the two propositions which they have to establish. They are established *primâ facie* clearly enough because the charter-party provides by clause 7: "That the charterers shall pay for the use and hire of the said steamer at and after the rate of 1000*l.* per calendar month, payment to be made at London, in cash, in advance, commencing from time of delivery as aforesaid; hire to continue until the hour of her redelivery to owners," and by clause 2 the hiring is to commence twenty-four hours, Sundays and holidays excepted, after written notice from the captain. Therefore, *primâ facie*, the charter-party is an existing charter-party, an enforceable charter-party, and the hire commenced. The charterers meet that by saying that they are protected by the strike clause; and, therefore, the umpire is quite right in saying that the first point that has to be considered is whether this clause is mutual. First of all I will deal with the authorities upon the point. There is, firstly, the case before Bigham, J. of *Newman and Dale Steamship Company* v. *British and South American Steamship Company* (87 L. T. Rep. 614; 9 Asp. Mar. Law Cas. 351; (1903) 1 K. B. 262). That is based not so much upon Bigham, J.'s own opinion as upon the opinion of Mathew, J. in the case of *Barrie* v. *Peruvian Corporation* (2 Com. Cas. 50). In that case Mathew, J. held that the clause containing the word "strikes" and all other things was mutual. I have to see whether that decision binds me in construing the contract. In my opinion it does not. The contract in this case is an entirely different contract. The contract in that case was a charter-party for a voyage where definite times were given for loading and unloading, and the charterer agreed to pay demurrage if he did not load or unload within certain stipulated times. In this case the hire is to be from a definite date to another date which has to be ascertained by what happens in the future. Therefore the contract is an entirely different contract in my opinion. Further than that, Mathew, J., in giving his decision, placed great reliance upon particular words in the clause in that case. He pointed out that it was quite clear that at the beginning and end of that clause were clauses which implied mutuality, and therefore he came to the conclusion that the clause was mutual from beginning to end. There seems to me to be so great a distinction between the two cases that I ought, I think, to disregard that case, and that I ought to decide for myself as to whether this clause is mutual or not. In order to decide that, it is necessary to see what effect the exception as to strikes will have in this particular case. It is argued—and I think that it must be argued—by the charterers, that the consequence, if the exception clause applies, is this: that the hire must be suspended for a time because the delay was caused by strikes, and that, when a time is reached at which the commercial venture may be said to be frustrated, the charter-party comes to an end altogether. It seems to me quite necessary that they should go as far as this—that there must be a suspension during the time of the strike. Looking through the contract first of all there is the absolute contract to pay, and it is obvious, of course, that a payment is not prevented by a strike. I then come to clause 22. Clause 22 provides that the payment of hire shall cease under particular circumstances. The present circumstances are not among those circumstances. Clause 22 comes before clause 26. Then comes clause 26, which is undoubtedly—as a rule I should have said—as it varies with the particular contract, a clause inserted for the protection of the shipowner; but I think that, whether it is so as a rule or not, it is so clearly in this case. Clause 26 says: "All losses and damages caused thereby are always excepted, even when occasioned by the negligence, default, or error in judgment of the pilot, master, mariners, or other persons employed by the owners, or for whose acts they are responsible" (therefore they deal with them as things that may happen in consequence of, or possibly in consequence of, some negligence, default, or error in judgment of somebody aboard the ship), "but nothing herein contained," observe, "shall exempt the owners from liability to pay for damage." Nothing is said there about exempting the charterers.

Then the clause goes on: "All the above exemptions are conditional on the vessel being seaworthy when she enters on the charter." What have strikes, which prevent the charterers from loading, to do with seaworthiness? Strikes, of course, may prevent a ship being seaworthy. They may prevent the owners doing that which would make the vessel seaworthy. "But any latent defects in the machinery shall not be considered unseaworthiness provided the same do not result from want of due diligence of the owners or any of them, or by the ship's husband or manager." Those are all matters confined to the owners. Then "This clause is not to be construed as in any way affecting or cancelling the provisions for cessation of hire as provided in this charter-party." So I should consider from that that they did not contemplate that these exceptions would have any effect whatever, one way or the other, as to cessation of hire. The clause then proceeds to deal with the charterers. It says: "Charterers are not answerable for any negligence, default, or error in judgment of trimmers or stevedores employed in loading or discharging the cargo." Then comes clause 29: "The hire shall not commence before the 1st Dec., unless with charterers' consent, and charterers have liberty to cancel this charter," and so on. I need not read that clause, but it provides for certain cases where the charterers are to have liberty to cancel. There is no liberty to cancel because they cannot obtain a cargo. I need not go further through the clause. The result of it is that I am convinced that, according to the true construction of the contract, this exception about strikes is not mutual, and it does not protect the charterers. The next question that the umpire asks is, "Whether the commercial object of the charter-party has been frustrated, and, if so, from what date?" I should rather gather that it was not put before him that if

there was no mutuality the second question was irrelevant; but, however, it has been put before me in this way as I understand it—that an event not contemplated at all by the parties has altogether frustrated the commercial object of this charter-party. The umpire deals with that in this way. He says: "I find that the doctrine of commercial frustration of the adventure has no application." It is not necessary to go as far as that. It seems to me that no event has happened which the parties might not have perfectly reasonably contemplated. Strikes are common things. They are actually referred to in the charter-party itself. Strikes may last for a long time or a short time; but they do not last for ever. They are temporary matters. And if they are not provided for, if the charterers have no clause which protects them from strikes, I cannot see for myself that they have any right to say that the commercial venture has been frustrated by the existence of this strike; and to say that a delay of three weeks frustrates the whole object of the charter seems to me to be absurd. It might just as well be said that the insolvency of the people who are going to provide the cargo frustrates the object of the voyage. Therefore I must answer that question in the negative, in the same way as the other. The result is that my judgment must be that the declaration of the umpire "that the *Braemount* is on hire to the charterers from the date at which she was placed at their disposal at Newcastle in Dec. 1909" is right.

Judgment accordingly.

Solicitors: *Lowless* and *Co.*; *W. A. Crump* and *Son.*

Feb. 9, 10, 11, 14, *and* 23, 1910.

(Before A. T. LAWRENCE, J.)

DENABY AND CADEBY MAIN COLLIERIES LIMITED *v.* ANSON. (*a*)

Harbour—Port of Portland—Title to soil—Right of Crown—Right of navigation—Mooring coal hulk.

The title to the soil in the port of Portland is vested in the Crown subject only to the public rights of and incidental to navigation over it.

The right of navigation is a right of passage with rights of stopping, anchoring, &c., for purposes incidental to passage to and fro.

A member of the public has, therefore, no right to moor a floating hulk or coal depot within such port for the purpose of bunkering ships with coal.

ACTION for an injunction to restrain the defendant, Captain C. E. Anson, R.N., harbour-master of the port of Portland, from seizing, taking possession of, or trespassing upon the plaintiffs' steamship *Persia*, lying at her own anchors in Portland Harbour, within the area appropriated to merchant shipping, or from removing her therefrom.

By the points of defence it was alleged that in Feb. 1903 regulations were made by Order in Council, pursuant to the Dockyard Ports Regulation Act 1865, by which it was provided (*inter alia*) that moorings for private vessels might be laid with the written permission of the King's Harbour-master, but were to be removed on his requisition, and that all merchant and other vessels were to be subject to his directions; that in Dec. 1909 the plaintiffs threatened to moor the *Persia* permanently as a coal hulk without such permission; that the *Persia* was an obstruction to navigation; that the bed of the harbour was the property of the Crown; and that the defendant had a right to remove the *Persia*.

Evidence was called before the learned judge, the effect of which, so far as is material, will be found in his written judgment.

Leslie Scott, K.C., *Greer*, and *Courthope Wilson* for the plaintiffs.—Portland was not a port in the time of Hale, and was not included in the list of ports in De Portibus Maris. In the earliest statutes it is referred to as a port of refuge. They referred to

9 & 10 Vict. c. cxvi.;
10 Vict. c. xxiv.

This last statute of 1847 refers to a harbour of refuge and breakwater in the Isle of Portland, and provides for certain lands to be bought with the moneys provided under the Act of 1846. In 1850 the Act 13 & 14 Vict. c. cxvi. made further provision for the application of moneys to this harbour, and in 1857, by 20 & 21 Vict. c. xxxii., provision was made for the better supply of water to the harbour of refuge at Portland, and for vesting in the Commissioners of the Admiralty certain lands there. [A. T. LAWRENCE, J.—Sect. 18 of that statute does appear to recognise the title of the Crown in the soil of the harbour.] The Harbours Transfer Act 1865 gives power to Her Majesty by Orders in Council to transfer from the Admiralty to the Board of Trade certain harbours, including Portland. Before 1847 there was no harbour at Portland, but it was open sea. The Crown has no title to the bed of the sea, had no title to the bed of the harbour, and it has no right now, unless the right has been conferred by some Act of Parliament. For the last thirty years the harbour has been regularly used as a bunkering harbour for steamers, and coal hulks have been regularly stationed there in increasing numbers. Portland is a port very convenient for this purpose, because it can be reached with the least deviation from the track of vessels in the Channel, and can be entered at all states of tide and weather. They referred to

Dockyard Ports Regulation Act 1865 (28 & 29 Vict. c. 125);
Order in Council, Feb. 16, 1903.

There is nothing in the Act to prevent this harbour being used as a harbour of refuge or for ordinary mercantile purposes and for bunkering passing steamers. The ownership of the soil of the sea, if it is in the King, is subject to the rights of public user, and not merely subject to the right of navigation in the narrow meaning of the word. Ships may be anchored in the soil and permanent moorings may be fixed and the business of bunkering carried on subject to the principle *Sic utere tuo ut alienum non lædas*. They referred to

Attorney-General v. *Wright*, 8 Asp. Mar. Law Cas. 320; 77 L. T. Rep. 295; (1897) 2 Q. B. 318;
Coulson on the Law of Waters, 2nd edit., pp. 12, 13, 40;

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

Reg. v. *Keyn*, 13 Cox C. C. 403; 2 Ex. Div. 63;
Direct United States Cable Company v. *Anglo-American Telegraph Company*, 36 L. T. Rep. 265; 2 App. Cas. 394;
Foreman v. *Free Fishers of Whitstable*, 3 Mar. Law Cas. O. S. 337 (1869); 21 L. T. Rep. 804; L. Rep. 4 H. L. 266;
Gann v. *Free Fishers of Whitstable*, 2 Mar. Law Cas. O. S. 179 (1865); 12 L. T. Rep. 150; 11 H. L. Cas. 192;
Blackpool Pier v. *Fylde Union*, 36 L. T. Rep. 251; 46 L. J. 129, M. C.;
Rex v. *Russell*, 6 B. & C. 566;
Attorney-General v. *Terry*, 2 Asp. Mar. Law Cas. 174, 217 (1874); 29 L. T. Rep. 716; L. Rep. 9 Ch. 423.

The question is whether the thing alleged to be an obstruction is in itself, on the balance of convenience, an obstruction to the class of the public concerned. They referred to

Rex v. *Russell* (*sup.*).
Hale's "De Portibus Maris"; Hargrave's Tracts, pp. 83 and 85.

The *Attorney-General* (Sir W. S. Robson, K.C.) and *B. A. Cohen* for the defendant.—With regard to the general law in relation to the soil of the sea, it has been said that the King is the lord "of the great waste of the sea," wherever he exercises his jurisdiction. It is not necessary to go so far in this case, for that would imply that he was lord of the soil within the three-mile limit, just as he might be lord of the manor or of the foreshores. *Reg.* v. *Keyn* (*sup.*) shows that the King had no criminal jurisdiction over foreigners on board a foreign ship sailing within that limit. The King, however, can annex any part of the soil within the three-mile limit either by Act of Parliament or by Order in Council, and so define the limits of a port and make the soil of the port the property of the King. The right of navigation is the right of locomotion (*Orr-Ewing* v. *Colquhoun*, 2 App. Cas. 839), and incidental to that, of course, is the right of anchoring, and a more qualified right of mooring. But in the case of a harbour both are subject to any regulations of the harbour-master. But here the plaintiffs are not claiming a right of locomotion, but a right to open a shop in a harbour built by the Crown. They referred to

Hale's "De Jure Maris"; Hargrave's Tracts, p. 10.

When once you have a port defined either by custom or statute, the soil *primâ facie* is in the King. They referred to

Crown Lands Act 1866 (29 & 30 Vict. c. 62), s. 7;
Mayor of Weymouth v. *Nugent*, 11 L. T. Rep. 672; 6 B. & S. 22;
Attorney-General v. *Chambers*, 4 De G. M. & G. 206;
Gann v. *Free Fishers of Whitstable* (*sup.*);
Gammel v. *Commissioners of Woods and Forests* 3 Macq. 419.

Here the King has annexed the soil of the sea. They referred to

Harbour Transfer Act 1865 (28 & 29 Vict. c. 100);
Dockyard Ports Regulation Act 1865 (28 & 29 Vict. c. 125;
Order in Council, Feb. 16, 1903;
Lord Advocate v. *Wemyss*, (1900) A. C. 48.

As to whether this ship was an obstruction to navigation, the harbour-master has a discretion and the court will not interfere with such discretion lightly. They referred to

Hawley v. *Steele*, 37 L. T. Rep. 625; 6 Ch. Div. 521.

The King owns the soil of all ports and harbours, whether they are ports and harbours which have belonged from time immemorial to the Crown or have been made by Acts of Parliament and so added to the territory of the Crown. Hale's propositions in "De Jure Maris" that the King was lord "of the great waste of the sea," though too wide for some purposes, except so far as modified by *Reg.* v. *Keyn* (*sup.*) are still good law. The Territorial Waters Jurisdiction Act 1878, however, made the judgment of the minority in *Reg.* v. *Keyn* (*sup.*) law, but says nothing as to the ownership of the soil. They referred to

Phear on the Law of Waters, p. 41;
Reg. v. *Cunningham*, 8 Cox C. C. 104; 28 L. J. 66, M. C.
Lord Fitzhardinge v. *Purcell*, 99 L. T. Rep. 154; (1908) 2 Ch. 139.

The King, apart from owning the soil of all harbours, is clearly conservator. As to what is the right of navigation, they referred to

Gardner v. *Doe*, 95 L. T. Rep. 492; (1906) 2 K. B 171;
Original Hartlepool Collieries v. *Gibb*, 3 Asp. Mar. Law Cas. 411 (1877); 36 L. T. Rep. 433; 5 Ch. Div. 713.

The right of navigation is not a right of property:

Orr-Ewing v. *Colquhoun* (*sup.*).

They also referred to

Attorney-General v. *Terry* (*sup.*).

Leslie Scott, K.C. in reply.—The King has no property in the soil of the open sea below the low-water line, nor has it been established that the King is owner of the soil of the sea below the low-water line in every harbour. Further, there is no case which shows that, even if the King incloses a piece of open sea, he thereby acquires the property in the bed of the sea below low-water level. Also, if there is an inclosure of open sea under statutory powers, the kind of property vested in the Crown must depend upon the statute. Although the sovereignty and jurisdiction of the Crown extends over this harbour, ownership does not follow. Assuming the soil of the harbour is vested in the King, that title is subject to the rights of the public to use the harbour. Unless it is shown that the plaintiffs are exercising their rights of user so as to be a nuisance or an obstruction they cannot be turned out. Here the plaintiffs were exercising a lawful trade, and an incident of navigation and of the shipping trade of the country. Every subject has the right to use public waters for any lawful trade and for any purpose that is incidental to any legitimate trade. Anchoring is an incident of navigation, and cannot be restricted. They referred to

Gann v. *Free Fishers of Whitstable* (*sup.*);
Attorney-General v. *Wright* (*sup.*);
Original Hartlepool Collieries v. *Gibb* (*sup.*);
Rex v. *Russell* (*sup.*);
Attorney-General v. *Terry* (*sup.*);
Reg. v. *Betts*, 4 Cox C. C. 211; 16 Q. B. 1022;
Booth v. *Ratte*, 62 L. T. Rep. 198; 15 App. Cas. 188.

Navigation is not limited to those acts done by way of navigation, but includes those acts done for the purpose of navigation generally—that is, the shipping trade. Really the right of the public is to use the water in any lawful way. The ownership of a bank does not *per se* give the owner a right to use navigable water to any greater extent than the public. If the ownership of the soil is in the Crown, it has only the bare ownership for the purpose of carrying out the Act of Parliament and the Order in Council. The plaintiffs claim no right of property nor any permanent anchoring place, but only the right of navigation in its fullest sense. The Dockyard Ports Regulation Act 1865 only allows the Crown to do that which the Act authorised, as defined by the statute.

Feb. 23.—A. T. LAWRENCE, J. read the following written judgment:—The plaintiff company is a colliery company in Yorkshire, and is the owner of the hulk *Persia*, late a steamship of the Anchor Line. It brings this action for an injunction to restrain the defendant, who is the King's Harbour-master of the dockyard port of Portland, from removing the *Persia* from such port. The plaintiffs in November last issued circulars to its customers informing them that it proposed to station the *Persia* at Portland as "a hulk" or "floating depot" for the purpose of bunkering ships with coal. It stated that the *Persia* would be equipped with the most approved appliances for affording quick dispatch to vessels seeking coal by day or night. Immediately on this circular coming to the attention of the defendant he informed the plaintiffs that permission could not be granted to add to the number of coal hulks already moored in Portland Harbour. The plaintiffs disregarded this notice; the *Persia* entered the harbour and took up a position in the part of it which is appropriated as a merchant shipping anchorage. The defendant, after pointing out that she was there in violation of the notice he had given and of the directions of the Lords of the Admiralty, ordered her to leave the harbour; this she refused to do. The defendant then threatened to have her removed, whereupon this action was brought and an injunction claimed. The plaintiff company takes up the position that it is entitled to keep the hulk permanently in the harbour, and for this purpose to attach it to the soil of the harbour by appropriate means. The plaintiffs are willing to concede to the harbour-master the right from time to time to move the hulk in the harbour as occasion may require. The crew and navigating staff have been discharged, and the *Persia* is now manned by bunkering men only; she is moored by her own anchors, which can be weighed. She swings at the centre of these moorings; in all other respects she is stationary. Portland is a dockyard port within the provisions of the Dockyard Ports Regulation Act 1865 (28 & 29 Vict. c. 125). The limits of the port have been defined by an Order in Council of the 16th Feb. 1903. Within these limits is the harbour, inclosed on the west and the north and south-west by the land, and on the east and north and south-east by four breakwaters, having three entrance channels. The inclosed space is divided into three sections—(1) men-of-war's anchorage, (2) torpedo range, and (3) merchant ships' anchorage. It is not a commercial port except for Portland stone. It is a port of refuge from storm, and is a convenient coaling station, chiefly for ships going north and east. A considerable portion of the original merchant shipping anchorage has been appropriated to the needs of the Navy, by extending the torpedo range and by anchoring destroyers and lighters within its limits. The defendant, who gave his evidence with absolute candour and impartiality, stated that in his judgment the whole area within the breakwater was needed for the requirements of His Majesty's Naval Forces, but that his orders were to afford all facilities to merchant ships seeking refuge in the harbour or desiring to coal there, and that these objects he has done his utmost to serve. I have no doubt that these statements are accurate. There were, before the arrival of the *Persia*, ten coaling hulks for the use of merchant ships permanently moored within the anchorage, by the permission of the authorities. There was no evidence before me that these were not sufficient to meet the requirements of the port, and the defendant had received no complaints of their inefficiency. I come clearly to the conclusion as a fact that both the defendant and the Lords Commissioners of the Admiralty formed the opinion—(1) That the existing coaling hulks were sufficient; and (2) that the addition of the *Persia* would tend unduly to impede navigation and interfere with the purposes for which this harbour exists. I do not think that I am entitled to review these decisions, but if I were I should not upon the evidence before me differ from them. I have no doubt, however, that Mr. Earnsby, the manager of the *Persia*, to whose energy the advent of this further hulk appears to be due, is right in thinking that with her more up-to-date appliances he would soon succeed in capturing the coaling trade of the port, and would very substantially increase it.

It is argued that the plaintiff company has a legal right to have the hulk kept in the harbour as an exercise of the right of navigation. This is, I think, wrong in fact. A stationary coaling depot does not exercise rights of navigation merely because it floats. Navigation is on water what locomotion is on land. The right of navigation is a right of passage, with rights of stopping, anchoring, &c., for purposes incidental to passage to and fro. This ship, the object and purpose of which is best served the more permanent its location is, cannot be said to be engaged in navigation. Then it is said that, if it is not exercising rights of navigation itself, it is incident or auxiliary to the rights of navigation of others—namely, that portion of the public interested in steamships. That coal is used in navigation is not denied, but how this fact should have the effect of giving the plaintiffs rights in Portland Harbour was never made clear to me. The plaintiff company seems to claim to be clothed with the rights of that portion of the community which is interested in steam shipping, and thus to have the right to affix this hulk to the soil just as the ships of such persons may drop anchor. To represent this section of the public it would be necessary that the action should have been brought in the name of the Attorney-General in his representative character. The company possesses no such right itself. Mr. Leslie Scott invoked the advance of trade and commerce in general as a reason for granting this injunction, and suggested that there was some lack of clarity of thought in the argument

presented for the defendant. The claim of the plaintiff company seems to me to be more open to this charge; for the company as one of the public is not exercising any right known to the law. The space it occupies by this ship it occupies adversely to the defendant, to the Admiralty, to the King, and to all the world. Except for the public right of navigation and the Crown rights in the soil, which I will consider in a moment, I see no reason, if the plaintiffs' contention be correct, why they should not in twelve years acquire the fee simple in the soil of the area they occupy under the Real Property Limitations Act. The *Persia* is necessarily an obstruction to navigation over this site, seeing that no two bodies can be in the same place at the same time, and unless the plaintiffs can justify this fact by showing that it is there in the exercise of a right recognised by law it fails *in limine* to make good its claim to an injunction. No question of reasonable user of the harbour arises unless the plaintiff is exercising such a right. He does not clothe himself with a right by using vague language about commerce and the conveniences of modern trade, nor by showing that his coal depot would be a much better commercial undertaking than that of the existing coal hulks. Whether the Admiralty have exercised their powers wisely by permitting these old hulks to continue in the enjoyment of the privilege extended to them is not a matter for my consideration. I have not heard either what their owners or the Admiralty have to say upon the subject. Similarly the arguments founded upon the curtailment of the merchant shipping anchorage which has taken place without the formal authority of an Order in Council are irrelevant; the plaintiff must first show that he is exercising a right known to the law before he can ask to have his claim to use this spot compared with the user conceded to others. It is not sufficient to say that the trade of bunkering ships is a lawful trade. It is, but it cannot be carried on wherever the plaintiff company pleases. For the defendant it was contended that the soil of the harbour is the property of the Crown, and that as the plaintiff was not exercising rights of navigation, but was in fact placing anchors in the soil intending to retain permanent possession thereof, he was a trespasser and could be removed. The plaintiff denied each of these propositions; at first he stoutly denied that the property in the soil was in the Crown. There can, I think, be no doubt that it is vested in the Crown, or in one of the departments in which Crown lands are now vested. It is not necessary to consider the views of Selden and of Hale as to Crown property in the narrow seas, nor the decision of the court in *Reg.* v. *Keyn* (13 Cox C. C. 403; 2 Ex. Div. 63) as to the limitation to be put upon these authorities and upon the more modern three-mile limit, for whatever may be the true view as to the soil in the open sea below low-water mark, it has never been held, so far as I know, that the property in the soil of harbours and navigable rivers within the realm is not *primâ facie* vested in the Crown. It may, of course, be found upon investigation to be vested by grant or by prescription in someone else. In the case of Portland this ownership is conspicuous in a peculiar and special degree, for not only does the harbour lie *inter fauces terræ*, but it is appropriated and inclosed by breakwaters, and, as appears by the Acts of Parliament that deal with it, the King is lord of the manor of Portland, and there existed as long ago as 1847 a pier known as the "King's Pier," even then in ruins. Further, the additional lands taken by the Act of 1847 (10 Vict. c. xxiv.) for the purposes of the harbour were vested in the Queen, her heirs and successors And subsequent statutes have recognised the fact that the harbour is Crown property. In the Act of 1857 (20 & 21 Vict. c. xxxii), sects. 12 and 18, may be referred to as clear expressions of this fact. I have, therefore, no doubt that the title to the soil in question is vested in the Crown, subject only to the public rights of and incidental to navigation over it.

Mr. Leslie Scott argued that, even assuming the title were in the Crown, it was a title shorn of all attributes of property other than those expressly conferred or recognised by the Dockyard Ports Regulation Act 1865 or the Orders in Council made thereunder. That the Crown holds this bed of the sea for the public is true, but that that deprives it of any ordinary rights of property against a wrongdoer is a view of the law which I cannot accept This is to confuse the incidents of the property with the objects for which it is held. The Act of 1865 by sect. 5 enumerates the purposes for which regulations may be made by Order in Council. It defines the purposes for which special laws may be made affecting the exercise of any rights within the area in question —viz., this dockyard port. It has no need for provisions dealing with an act of trespass. The regulation No. 3 contained in the Order in Council, which deals with moorings for private vessels, does not relate to coal depots or other permanent structures, but to moorings for ships navigating the harbour, just as Regulation No. 2 does in the case of His Majesty's ships. The contrast so much relied upon between the language to be found in clauses 14 and 15 and that in clause 16 seems to be natural in view of the fact that 14 and 15 deal with circumstances that would rarely occur, whereas those in clause 16 would be of daily, nay, almost hourly occurrence. If it were necessary to find statutory authority for the act of the defendant it may be found in sect. 4 of the Act. He is applying the ordinary means used in civil life to "protect the port" from trespass. In my opinion, the property in the soil being in the Crown, and the possession and administration of that property being in the Lords Commissioners of the Admiralty by their servant, the defendant, I hold that he had the right to refuse permission to the plaintiffs' ship to take up a trading station and form a coal depot in the dockyard port of Portland. A great many cases were cited to me during the elaborate argument of Mr. Leslie Scott. I do not think any purpose would be served by my reviewing them in detail. The fundamental difference between this case and those is that in each of them there was a right being exercised, either of riparian property or of navigation, or of passage over a highway; it was the extent, whether due or otherwise, of the exercise of such right which was in question. There is no place for the consideration of reasonableness or discretion where the claim of the plaintiffs is to a right *in alieno solo* which is not recognised by law. The plaintiffs, if they wish to set up a shop on land or a coal depot in harbour, must arrange with the owner of the soil of the

land which they propose to occupy. This court will not grant an injunction restraining the owner or his servant from removing them so long as they remain trespassers; this they became when the *Persia* ceased to be a ship engaged in navigation. There must be judgment for the defendant.

Judgment accordingly.

Solicitors: *Lightbound, Owen,* and *Co.*; *Treasury Solicitor.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Oct. 27, 28, *and Nov.* 3, 1909.

(Before Sir J. BIGHAM, P. and Elder Brethren.)

THE GLADYS. (*a*)

Collision—Sailing vessel—Steam trawler hauling up trawl—Duty to keep out of the way—Duty to keep course—"Proceeding so as to involve risk of collision"—"Underway"—Collision Regulations 1897—*Preliminary article—Arts.* 9 (*k*), 20, 22, 23, 27, *and* 29.

Where a barque collided with a steam trawler which was stationary and engaged in hauling up her trawl and unable to go ahead or astern, the court held that there was no duty on the steam trawler to keep out of the way of the barque as she was not "proceeding" within the meaning of art. 20 *of the Collision Regulations.*

DAMAGE ACTION.

The plaintiffs were the owners of the steam trawler *Prome* and the representatives of her master and crew suing for their effects; the defendants and counter claimants were the owners of the barque *Gladys.*

The case made by the plaintiffs was that about 9 a.m. on the 22nd July 1909 the *Prome,* a steam trawler of 141 tons gross and 44 tons net register, was trawling with the Gamecock fleet in the North Sea about 150 miles east by north of the Spurn Lightship, being manned by a crew of nine hands all told, and with two boy passengers on board. The wind was west-south-west fresh, and the weather was fine and clear. The *Prome* was lying stationary, heading about north-north-west, and getting up her fishing gear. She was carrying a basket ball on her forestay to indicate her occupation, and a good look-out was being kept on board of her. In these circumstances the barque *Gladys* came on to the fleet in full sail at great speed, and having no look-out was so badly steered that she came on to the *Prome,* and with her stem struck her a violent blow on the port side, causing her to founder immediately with all hands.

The *Prome* was unable to manœuvre, and the *Gladys* was loudly hailed as she approached, but owing to the loss of all hands the plaintiffs were unable to give further particulars.

Those on the *Prome* charged those on the *Gladys* with not keeping a good look-out and with neglecting to keep clear of the *Prome.*

The case made by the defendants was that shortly before 9 a.m. on the 22nd July 1909 the *Gladys,* a steel barque of 1363 tons gross and 1345 tons net register, manned by a crew of fifteen hands all told, was in the North Sea off the Dogger Bank, in the course of a voyage from Antwerp to Fredriksstad, in Norway, with a cargo of pig iron. The weather was clear but overcast, and the wind was about south-west, a moderate breeze. The *Gladys,* under all plain sail, was being kept steady on a course of N.E. by E. magnetic, and was making about eight knots. In these circumstances the *Prome* was seen about right ahead and close to. The helm of the *Gladys* was thereupon immediately put hard a-port, in order, if possible, to ease the blow of collision, but very shortly afterwards the starboard side of the *Prome* just abaft the foremast struck the stem of the *Gladys,* doing her damage.

Those on the *Gladys* charged those on the *Prome* with not keeping a good look-out; with improperly failing to keep out of the way; with attempting to cross ahead of the *Gladys*; with failing to ease, stop, or reverse their engines; and with failing to indicate their presence and manœvures by signals.

The following Collision Regulations 1897 were referred to:

9 (*k*). All vessels or boats fishing with nets or lines or trawls, when under way, shall in day time indicate their occupation to an approaching vessel by displaying a basket or other efficient signal where it can best be seen. If vessels or boats at anchor have their gear out they shall, on the approach of other vessels, show the same signal on the side on which those vessels can pass.

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.

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.

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.

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.

Horridge, K.C. and *Arthur Pritchard* for the plaintiffs, the owners of the *Prome.*—There was no look-out on the *Gladys* at all, so even if the basket was not in the best position to be seen the breach could not have contributed to the collision:

The Englishman, 37 L. T. Rep. 512; 3 Asp. Mar. Law. Cas. 506; 3 P. Div. 18.

It has been held that a trawler with her trawl down is not bound to get out of the way of a steamship. Rule 27 of the present Collision Regulations (it was then rule 23 of the regulations of 1884) excuses her:

The Tweedsdale, 61 L. T. Rep. 371; 6 Asp. Mar. Law Cas. 430; 14 P. Div. 164.

In *The Upton Castle* (93 L. T. Rep. 814; 10 Asp. Mar. Law. Cas. 153; (1906) P. 147) a steam

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

trawler was held to blame for colliding with a sailing vessel because the collision happened when she was not incumbered with her trawl. In *The Craigellachie* (99 L. T. Rep. 252; 11 Asp. Mar. Law Cas. 103; (1909) P. 1) the trawler was held alone to blame, for she could in fact have got out of the way of the sailing vessel and did not do so. Here, the trawler could not get out of the way.

Laing, K.C. and *H. C. S. Dumas* for the defendants, the owners of the *Gladys*.—No proper basket signal was exhibited. A steamship can always get out of the way of a sailing ship much more easily than a sailing ship can get out of the way of a steamship, for the steamship is not dependent on the wind. A steam tug lying-to has been held to blame for not getting out of the way of a sailing vessel:

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

Horridge, K.C. in reply.—The proper basket signal was exhibited. A signal could not be seen unless there was some look-out. There was no look-out, so, assuming the absence of the signal, it could not have contributed to the collision:

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

Cur. adv. vult.

Nov. 3.—THE PRESIDENT.—This is an action by the owners of the steam trawler *Prome* and others, against the owners of the barque *Gladys* to recover damages in respect of a collision between the two vessels, whereby the *Prome* was sunk with all hands. The facts are in some dispute, but I have no difficulty in finding them. They are as follows: The *Prome* was a steam trawler of 141 tons gross and 44 tons net register, with engines of 45-horse power nominal, and was manned by a crew of nine hands all told. The *Gladys* is a steel barque of 1362 tons gross and 1345 tons net register, and was manned by a crew of fifteen hands all told. At nine o'clock on the morning of the 22nd July last the *Prome* was trawling with the Gamecock trawling fleet in the vicinity of the Dogger Bank. The wind was W.S.W., fresh, and the weather was fine and clear. The trawler was stationary, heading N.W. or N.N.W., and was engaged in drawing up her trawl on her port side. She was carrying a basket ball on her forestay, in compliance with the requirements of sub-sect. (*k*) of art. 9 of the Order in Council of the 4th April 1906, which relates to fishing vessels. The sub-section reads as follows: "All vessels or boats fishing with nets or lines or trawls, when under way, shall in daytime indicate their occupation to an approaching vessel by displaying a basket or other efficient signal where it can best be seen." There was a dispute on this part of the case. It was said on the part of the *Gladys* that the operation of drawing up the trawl on the *Prome* was finished, and that the vessel was heading S.E. by E., and that no basket ball was exhibited; but I accept the evidence called on behalf of the plaintiffs on these points and I find the facts as I have stated them. In these circumstances the *Gladys* under all plain sail and steering N.E. by E. magnetic, and making eight or nine knots, approached. She got within 100 or 120 feet of the trawler before anyone on board became aware of the trawler's existence. The master of the *Gladys* then saw the masthead of the trawler just over his bow. He gave the order to put the helm hard-a-port, intending if possible to pass under the trawler's stern, but it was too late. The bow of the *Gladys* struck the port side of the trawler abaft the foremast, and in three minutes the trawler sank with all hands. After the collision all was done by those on board the *Gladys* that could be done. The trawler showing her port side to the *Gladys*, it was right for the latter to put her helm hard-a-port and to try to get under the trawler's stern; but the evidence makes it quite clear to my mind that before the collision there was no look-out on the *Gladys*. The captain says that he was on the poop keeping watch, and he says that by craning his neck he could see right in a line with the stem; but in point of fact he did not see straight in a line with the stem. The trawler was and had been for an hour or more straight ahead, and yet had never been seen during all that time by anyone on board the *Gladys*. He says, further, that without craning his neck he could see anything within half a point or a point on either bow. But as he saw nothing I must assume that the trawler was not within his line of sight, but was right ahead and stationary. If she had been moving she must have come within his line of sight. The *Gladys* was down by the stern and the captain was on the poop, so that he was unable to see anything ahead, even if he looked. In my opinion no look-out at all was being kept on the sailing ship, or, if any, a very bad one. I am also satisfied that if the trawler had been seen when she ought to have been seen the helm of the *Gladys* would have been put to port in plenty of time to have enabled the *Gladys* to go under the trawler's stern and so to have avoided the accident. The *Gladys* is therefore to blame for the disaster.

But the question arises whether she is wholly to blame. Counsel for the defendants says "No," because, as he alleges, it was the duty of the trawler to have used her steam and got out of the sailing ship's way. By art. 20 of the Steering and Sailing Rules it is provided that where a steam vessel and a sailing vessel are approaching in such directions as to involve risk of collision the steam vessel shall keep out of the way of the sailing vessel. But in applying this rule the facts of the case must be kept in mind. The trawler had her trawl still out, though she was engaged in the operation of hauling it in. She was thereby rendered stationary, and was as if she were an anchored ship. The evidence shows that in this condition she could neither go ahead nor astern. The trawl being close aboard, she could not have moved her engines ahead without risk of fouling her propeller, and if her engines had been moved astern she would probably have fallen off head on to her trawl in an unmanageable position. She was an incumbered vessel, and, practically, until her trawl was up, immovable. In my opinion a vessel so placed cannot properly be said to be "proceeding" within the meaning of art. 20. *The Jennie S. Barker* (*ubi sup.*), relied on by counsel for the defendants for the purpose of showing that the trawler was a proceeding ship, is not applicable. There a tug was hove-to in a fairway channel waiting for employment. She could have moved out of the way of the

approaching sailing ship by one or two revolutions of the engines, but she had no one at the starting gear when the order was given to go ahead. In these circumstances she was held to be within the rules. The reason of the rule is that a steamship is more completely under command than a sailing ship. She can go ahead in the teeth of the wind, and she can stop or go astern as she pleases. This reason applied in the case of *The Jennie S. Barker* (*ubi sup.*), for she could move; whereas the reason did not apply to the trawler *Prome*, for she could not move. The *Gladys* could and ought to have seen that the *Prome* was stationary and engaged in getting up her trawl, and was therefore immovable. In such circumstances it was the business of the *Gladys* to get out of the way. She should have taken steps to go under the *Prome*'s stern without waiting for the *Prome* to do that which the *Gladys* should have known was impossible. I do not think the question is affected by the definition of a vessel "under way" to be found in the preliminary rule. The *Prome* may very well have been a vessel under way within that rule, and yet not have been a proceeding vessel within art. 20. Referring to sect. 419, sub-sect. 4, of the Merchant Shipping Act 1894, I find that the Collision Regulations were not infringed by the *Prome*; and even if it could be said that they were, I should be prepared to hold that the departure from them, so far as it consisted of not making way, was necessary in the sense that it was unavoidable. The case which appears to me to be most in point is that of *The Tweedsdale* (*ubi sup.*). There a moving steam trawler with her trawl down failed to get out of the way of a sailing ship, and yet it was held by Butt, J. that she was not to blame because, being incumbered by her trawl, there were special circumstances within the meaning of art. 27 which authorised a departure from art. 20. The present seems to be an *a fortiori* case, because, as I have already said, the *Prome* was stationary and immovable. Therefore there will be judgment for the plaintiffs, with costs.

A stay of execution was granted pending an appeal.

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

Solicitors for the defendants, *Ince*, *Colt*, and *Ince*.

Nov. 1, 3, 4, *and* 5, 1909.

(Before Sir JOHN BIGHAM, P. and Elder Brethren.)

THE POLYNESIEN. (*a*)

Collision—Vessel moored—Inevitable accident—Onus of proof—Compulsory pilotage—Straits Settlements Ordinances (1879) *No.* 8, *ss.* 1 *and* 12; (1885) *No.* 5, *s.* 4; (1905) *No.* 8, *ss.* 21 *and* 32; (1905) *No.* 7, *ss.* 20 *and* 23.

A vessel when leaving Singapore Harbour ran into another vessel moored to a wharf. In a damage action the vessel leaving the harbour alleged that the collision was an inevitable accident, as she was driven against the moored vessel by an abnormal current; it was further alleged that if the collision was caused by negligence it was caused by the negligence of the pilot on the vessel leaving the harbour, who was compulsorily in charge, and that therefore her owners were not liable for the damage.

Held, that the onus was on the owners of the vessel leaving the harbour to show that the collision could not have been averted by the exercise of ordinary care and skill by a competent seaman; that the evidence did not establish that there was an abnormal current; that they had failed to discharge that onus, and were liable for the damage.

The Straits Settlements Ordinances and the rules and regulations of the Tanjong Pagar Dock Board do not make pilotage compulsory in Singapore Harbour.

DAMAGE ACTION.

The plaintiffs were the owners of the steamship *Djambi*; the defendants were the owners of the steamship *Polynesien*.

The case made by the plaintiffs was that about 5.15 p.m. on the 11th Jan. 1909 the *Djambi*, a steel screw steamship of the port of Batavia of 321 tons gross and 173 tons net register, manned by a crew of twenty-six hands all told, was lying properly and securely moored alongside the Tanjong Pagar, East Wharf, Singapore, with her head towards the entrance to the Albert Dock, completing her loading of general cargo for Pangkalan Brendan. The weather was fine and clear, the wind about north-east light, and the tide half ebb, of the force of about two to three knots. A good look-out was being kept on board of her. In these circumstances the *Polynesien*, which had shortly before left Borneo Wharf, approached, and instead of keeping clear, as she could and ought to have done, came on at considerable speed, and with her stem struck the port side of the *Djambi* in the way of the after hatch a heavy blow, cutting into her and causing her to founder almost immediately.

Those on the *Djambi* charged those on the *Polynesien* with not keeping a good look-out and with neglecting to keep clear of the *Polynesien*.

The case made by the defendants was that the collision was not caused or contributed to by any negligence on their part or on the part of their servants, and that it was the result of an inevitable accident.

They alleged that about 5.10 p.m. on the 16th Jan. 1909 the *Polynesien*, a steel screw steamship of 6363 tons gross and 3544 tons net register. 482ft. in length, was in North Channel, Keppel Harbour, Singapore, in the course of a voyage from Borneo Wharf, Singapore, to Saigon, with passengers, mails, and cargo. The weather at the time was fine and clear, the tide running to the eastward at about six knots, but variable in force, and the wind southerly, a light breeze. The *Polynesien*, in charge of a duly licensed pilot, proceeding at various speeds, was shaping a course to the south-eastward, a good look-out being kept on board her. In these circumstances, when nearing Tanjong Pagar Wharf, the *Polynesien* encountered a strong and unusual eddy, so that she failed to answer her port helm. Her engines were at once put full speed astern and both anchors were let go, but before her way could be taken off her stem collided with the port side of

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

the *Djambi*, lying alongside Tanjong Pagar Wharf.

The defendants also alleged that if the collision was caused or contributed to by any negligent navigation of the *Polyncsien*, which they denied, it was occasioned solely by the fault or neglect of the pilot, who, being a duly licensed pilot for the district, was by compulsion of law in charge of the *Polynesien*.

The following Ordinances of the Straits Settlements were referred to during the course of the case:

Ordinance No. 8 of 1879. An Ordinance to Consolidate and Amend the Law Relating to Pilots and Pilotage:

1. The following shall be the harbours and channels within the operation of this ordinance, and it shall not be lawful for any person to take any ship into or out of any such harbour or channel, except as provided in this ordinance: that is to say, New Harbour, Singapore, and the channel leading thereto from the westward, and the South Channel, Penang.

12. The master or person in charge of any ship entering or leaving either of the harbours or channels to which this ordinance is extended, or moving a ship from one part to another of either of the said harbours or channels, without having on board his ship a pilot licensed for such harbour or channel, or without such vessel being towed by a steamer having on board a first class licensed pilot, shall, unless he shall have been unable to obtain the services of a duly licensed pilot, and except as provided under schedule B, be liable to pay the regulated amount of pilotage dues, and if such amount of pilotage dues be not forthwith paid, the master-attendant or harbour master may recover the same in the manner pointed out by sect. 9 of this Ordinance before a magistrate, with a sum equal to the full amount of pilotage dues in addition by way of penalty, and all pilotage dues recoverable under this Ordinance for which the services of a pilot shall not have been used shall be paid to the colonial treasurer for the service of the colony. Provided that it shall not be necessary for any master or person in charge of a ship to have on board his ship a licensed pilot when such ship is being hauled from a wharf into the stream, or from the stream alongside a wharf, or is being shifted from one part to another part of any wharf, or between any wharf and dock forming part of the same premises.

Straits Settlements Ordinance No. 5 of 1885, cited as the Pilots Ordinance Amendment Ordinance 1885, s. 4, sect. 12 of the principal Ordinance is hereby repealed.

The principal Ordinance was No. 8 of 1879.

Straits Settlements Ordinance No. 8 of 1905, being an Ordinance to Consolidate and Amend the Law Relating to Pilots and Pilotage:

21. Any police court shall have authority to hear and determine all claims brought against any ship while in charge of a pilot for damage done by the ship to any wharf, beacon, buoy, harbour mark, mooring, or other public property. Such claims shall be made by the master-attendant or harbour master by way of complaint in writing setting out the damages on which the police court may issue a summons requiring the attendance of the person complained against, and in default of appearance, or in the first instance if it appears to the police court necessary for any reason to secure the due attendance of the persons against whom complaint is made, a warrant may be issued to compel their appearance.

32. The Pilots Ordinance 1879 and the Ordinances amending the same are hereby repealed, but all appointments made and numbers of pilots fixed and licences and certificates granted thereunder, and all rules and orders and scales of fees and dues shall continue in force under this ordinance unless inconsistent with the terms hereof until superseded by analogous appointments and provisions made under this ordinance.

Straits Settlements Ordinance No. 7 of 1905. The Tanjong Pagar Dock Ordinance 1905.

20. (1) A board to be called the Tanjong Pagar Dock Board shall be constituted as hereinafter provided. The board shall from and after the appointed date hold the undertaking of the company, and may exercise all the rights, powers, authorities, and privileges of the company, and shall (to the exclusion of the company) be subject to all the duties, obligations, and liabilities of the company. The board shall be a body politic and corporate, and have perpetual succession and a common seal, and may sue and be sued in its corporate name as freely and unrestrictedly as any other incorporated company.

23. (1) The board shall be appointed by the governor. One-third of the members shall retire by rotation every three years, but may be reappointed if the governor shall see fit. Of the original members those to retire in the first and second years shall be determined by lot. (2) The governor may at any time by writing under the hand of the Colonial Secretary remove any member from the board, and such member shall forthwith cease to act. (3) In the event of a vacancy among the members of the board from whatever cause arising, the governor may appoint another person to fill the vacancy, and such person shall hold office for the unexpired term of office of the member whom he replaces. (4) In addition to the members referred to above there shall be not more than two official members who shall be appointed by and hold office during the pleasure of the governor. (5) The chairman of the board shall be appointed by the members from among themselves subject to the confirmation of the governor. He shall not be an official member.

The board had made and published rules, one of which was as follows:

TOWAGE.—Vessels requiring to be towed to or from the wharves, or assisted when berthing or leaving by tug shall be piloted by a duly licensed pilot unless the board waives those conditions, and shall only employ the board's tugs. Should any other tug or launch be used without the permission of the board the same charge will be made as if one of the board's own vessels had been employed.

Bailhache, K.C. and *Noad* for the defendants, the owners of the *Polynesien*.—The defendants cannot escape liability for the consequences of the collision unless they show that a competent seaman could not have averted or mitigated the disaster by the exercise of ordinary care and skill:

City of Pekin, 61 L. T. Rep. 136; 6 Asp. Mar. Law Cas. 396 (1890); 14 App. Cas. 60.

That is the onus which is upon them. There is no evidence here to show that those on the *Polynesien* did anything that a competent sailor ought not to have done or left undone anything that a competent sailor would have done. The rules of the dock company compelled the defendants to take a tug and a pilot, and if there was any negligence on the *Polynesien* he was guilty of it. [THE PRESIDENT: Is there a duty on the pilot to ascertain the conditions of the current or is it the duty of the crew?] The pilot is taken

on board for the purpose of dealing with local difficulties. He was a compulsory pilot, and the owners of the *Polynesien* are not liable for his negligence, for he was not their servant:

Marsden's Collisions at Sea, p. 213.

The Tanjong Pagar Dock Company was formed under sects. 20 and 23 of the Straits Settlements Ordinance, No. 7, of 1905. The company have made rules which compel the defendants to employ a pilot when they employ a tug. This is one of those cases in which an owner is protected from the consequences of the pilot's negligence while within the district in which he was taken on board, although during part of the distance pilotage is not compulsory:

General Steam Navigation Company v. *British and Colonial Steam Navigation Company*, 20 L. T. Rep. 581; 3 Mar. Law Cas. O. S. 237 (1869); L. Rep. 4 Ex. 236.

Laing, K.C. and *Stephens* for the plaintiffs, the owners of the *Djambi*.—The defendants have to satisfy the court that they were not to blame. On the evidence it is clear they miscalculated the strength of the tide and did not port soon enough to round the bend in the channel, and so they ran into the *Djambi*. Further, they ought not to have started down this channel with this vessel, which was nearly as long as the channel is broad with this strong current running. That, perhaps, was the fault of the pilot; but pilotage is not compulsory, and the defendants are liable for the consequences of the pilot's negligence. The reason why the owner escapes liability for the fault of a compulsory pilot has long been settled, and is set out in Marsden's Collisions at Sea, p. 215: "The leading principle of the Legislature exonerating owners from any liability for damage occasioned by their vessels having pilots on board is this: that masters are compellable to take pilots on board, and the owners are not responsible for the acts of the persons to whom they are forced to commit the management of their property and over whom they have no control. This, I apprehend, is a rule founded upon a great principle of justice and equity." Pilotage is compulsory if you are compelled to pay for the pilot whether you employ him or not. It is not compulsory here. Ordinance No. 8 of 1879 made pilotage compulsory, but sect. 12 of that ordinance, which was the important section, was repealed by sect. 4 of Ordinance No. 5 of 1885. Then Ordinance No. 8 of 1905 was passed, which repealed the former ordinances, and it does not make pilotage compulsory. The following sections, 21 and 32, of Ordinance No. 8 of 1905 show that pilotage is not compulsory. The dock company, no doubt, have power to make rules for the conduct of business and navigation in the harbour, but they have no power to make pilotage compulsory, and the rule which is relied on comes in a series of rules headed Towage, and does not profess to deal with pilots except to say that if a company's tug is used a pilot must be employed. Such a rule does not make pilotage compulsory.

THE PRESIDENT.—This is a case in which a steamer in charge of a licensed pilot ran into a vessel lying at her moorings, and sunk her in broad daylight. The law applicable to such a case is stated by Lord Watson in *The City of Pekin* (*ubi sup.*), who in that case, delivering the judgment of the court, said this: "When a vessel under steam runs down a ship at her moorings in broad daylight, that fact is by itself *primâ facie* evidence of fault, and she cannot escape liability for the consequences of that act except by proving that a competent seaman could not have averted or mitigated the disaster by the exercise of ordinary care and skill." Thus the onus is cast upon the steamer of showing that the disaster was one which could not have been provided against by the exercise of ordinary care and skill, by which is meant that kind of care and skill which is to be expected of a properly qualified mariner. Counsel for the defendants has attempted to discharge this onus in the present case, but he has, in my opinion, failed. The facts are shortly as follows: The defendant's steamer, the *Polynesien*, is a Messageries Maritimes boat, 500 ft. long, of 6,363 tons gross and 3,544 tons net register, with engine power of 818-h.p. nominal. At 5 o'clock in the afternoon of the 11th Jan. last the *Polynesien*, being then at a wharf in Singapore Harbour, was about to put out to sea, and she employed, for the purpose of taking her from the wharf and placing her in a position in the channel, two tugs, the tow-ropes of which broke in a very short time. I am not disposed to attribute any great importance or any importance to the fact that the tow-ropes broke. The vessel got into a position for going out to sea, and she had at that time, apparently, a little sternway. The strength of the tide, three to four knots, was running to the eastward. After getting into this normal position, with, as I say, sternway on, she went ahead for a short distance, and then what happened is described, whether accurately or not I do not say, in the pilot's evidence. I will read some parts of that evidence as showing what, according to him, happened. He says: "Having got into that (normal) position I had a little stern way on me. Then I gave the order 'full speed ahead.' Having given this order, as soon as she gathered steerage way I gave the order 'half-speed' and then 'slow.' That is the usual course to follow. When I went full speed ahead the helm was a little to port. It was steadied as the ship commenced to steer. For the purpose of turning round the Tembaga Reef it is necessary to port your helm. When I commenced to port my helm I was about abreast of godown No. 22. When I gave the order she came down very sluggishly, so I gave the orders 'hard a-port' and 'full speed ahead.' I gave the order 'hard a-port' first, and then a minute after I gave the order 'full speed ahead.' I gave the order 'full speed ahead' so that I could turn more quickly, as she was coming round so sluggishly; in fact she stopped coming round. At the time I gave the order 'full steam ahead' I was abreast of godowns Nos. 18 and 19. Notwithstanding the order given she did not move at all, and when I found this was the case I stopped the engines, went full speed astern, and dropped both anchors. I did not really stop, I went straight from right ahead to full speed astern. On my engines going astern her stern swung to the southward, and her stem canted inwards towards the wharf, and struck the *Djambi* abaft the engines—at about right angles." The pilot then goes on to say that after the collision she answered her helm just as usual, and there was no sign of anything wrong with her steering gear.

He had already said he could not see whether his orders were carried out, and he went on: "If the *Polynesien's* helm was hard-aport at the time I was attempting to round the Tembaga Reef, and her engines were going as I have described a strong eddy must have caught me, otherwise I should have got round. I saw no signs of such an eddy, but that would not be visible from where I was on the bridge of the steamer." The third officer, who was on the upper bridge, and whose business it was to see that the orders given by the pilot were carried out, has described the operations after the straightening up of the vessel in the channel; and it is quite certain that the recollection of one or other of these gentlemen is inaccurate. I do not suggest for a moment that either of them was telling a deliberate untruth, but they are inaccurate. It shows me it is difficult to rely upon the description given by the different witnesses as to what the navigation of this ship consisted of during the very short time which elapsed between her getting into position just outside the wharf and her arriving at the point where the accident occurred. The whole thing happened in about four minutes, or something like that—a very short time—and the distance from the wharf at which the *Polynesien* was moored to the place of the collision was something like three-quarters of a mile. The plaintiffs, of course, are at a disadvantage, for they are not in a position to call any evidence with regard to the orders given on the *Polynesien*, but they have been able to obtain the evidence of Mr. Brooksbank, the wharf superintendent of the Tanjong Pagar Dock Board, who was a witness of this disaster. He says that he was in his office at the time in question, and he noticed from the bow window in his office that the *Polynesien* was going more quickly than was usual on a following tide, and was much closer to the wharf than was usual. He says: "I felt instinctively that in the state of the tide the *Polynesien* was too close to the wharves, and I ran to the bridge in front of my office and I watched her. Her engines were going ahead. I could also see that they increased the speed from the extra commotion in the water. I saw that her helm was hard-a-port and her rudder hard over to starboard. I continued watching her. When abreast of the Sheers Wharf she let go her port anchor, which is a stockless anchor. A few seconds afterwards she collided with the *Djambi*. I could not see her starboard anchor from where I was. I saw the wash of the propeller at one speed and thereafter saw the wash of the propeller at an increased speed. I saw no alteration in the rudder the whole time." This gentleman is probably accustomed to seeing this place navigated by large steamers, and I therefore am disposed to rely very much upon what he says.

Now, the defendants, upon whom the onus in this case rests, have cast about to find some explanation of this disaster, and the explanation which they have selected is that of an abnormal current which nobody had noticed before the accident and nobody noticed, apparently, after the accident. Counsel for the defendant says there is nothing on board this ship to account for the disaster; and that the steering gear and engines were all in good order, and the orders of the competent pilot were all duly carried out; and that in those circumstances it is impossible to attach any blame for this occurrence to anything done on board the ship. and therefore it becomes necessary to look outside the ship to see what was the cause of the disaster. It is said the whole mischief was due to an abnormal current, running, as I understand, to the N.E. I am not quite sure about the direction, and I do not think it matters, for I do not for a moment believe there was any abnormal current at all. I have listened to the evidence, and although I do not mean to say, as counsel for the defendants attempted to tell me I would have to say if I did not accept the evidence, that they have concocted a lie for the purpose of deceiving the court—I do not for a moment mean anything of the kind—all I do mean is that they have probably been casting about, after the event, to find some cause which would not clash with the loyalty which they naturally owe to their own ship, and they have thought—and I dare say that at present they honestly do think—that there must have been something outside that ship which produced the disaster, and something which they could not have foreseen and therefore could not be expected to provide against. Their frame of mind is exemplified by what the pilot himself says: "If the *Polynesien's* helm was hard-a-port at the time I was attempting to round the *Tembaga Reef*, and her engines were going as I have described, a strong eddy must have caught me, otherwise I should have got round." I have already said that nobody saw any signs of such an abnormal eddy—and the pilot goes on and says this:—"The disaster was due either to the helm not working properly, or to an eddy of which I knew nothing. At times there is a strong eddy round by the red buoy, but there is nothing unusual in there being such an eddy. It is one of the things that I, as a pilot, have to be prepared to guard against. We know that there is generally an eddy there which assists the ship round, but we must be on the look-out for other eddies." I presume, therefore, he was on the look-out and he did not see anything; and there is this strange fact, that there is not a single independent witness called on the part of the *Polynesien* to say that any such abnormal state of water existed at that time. I am left to rely upon the evidence called from the ship and upon the evidence of the pilot, and I should have expected, if there was anything so abnormal as to make it impossible or unreasonable to expect the pilot to provide against it—I should have expected that somebody must have noticed the existence of this alleged current at the time. I dismiss the suggestion that there was any such current as is stated to have existed, and if there was no such current the defendants are in my opinion left with the onus which is on them still undischarged. It is not for the court to say, or for the plaintiff to find out, what the cause in or upon the defendant vessel was. It is sufficient to say that the defendants had failed to point it out. Therefore they are left in this position, that the onus which they undertook to discharge and which counsel for the defendants quite properly described at the beginning of this cause as very serious, has not been discharged. Casting about for an explanation of this disaster I am advised, and I think, that this vessel was navigated from the first too close to the side of

the channel, where she was hampered by not having sufficient time and place to turn, and where the effect of a very strong easterly-going stream was to press the vessel still further towards the side of the channel. I am advised, and I think, that in the circumstances reducing the speed from full to half speed was improper, and that that manœuvre is not unlikely to have led to the disaster. It was suggested by counsel for the plaintiffs that this vessel ought to have left by what is called, I think, the western channel, where she would not have had a strong following tide, and that if she had done so this accident would not have happened. Certainly it would not have happened in those circumstances, because the vessel would have been going in a different direction and away from the Djambi. Speaking for myself, I think it would have been more prudent in the circumstances to have gone out by the western channel. However, I am told that the ordinary route is by the eastern channel, and therefore, I am not going to attribute any negligence or blame to the pilot for having chosen the eastern channel rather than the western channel. I do not think there is anything more I need say about the facts of the case.

I can sum them up by saying this, that the defendants have entirely failed to convince me that this accident was due to the alleged abnormal current—I do not believe there was any abnormal current—and I am therefore driven to the conclusion, and am entitled to come to the conclusion, that the collision was due to some mismanagement on board the *Polynesien* itself. It is not for me, nor is it for the plaintiffs, to say what that mismanagement was. If the collision was due to nothing outside the ship then it must have been due to something inside the ship, and that something must, in my opinion, have been mismanagement, in the absence of evidence to show it was not.

The defendants, however, rely also on the defence of compulsory pilotage. This is a defence which must be clearly established before it can be allowed to prevail. It means that the law has taken the charge of the ship out of the hands of the owners' servants and has placed it in the hands of a qualified or licensed pilot, whom the owner is bound to employ and pay, but over whom he has no control. The employment of a compulsory pilot is always enforced by a legal penalty, and therefore the enactment requiring such employment must be clear and precise. What is the enactment in this case? It appears that by an ordinance (No. 8 of 1879) of the Straits Settlements, which is termed "an ordinance to consolidate and amend the law relating to pilots and pilotage," it was provided (sect. 1) that it should not be lawful for any person to take any ship out of Singapore, except as provided by that ordinance. By sect. 12 it is provided that any person in charge of a ship who leaves the harbour without having a licensed pilot on board shall be liable to pay the regulation pilotage dues, and provides that in default of such payment double the amount may be recovered by proceeding before a magistrate, by way of penalty. So the law remained until the 28th April 1885, when by another ordinance sect. 12 of the earlier ordinance was repealed; and, by a later enactment—namely, the Pilots Ordinance 1905 the whole of the Ordinance of 1879 was repealed. The last-named ordinance contained no clause corresponding with clause 12 of the Ordinance of 1879. If, therefore, pilotage was made compulsory by the Ordinance of 1879, it certainly ceased to be compulsory at the date of the last-mentioned ordinance, which was the 14th April 1905. It is said, however, that compulsory pilotage was established by an Ordinance of the 7th April 1905 and by certain acts done in pursuance of that ordinance. This is an ordinance "to provide for the acquisition by the Government of the Straits Settlements of the undertaking known as the Tanjong Pagar Dock Company Limited, and for the management of the same." From its terms it appears that there had been a company in Singapore called the Tanjong Pagar Dock Company Limited, which owned the wharves used by the shipping entering and leaving the port, and that this undertaking was to be transferred to the Government of the Straits Settlements. It was so transferred, and by sects. 20 and 23 it was provided that a board, to be called the Tanjong Pagar Dock Board, should be nominated by the Governor, which should carry on the business of the old company. This board was nominated, and it made certain rules and regulations relating to the berthing and towage of vessels coming to or leaving the wharves. The second regulation, under the heading of "Towage," is as follows: "Vessels requiring to be towed to or from the wharves or assisted when berthing or leaving by tug shall be piloted by a duly licensed pilot unless the board waives those conditions, and shall only employ the board's tugs. Should any other tug or launch be used without the permission of the board the same charge will be made as if one of the board's own vessels had been employed." It is said that this rule makes pilotage compulsory. I am quite clear, however, that it does not. I can find no authority vested in this board giving the board power to make pilotage compulsory. I do not think the rule purports to make the pilotage compulsory and no penalty is attached to the omission to employ a pilot. Although, perhaps, the evidence taken on commission with reference to the existence of compulsory pilotage is in strictness inadmissible, it is satisfactory to know that my finding on the question is in accordance with the views of merchants and others engaged in business in Singapore. There will be judgment, therefore, for the plaintiffs, with costs.

Solicitors for the plaintiffs, *Clarkson, Greenwell and Co.*

Solicitors for the defendants, *Gellatly and Son.*

Dec. 1, 2, *and* 6, 1909.

(Before Sir J. BIGHAM, P. and Elder Brethren.)

THE PICTON. (*a*)

Collision—Steamship—Sailing trawler—Engaged in trawling—Duty to show white flare-up light—Duty to keep clear—Collision Regulations 1897, *arts.* 2, 5, 9 (*d*, 2), 20, 21, 23.

A sailing trawler, exhibiting a white light in a lantern in accordance with art. 9 (*d*, 2) *of the Collision Regulations, was lying stationary while*

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

those on board her were engaged in hauling the trawl. The trawl was almost on board, the cod end of it being awash, when those on the trawler saw a steamship, which had been seen approaching for some time before, about three hundred yards away on the starboard quarter. Those on the trawler also showed a flare-up light in accordance with art. 9 (d, 2), but the steamship, which was proceeding about eight and a half knots, struck the trawler and sank her. In a damage action brought by the owners of the trawler against the owners of the steamship :

Held, that the trawler was engaged in trawling within the meaning of art. 9 (d, 2) of the Collision Regulations, and as she had a white lantern exhibited and showed a white flare-up light in accordance with that article, she was not to blame for the collision.

Held, further, that it was the duty of the steamship to keep out of the way of the trawler, and that she was alone to blame for keeping a bad look-out, and for travelling through the fishing ground at excessive speed.

DAMAGE ACTION.

The plaintiffs were the owners of the dandy rigged trawler smack *Westward Ho*; the defendants and counter-claimants were the owners of the steamship *Picton*.

The case made by the plaintiffs was that shortly before midnight on the 16th April 1909 the *Westward Ho*, a dandy-rigged smack of fifty-nine tons, manned by a crew of five hands all told, was in the entrance to the Bristol Channel about eight miles north by east of Trevose Head, in the course of a trawl fishing voyage from Padstow. The wind was about S.S.W., a moderate breeze, the weather was clear, but there was drizzling rain, and the tide was first quarter flood of unknown force.

The *Westward Ho*, which had been trawling on the starboard tack, was engaged in hauling her trawl on her port side. She was heading about west, with her tiller lashed a little to port, her jib sheet was pulled to leeward, that was to starboard, and she was about stationary in the water. Her regulation trawling light for a sailing vessel engaged in trawling was being duly exhibited, and was burning brightly; she had a deck light burning in a lantern so constructed and fixed as not to show aft, or on her starboard side, and a good look-out was being kept on board of her.

In these circumstances those on the *Westward Ho* saw about two to three miles off, and, bearing about four points on the starboard quarter, the masthead and green lights of the *Picton*. Those on board the *Westward Ho* continued to haul in their gear, and when the cod end was just awash the head of the *Westward Ho* swung to port until she headed about south-south-east, where she remained still about stationary in the water. Some time afterwards those on board the *Westward Ho* saw that the *Picton* was coming on heading for them, and apparently taking no steps to keep out of the way. The *Picton* was thereupon loudly hailed, a flare-up light was burnt on board the *Westward Ho*, and the lashing of her tiller was cast off, and almost immediately afterwards her helm was put hard-a-port; but the *Picton*, which was then quite close, coming on at high speed, with her stem struck the port side of the *Westward Ho* about amidships a very heavy blow, cutting right into her and doing her such damage that she sank almost immediately, and, with the crew's effects, was totally lost, and her master and two of the members of her crew were drowned.

Those on the *Westward Ho* charged those on the *Picton* with not keeping a good look-out; with improperly failing to keep out of the way of the *Westward Ho*; with improperly attempting to pass ahead of her; with not easing, stopping, or reversing their engines; and with not indicating their manœuvres by sound signals.

The case made by the defendants and counter-claimants was that shortly before midnight on the 16th April 1909 the *Picton*, a steel screw steamship of 5083 tons gross and 3241 tons net register, manned by a crew of thirty-four hands all told was off the north coast of Cornwall in the neighbourhood of Trevose Head in the course of a voyage from Cardiff to Venice with a cargo of about 7500 tons of coal. The weather was clear but overcast, with drizzling rain, the wind was about south-west by west, fresh, and the tide flood setting to the north-eastward with a force of about two knots. The *Picton* steering a course of south-west by west westerly magnetic, was making about eight and a half knots. Her regulation masthead lights, side lights, 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 those on the *Picton* observed about two to three miles off, and in the neighbourhood of what appeared to be the white lights carried by trawlers engaged in trawling, a white light carried by the *Westward Ho*, which bore between one and two points on the starboard bow of the *Picton*. The *Picton* continued on her course and approached the light of the *Westward Ho*, which was carefully watched, in a direction to pass all clear, and for a time the light appeared to broaden on the steamer's starboard bow. When the *Picton* drew nearer the *Westward Ho* the light was seen to be ceasing to broaden, and the engines of the *Picton* were put to slow, and shortly afterwards when the light on the *Westward Ho* was seen to be closing in, causing danger of collision, the helm of the *Picton* was put hard-a-port, her whistle was sounded one short blast, and her engines were stopped and put full speed astern. Notwithstanding these measures the *Westward Ho*, which had hauled her trawl and was not dragging the apparatus along the bottom of the sea, suddenly altered her course and came on fast and with her port side abaft amidships struck the stem of the *Picton*, causing damage to that steamship, and sustaining such damage that she shortly afterwards sank.

Those on the *Picton* charged those on the *Westward Ho* with not keeping a good look-out; with neglecting to keep their course and speed; with improperly failing to keep the *Westward Ho* under control; with neglecting to exhibit the regulation lights for a sailing vessel under way when she ceased to trawl; alternatively they alleged that the *Westward Ho* failed to carry the regulation lights for a vessel engaged in trawling, and failed on the approach of the *Picton* to show a flare-up light in sufficient time to prevent collision.

The following Collision Regulations 1897 were referred to during the course of the case :—

2. A steam vessel under way shall carry— . . . (*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. (*d*) The said green and red side lights shall be fitted with inboard screens projecting at least 3ft. forward from the light, so as to prevent these lights from being seen across the bow.

5. A sailing vessel under way, and any vessel being towed, shall carry the same lights as are prescribed by art. 2 for a steam vessel under way, with the exception of the white lights mentioned therein, which they shall never carry.

9. Fishing vessels and fishing boats, when under way, and when not required by this article to carry or show the lights hereinafter specified shall carry or show the lights prescribed for vessels of their tonnage under way. . . . (*d*) Vessels, when engaged in trawling, by which is meant the dragging of an apparatus along the bottom of the sea. . . . 2. If sailing vessels, shall carry a white light in a lantern, so constructed as to show a clear, uniform, and unbroken light all round the horizon, and shall also, on the approach of or to other vessels, show where it can best be seen a white flare-up light or torch in sufficient time to prevent collision. All lights mentioned in subdivision (*d*) 1 and 2 shall be visible at a distance of at least two miles.

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.

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.

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.

Aspinall, K.C. and *H. C. S. Dumas* for the plaintiffs.—This vessel was engaged in trawling and was not under way.

The Cockatrice, 98 L. T. Rep. 728 ; 11 Asp. Mar. Law Cas. 50 ; (1898) P. 182.

She was therefore showing the proper lights. The evidence shows that a flare-up light was shown in sufficient time to prevent a collision. The collision was brought about solely by the fault of the *Picton's* bad look-out and excessive speed.

Laing, K.C. and *D. Stephens* for the defendants.—The smack did not keep her course or speed ; she altered her heading from west to south-south-east ; she must have had way on her to do that and was in fact underway and ought to have had side lights up. The object of a flare-up light is to let an approaching vessel see the sails of the smack, so that the heading of the smack may be known. This flare was shown too late, and therefore those on the smack infringed art. 9 (*d*, 2).

Aspinall, K.C. in reply. — The smack undoubtedly altered her heading, for when the trawl was hauled the smack pivoted from west to south-south-east, but she was not underway, and she was not on a course.

THE PRESIDENT.—This is an action by the owners of the trawling smack *Westward Ho* and two survivors of her crew suing for the loss of their effects, to recover damages in respect of a collision with the steamer *Picton* whereby the trawler became a total loss. The trawler was of fifty-nine tons register, and was manned by a crew of five hands all told, and late on the night of the 16th April last she formed one of a fleet of about sixty fishing vessels which were trawling near Trevose Head in the Bristol Channel. The wind was S.S.W. a moderate breeze, the weather clear, but with a drizzling rain, the tide being first quarter flood. At a little before midnight she was engaged in hauling in her trawl on her port side. She was heading west ; her tiller was lashed to port and she was about stationary in the water. Her regulation trawling light (a globular light) was properly showing on her mast-head and she had also a deck light. All sail was set except the foresail, which had been lowered, and all hands were on deck. The white lights and the starboard light of a steamer, the *Picton*, were then observed about 300 yards away to the N.E. By this time the head of the trawler had gone round to S.S.E., and the trawler was lying hove-to on the water, the cod end of the trawl being still over the port side. In this position, she was stationary. Seeing there was danger Lincoln, the mate of the *Westward Ho*, unlashed the tiller and put it hard-a-port. The trawler, however, did not alter under this port helm. At the same moment the cook lit a flare and exhibited it over the side, but the steamer swept down upon the trawler, instantly destroying her. She sank in about a minute, and three of the five hands were drowned. The other two—namely, Lincoln and a boy named Morris, who was the son of the skipper—were rescued and brought on board the *Picton*. The foregoing are the facts as I find them so far as they relate to the movements of the trawler. Turning to the *Picton*, she was a steamer of 5083 tons gross and 3241 tons net register, and manned by a crew of thirty-four hands. She was on a voyage to Venice with a cargo of 7500 tons of coal, and was making about eight and a half knots. Her story is that at and before the collision the *Westward Ho* was sailing at a considerable speed, her trawling operations having been completed, that she had no side-lights out, that she altered her course, and that she exhibited no flare. In support of this case only three witnesses are called—namely, Smith, the mate, and two young men who were respectively the look-out and the helmsman. They are, in my opinion, unreliable. It appears that the *Picton* was travelling through this fleet of fishing smacks at a speed of eight and a half to nine knots, and that shortly before the collision took place the look-out man had left his post to go to the sleeping quarters of the crew aft to rouse the fresh watch which was to come on duty at midnight. He says that he was back at his post before the collision took place, but I doubt it. At all events he seems to have been more concerned in rousing the man who was to succeed him than in attending to his work. His own statement is that he was away about five minutes. The mate Smith was on the bridge, and, to use his own expression, had his hands

full. He saw the look-out man leave his post, but he did not see him come back. The helmsman says he was attending to his wheel and knew nothing about the look-out. I come to the conclusion that the look-out was, in the circumstances, very bad, even if it can be said to have been existent.

It is said that the trawler had all sails set, and was sailing at something like six knots across the bows of the steamer. But I accept the evidence from the trawler. I think the foresail was down and that the vessel was hove-to, the operation of trawling being incomplete. It is true that she had no side-lights out, but she had her regulation fishing light at the masthead, which was in the circumstances all that was necessary. I have said that the flare was exhibited. Two of the three witnesses from the *Picton* deny it—namely, the mate and the look-out, but I prefer the evidence of those who saw the flare to the evidence of those who say they did not see it. My only difficulty about the flare is whether it was shown in time to prevent a collision, within the meaning of rule 9 (*d*), sub-sect. 2, of the rules of 1906. The *Picton* was no doubt very near when the flare was put over the side, that is, she was between 200 and 300 yards away, but I think that if she had instantly reversed and ported her helm the collision would probably have been averted. She struck the trawler amidships, and the trawler was about 60 feet long. I think, moreover, that the steamer was travelling through this fishing ground at a reckless speed, and that if it could be said that there was no time after the showing of the flare to arrest the steamer, it ought to be attributed to the steamer's excessive speed. I find, therefore, that the *Picton* was to blame for having a very bad look-out, which undoubtedly contributed to the accident.

I think the trawler was not to blame. She was engaged in trawling, and had proper lights showing. She did not alter her course or speed at any material time, and she exhibited a flare in sufficient time. There is one further point with which I must deal. Smith, the mate of the *Picton*, speaks to a conversation which he says he had with Lincoln, the mate of the *Westward Ho*, immediately after the latter had been rescued from the water. The conversation is said to have taken place in the galley of the *Picton* in the presence of many of the *Picton's* crew and in the presence of young Morris, the son of the skipper of the *Westward Ho*, who had also been saved from drowning. In this conversation Lincoln is alleged to have said that the skipper was alone responsible for the calamity, and to have turned to young Morris and said to him "You know your father was the cause of all this mischief." Smith gave me full details of this conversation. I am satisfied that there is no truth in this statement. No one corroborates it. So far as I have been able to ascertain, no one on the ship heard the conversation talked about among the men. The captain says nothing about it in his letter to his owners announcing the collision. Both Lincoln and young Morris strenuously deny it. It is true that when the log was written up a statement was inserted to the effect that those from the trawler admitted that the fault was theirs. I do not know when this document came into existence, but in my opinion it is in this connection an invention. Counsel for the defendants says that Smith's statement ought to be accepted because it bears evidence of truth on the face of it, for it contains some particulars which accord with the tale now told by Lincoln, and which—having regard to the time when Smith first gave his statement to the defendants' solicitors, about the alleged confession, namely, on the 22nd June—could only have been learned from Lincoln himself. But I think it is not improbable that he did get some details from Lincoln of the events on board the trawler, and that he has utilised these details in making up the story. Lincoln and Morris were landed at St. Ives from the steamer the day after the collision, and the former made his deposition before the Receiver of Wreck, giving an account of the collision, which in substance accords with the account given before me in the witness-box, and is quite inconsistent with the confession he is supposed to have made a few hours previously. I disbelieve and reject Smith's evidence, and there must be judgment therefore for the plaintiffs.

Solicitors for the plaintiffs, *Dubois* and *Co.*, agents for *Chamberlin* and *Talbot*, Great Yarmouth.

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

Wednesday, Dec. 15, 1909.

(Before Sir J. BIGHAM, P.)

THE SALYBIA. (*a*)

Collision—Arrest of defendants' vessel—Release of arrested vessel before appearance—Discontinuance of action—Counter-claim by defendants—Order XXVI., r. 1—*Order XXI., r.* 16.

A French steamship was sunk after collision with a British steamship. The French owners arrested the English vessel in an action in rem. *At noon on the day after the collision, and before an appearance had been entered by the defendants, the solicitors acting on behalf of the French owners filed a præcipe praying a release of the English vessel as they had withdrawn the action. The marshal thereupon released the English vessel. Later on the same day the solicitors for the French owners received a telegram from the defendants' solicitors undertaking to appear and put in bail, and asking for the writ to be sent to them by post. The solicitors for the French owners replied:* "Sabylia *released; not proceeding with action.*" *These telegrams were confirmed by letters. On the following day the solicitors acting for the English vessel wrote saying their clients had a counter-claim, and asking for the writ to be sent that they might enter an appearance, and they then entered an appearance in London and sent the præcipe of appearance to the London agents of the solicitors acting for the French owners, who returned it saying they had no authority to act in the discontinued action. The solicitors for the defendants then took out a summons before the registrar calling on the plaintiffs in the action to file a preliminary act so that the counter-claim might be proceeded*

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

with. The registrar dismissed the summons. The defendants appealed to the judge.

Held, that the action was "wholly discontinued" within the meaning of Order XXVI., r. 1, of the Rules of the Supreme Court; that a counter-claim can only be born of a living action; that no counter-claim ever was set up; and that the application that the French owners should be ordered to file a preliminary act must be refused.

Bildt *v.* Foy (1892, 9 *Times L. Rep.* 34, 83) *distinguished.*

APPEAL from a decision of the assistant registrar to the judge sitting in chambers against an order refusing to direct the plaintiffs in the action to file a preliminary act.

The summons was adjourned into court for judgment.

The facts and correspondence are fully set out in the judgment.

The following orders and rules were referred to:

Order XXVI., r. 1. The plaintiff may, at any time before receipt of the defendants' defence . . . by notice in writing, wholly discontinue his action against all or any of the defendants or withdraw any part or parts of his alleged cause of complaint, and thereupon he shall pay such defendant's costs of the action, or, if the action be not wholly discontinued, the costs occasioned by the matter so withdrawn. Such costs shall be taxed, and such discontinuance or withdrawal, as the case may be, shall not be a defence to any subsequent action. Save as in this rule otherwise provided, it shall not be competent for the plaintiff to withdraw the record or discontinue the action without leave of the court or a judge, but the court or a judge may before, or at, or after the hearing or trial, upon such terms as to costs, and as to any other action, and otherwise, as may be just, order the action to be discontinued, or any part of the alleged cause of complaint to be struck out.

Order XXI., r. 16. If, in any cause in which the defendant sets up a counter-claim, the action of the plaintiff is stayed, discontinued, or dismissed, the counter-claim may nevertheless be proceeded with.

C. R. Dunlop for the plaintiffs, the owners of the French steamship.

A. A. Roche for the defendants and counter-claimants, the owners of the English steamship.

The PRESIDENT.—In this case the registrar has refused an appplication of the defendants that the plaintiffs should be ordered to file a preliminary act. The defendants appeal. The facts are as follows: On the 2nd Nov. there was a collision outside Cardiff between the French steamer *Boucau* and the British steamer *Salybia*, in which the *Boucau* sank. The same day the owners of the *Boucau* issued a writ *in rem* out of the Cardiff Registry to recover damages, and the *Salybia* was arrested. At noon on the 3rd Nov. the plaintiffs' solicitors filed a præcipe praying a release of the *Salybia*, "the action having been withdrawn by us before an appearance was entered therein." The marshal of the court accordingly released the *Salybia*. Later on the same day the solicitors for the plaintiffs received a telegram from the defendants' solicitors saying that they were acting for the *Salybia*, that they undertook to appear and put in bail, that they wished the ship to be released, and that they desired to have a copy of the writ sent by post. In answer to this telegram the solicitors for the owners of the *Boucau* wired, "We have withdrawn warrant; *Salybia* released; not proceeding with action"; and this they confirmed by letter on the same day. Crossing this letter the defendants' solicitors wrote: "We hope to hear from you in the morning fully explaining how our clients' ship came to be arrested, as it now appears your clients admit that they have no cause of action." In my opinion this correspondence put an end to the action. By virtue of Order XXVI., r. 1, the action was "wholly discontinued." Order XXVI., r. 1, says that "The plaintiff may, at any time before receipt of the defendants' defence . . . by notice in writing, wholly discontinue his action against all or any of the defendants." No doubt there remained an obligation to pay the defendants' costs of the action, but the action was none the less wholly discontinued, and it became impossible for the plaintiffs to prefer any claim in it. This I understand is not disputed. But on the next day, the 4th Nov., the defendants' solicitors wrote acknowledging the receipt of the plaintiffs' solicitors' letter of the 3rd and saying, "Our clients of course have a counter-claim for the damage to their ship, with which we intend to proceed. Will you kindly send us the writ in order that we may enter an appearance?" and on the 5th Nov. they entered an appearance in London, and sent præcipe thereof to the London agents of the plaintiffs' solicitors. This præcipe was returned by the London agents, "as neither we nor our principals have any authority at present to act on behalf of any of the plaintiffs in the discontinued action. It seems, moreover, somewhat novel to enter an appearance at all to an action which has been discontinued."

The real question which the defendants wish to raise by their application for an order against the plaintiffs to deliver a preliminary act is, whether they are in a position to proceed with a counter-claim, notwithstanding the discontinuance of the action by the plaintiffs. I think the application is wrong in form, for I do not see how the plaintiffs, who are foreigners, are to be compelled to deliver a preliminary act for the purpose of the intended counter-claim, nor do I know what will happen if they refuse or neglect to deliver such a document. But I prefer to deal with the substance of the matter. I think it is clear that if a defendant has already "set up" a counter-claim in an action, a plaintiff has no power to prevent the trial of that counter-claim by discontinuing the action. That appears by order XXI., r. 16, which says: "If, in any case in which the defendant sets up a counter-claim, the action of the plaintiff is stayed, discontinued, or dismissed, the counter-claim may nevertheless be proceeded with." But the question is whether in this case a counter-claim ever was "set up," for there is no authority for the contention that a counter-claim can be set up after "the case" has ceased to exist. I am of opinion that no counter-claim ever was set up. A counter-claim can only be born of a living action. The letter of the 4th Nov. was written after the action had been wholly discontinued and when "the case" had gone. If *Bildt* v. *Foy* (9 Times L. Rep. 34) be good law, I think it is distinguishable on the ground that there the set-off was mentioned while the action was still

alive, whereas here it was not mentioned until after the action was dead. I doubt, moreover, whether a mere casual reference to an intention to prefer a counter-claim can be described as setting up a counter-claim at all. I think the registrar was right.

Solicitors for the appellants, *Parker, Garrett,* and *Co.*

Solicitors for the respondents, *Stokes* and *Stokes.*

[Reporter's Note.—The following rule was not referred to in court: Order XXIX., r. 2. A solicitor, at whose instance any property has been arrested, may, before an appearance has been entered, obtain the release thereof by filing a notice that he withdraws the warrant.]

House of Lords.

Tuesday, Feb. 1, 1910.

(Before the LORD CHANCELLOR (Loreburn), Lords MACNAGHTEN, ATKINSON, COLLINS, and SHAW.)

ROSIN AND TURPENTINE IMPORT COMPANY *v.* B. JACOB AND SONS. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Carriers—Lightermen—Contract for carriage of goods—Exemption from liability for negligence—Ambiguity.

The respondents, who were lightermen, received goods of the appellants for carriage under a contract which provided that "every reasonable precaution is taken for the safety of goods whilst in craft; they will not be liable for any loss or damage, including negligence, which can be covered by insurance." While the goods were on board the lighter they were lost through the negligence of the respondents.

Held, that the clause was not ambiguous, and protected the respondents from liability.

Judgment of the Court of Appeal affirmed, Lord Collins dissenting.

APPEAL from a judgment of the Court of Appeal (Farwell and Kennedy, L.JJ.), Cozens-Hardy, M.R. dissenting, reported 11 Asp. Mar. Law Cas. 260 (1909); 101 L. T. Rep. 56, who had reversed a decision of Bray, J., reported 11 Asp. Mar. Law Cas. 231 (1909); 100 L. T. Rep. 366, in an action tried before him without a jury.

The appellants, who were plaintiffs in the court below, claimed for loss and damage to certain barrels of rosin which were being lightered for them by the respondents. They alleged that the respondents had been negligent and broken their contract. The negligence and breach of contract were denied by the respondents, who also pleaded that they were not responsible for the loss and damage to the rosin by reason of the following clause, which was a term of the contract—viz.;

> The rates charged by B. Jacob and Sons Limited are for conveyance only, and every reasonable precaution is taken for the safety of goods whilst in craft; they will not be liable for any loss or damage, including negligence which can be covered by insurance, and the shipper in taking out policy should effect same "without recourse to lightermen," as B. Jacob and Sons Limited do not accept responsibility for insurable risks.

The negligence alleged was that the lighter in which the goods were being carried was improperly, and in breach of the Thames By-laws 1898, left moored at night at moorings other than the usual barge moorings, without proper lights, and without any lighterman on board, whereby she was run down by a passing steamer, and some of the barrels of rosin were totally lost and the remainder were damaged.

Bray, J. held that the damage was occasioned by the want of reasonable precautions on the part of the defendants, and that the clause was ambiguous and did not exempt them from liability, and gave judgment for the plaintiffs, but his judgment was reversed as above mentioned.

Scrutton, K.C. and *Dawson Miller*, for the appellants, contended that if a carrier intends to contract himself out of his common law liability for negligence he must use unambiguous language. Here the respondents say, first, "every reasonable precaution is taken," and then go on to say "they will not be liable for negligence," which are contradictory statements. As to ambiguous documents, see

Elderslie Steamship Company v. *Borthwick*, 10 Asp. Mar. Law Cas. 24; 92 L. T. Rep. 274; (1905) A. C. 93;

Nelson Line Limited v. *J. Nelson and Sons*, 10 Asp. Mar. Law Cas. 581; 97 L. T. Rep. 812; (1908) A. C. 16;

Chartered Bank of India, &c. v. *British India Steam Navigation Company*, 11 Asp. Mar. Law Cas. 245; 100 L. T. Rep. 661; (1909) A. C. 369;

Owners of Cargo on the Waikato v. *New Zealand Shipping Company*, 8 Asp. Mar. Law Cas. 351, 442; 79 L. T. Rep. 326; (1899) 1 Q. B. 56.

Bray, J. found that the respondents did not take every reasonable precaution. The lighter was deliberately sent to this berth without lights, and, if the words are not held to be ambiguous, they can only apply to negligence of the respondents' servants, and not to their own negligence in sending out the lighter in an unseaworthy condition.

Bailhache, K.C. and *Leck*, for the respondents, maintained that the clause was plain, simple, and unambiguous. It means that the owner of the goods is not to have any common law right of action against the lighterman for negligence, but must protect himself by insurance. The clause speaks for itself, and the appellants have created the ambiguity of which they complain by their own ingenuity. See *Price* v. *Union Lighterage Company* (88 L. T. Rep. 428; (1903) 1 K. B. 750; affirmed in the Court of Appeal, 89 L. T. Rep. 731; (1904) 1 K. B. 412), a very similar case.

Dawson Miller was heard in reply.

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

The LORD CHANCELLOR (Loreburn). — My Lords: In this case there has been a difference of opinion upon the effect of a very short document, and most eminent authorities have read it in different ways. It really is beyond dispute that if a shipowner wishes to get rid of his legal

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

obligations he must say so clearly, and the only question here is—has he said so clearly, or is this an ambiguous clause which gives him no protection. For my own part I must say that in my view if you read these words carefully there is no contradiction as there is no ambiguity. The first words are that the shipowner takes all reasonable precautions for the safety of the goods, and the last words are that he will not be liable for loss or damage caused, among other things, by negligence. Substantially that means, "You must not suppose that we are careless people, but we will not accept liability; you must insure if you wish to be protected, both from our own and our servants' negligence." If the absence of a light, therefore, is to be regarded as unseaworthiness then this clause equally exempts Jacob and Sons from unseaworthiness. I think that there is no objection to a man saying that he accepts no risks and that the other party to the contract must insure, and that seems to me to be exactly what this clause says.

Lord MACNAGHTEN.—My Lords: I am of the same opinion. I am unable to find any ambiguity in this clause.

Lord ATKINSON.—My Lords: I agree. I am unable to find any ambiguity in this clause. To a person of ordinary understanding I think that it means "our practice is to be careful of other people's goods, and if you want to be protected you must insure."

Lord COLLINS.—My Lords: I cannot say that in this case my mind is absolutely clear, but I am unable to agree with the decision arrived at by your Lordships. It seems to me that the judgments of Bray, J. and the Master of the Rolls are right. I think that it is well established that people who desire to contract themselves out of liabilities should do it in clear unambiguous language. I find in this case that the defendants contracted on such terms that they except liability for negligence. The clause is in the following terms: "The rates charged by B. Jacob and Sons Limited are for conveyance only, and every reasonable precaution is taken for the safety of the goods whilst in craft." That appears to me to be meant as an undertaking to use every reasonable precaution for the safety of the goods. In other words, these are words of contract. I agree that the words following are equally explicit. They say in one and the same contract that they expressly undertake liability for every reasonable precaution, and in the other part they say that they will be under no liability in respect of negligence. That appears to me to be ambiguity, and people who choose to contract in such ambiguous terms must take the consequences. I agree with the judgment of the Master of the Rolls.

Lord SHAW.—My Lords: I cannot say that my mind was altogether made up until near the conclusion of the argument. Properly read, the words "every reasonable precaution" do appear to me as part of the general clause to be merely narrative, a statement of the general practice of this firm's business. That is succeeded by a clear and unambiguous statement as to damage for negligence and that the proper remedy to be taken is insurance. That latter portion of the contract is clear from ambiguity, though the addition of the word "but" would have made the language clearer. I cannot see with Farwell, L.J. that there is any repugnance. It appears to me that it is the way in which mercantile men deal.

Judgment appealed from affirmed, and appeal dismissed with costs.

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

Solicitors for the respondents, *Ballantyne, McNair,* and *Clifford.*

Supreme Court of Judicature.

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Jan. 11 *and* 12, 1910.

(Before HAMILTON, J.)

WATSON BROTHERS *v.* MYSORE MANGANESE COMPANY LIMITED. (*a*)

Charter-party—Demurrage—Lay days—Meaning of "day"—Averaging of days—Exceptions.

A charter-party provided (inter alia) *that the vessel should proceed to a certain port "and there load in a customary manner (about* 5000 *tons) . . . to be shipped at the rate of* 500 *tons per clear working day of twenty-four hours . . . Sundays and holidays always excepted . . . and to be discharged at* 500 *tons per like day except in the case of strikes of miners or workmen . . . scarcity of workmen, epidemics . . . interventions of sanitary, customs, and other properly constituted authorities. . . . In case charterers can arrange to load or discharge ship on Sundays or holidays, captain to allow work to be done, half such time actually used to count. Days to be averaged over all voyages to be performed under and during the entire currency of this charter to avoid demurrage."*

On arrival the vessel was delayed in consequence of the action of a railway company responsible for bringing down the cargo.

Held, on the true construction of the charter-party, that "day" meant a conventional day according to the custom of the port, and that the amount of demurrage incurred at the port of loading should be abated by credit being given for the number of days saved at the port of discharge.

Held, also, that the railway company was not a "properly constituted authority" within the meaning of the charter-party.

COMMERCIAL COURT.

Action tried by Hamilton, J., sitting without a jury.

The plaintiffs were the owners of the steamship *Ben Vrackie,* and the defendants were the charterers of the vessel.

The plaintiffs' claim was for demurrage incurred on the said vessel whilst at Marmagoa.

Scrutton, K.C. and *Leck* for the plaintiffs.

Bailhache, K.C. and *Dawson Miller* for the defendants.

(*a*) Reported by LEONARD C. THOMAS, Esq., Barrister-at-Law.

The facts and arguments are sufficiently stated in the judgment.

Hamilton, J.—This action is brought by the owners of the *Ben Vrackie* against the defendants as charterers and shippers for demurrage under a charter-party dated the 31st March 1908, under which the vessel was to load at Marmagoa a cargo of manganese ore. Many questions of construction and some questions of fact are in dispute upon this charter, and it has been agreed that in the first instance the leading questions, both of construction and fact, shall be dealt with, leaving over for further consideration, if necessary, any subsidiary questions. The ship arrived light at Marmagoa, and, apart from a question as to turn, she was at 6 a.m. on the 30th April ready to receive cargo. In fact she did not get into a berth until the 29th May, when she began to load, and she finished loading the defendants' cargo on the 11th June, and she subsequently sailed after having filled up with some other cargo. The principal business of the port of Marmagoa is the shipping of materials brought down by the Southern Mahratta Railway Company, and in receiving materials to be carried into the interior by that railway company. There is a wharf, a breakwater, a line of rails, and a number of cranes, all belonging to the railway company; and the only practicable way of loading ore is by means of the railway, cranes, and wharf. For vessels of the *Ben Vrackie* type there are two berths. The first question to be decided is upon the construction of the charter-party—namely, how the lay days are to be measured in the terms of the charter; and that question divides itself into two parts: first, what is a day; and, secondly, how the lay days at the port of loading and discharging are to be averaged or dealt with together. These appear to be pure questions of construction. There is then a further question as to the effect of the terms of the charter upon the circumstances which it is said existed at the port at the time, hindering the loading of the vessel, and that divides itself again into two questions: first, the terms of the charter as to the vessel being free of turn; and, secondly, the terms of the charter as to lay hours not counting in the event of certain circumstances arising. The material provisions of the charter-party are as follows: The vessel is to proceed to Marmagoa "and there load in the customary manner, as soon as and where ordered by the shipper or his agent, a cargo of ore" about 5000 tons. In the clause I have just read there were originally after the words "customary manner" the words "in turn," but those latter words have been deleted. There is then a provision (clause 4) that the cargo is "to be shipped at the rate of 500 tons per clear working day of twenty-four hours (weather permitting), Sundays and holidays always excepted; and to be discharged at 500 tons per like day, except in the case of strikes of miners or workmen . . . scarcity of workmen, epidemics . . . intervention of sanitary, customs, and other constituted authorities, or any cause beyond the personal control of shipper, charterer, or consignees, which may hinder the loading or discharge of the said vessel. In these cases lay-day hours not to count, and demurrage not to accrue. (5) In case charterers can arrange to load or discharge ship on Sundays or holidays, captain to allow work to be done, half such time actually used to count. Days to be averaged over all voyages performed under and during the entire currency of this charter to avoid demurrage. (6) Loading time to count from 6 a.m. after ship is reported at Custom house and ready free of turn, and for discharging from 6 a.m. after ship is in every respect ready in berth, and in free pratique, as per custom of port, written notice of such readiness being given to consignees during usual office hours. (7) . . . Time not to count at port of loading and discharge between the hours of 1 p.m. on Saturdays and 7 a.m. on Mondays. (8) Ship to work day and night, if requested to do so, and to give use of cranes and winches with necessary steam power and hands, paying all extra expenses. (18) A commission of 2½ per cent. on estimated gross amount of freight, dead freight, and demurrage is due to William Shyvers and Co. on loading, ship lost or not lost. (22) All accounts and any difference or disputes in regard to loading and discharging of the vessel are to be settled at the loading and discharging ports respectively. Charterers' liability in every respect, and as to all matters and things, ceasing on completion of loading. Captains and owners to have a lien on the cargo for all freight, dead freight, and demurrage due under this charter, which they are hereby bound to exercise." It is said by the defendants that they are entitled under this charter-party to a day which is not an astronomical day, but a conventional day, made up in a way which is peculiar to the charter-party, and that they are entitled to ten of these days of twenty-four hours. It is said, first of all, that the day is to be a day of twenty-four working hours; and, secondly, it must be clear which means that the shipper must have the full benefit of them all; and, thirdly, there are some qualifications on that day—namely, that the weather must permit, and that Sundays and holidays are always to be excepted unless the charterer can arrange to load on these days, in which case the captain is to allow him to do so, and half the time is to count, and that the shipper is to work day and night if requested to do so; but in this case the ship was not requested to do so, and no work was done at night. It is then said as a matter of construction, and also as a matter of authority, that the days are to be clear working days of twenty-four hours, which will be made up by hours of many different calendar days, and which will depend on the usual hours of working at the port, which at Marmagoa are ten and a half hours per day. The authority relied upon by the defendants in support of their contention is the case of *Forest Steamship Company* v. *Iberian Iron Ore Company* (9 Asp. Mar. Law Cas. 1 (1899); 79 L. T. Rep. 241; 81 L. T. Rep. 563). I think upon this question the defendants are right.

The grounds of the decision of the House of Lords in the case cited are not quite so fully stated as were those of the Court of Appeal, but I think that all the judgments concur in construing the words of the charter-party by reference to the fact, first, that the parties had created their own charter-party days; secondly, that they had stipulated that the days were to be working days of so many hours; and, thirdly, that, owing to the provisions as to the "working day," and also as to other provisions, notably "weather permitting" and

"holidays and Sundays excepted," the occurrence of these working hours was quite independent of the calendar days in which they might fall. It is quite true that in that case there was a provision that did not exist in the charter-party in this case—namely, that the steamer was to work at night if required, and also on Sundays and holidays, such time not to count unless used. In the present case the provision is that if the charterers can arrange to work on Sundays and holidays, the ship is bound to allow work to proceed, half such time actually used to count. I do not, however, consider that the present charter-party can be successfully distinguished from that in *Forest Steamship Company* v. *Iberian Iron Ore Company* (*sup.*). The clause as to weather permitting raises exactly the same point as the clause about not working at night or on Sundays or holidays—namely, that in the events which may happen the sequence of these working twenty-four hours may be discontinuous, and may therefore in the result be constituent elements in a day of twenty-four hours widely different from days in any other sense of the word. It seems to me also that, apart from authority, the natural construction of the clause in the charter-party would be that the defendants, who are stipulating for this clause in their favour, are to have, not a day by the calendar, or a day which is a working day as distinguished from a calendar day which is a holiday, but a certain number of hours upon which work in the ordinary course may be done. It does not seem to me that the circumstance that the charterer stipulated that if he can arrange to work in hours when ordinarily men in the port would not work he is to be entitled to call upon the ship to allow work to be done prevents the working day of twenty-four hours mentioned in the charter-party from being in itself a day made up of working hours whenever they may occur. I take it that if he does require the ship to work in hours not usually worked on, and the ship complies with its obligation, the shipper could not deny that such hours having been used were part of the working day of twenty-four hours; but I do not think that the fact that the ship is bound to work at night if requested, while the charterer is not so bound unless he chooses, entitles the shipowner to say: "The day for the purpose of this charter-party is a day and a night, twenty-four hours consecutively, within which I may be called upon to work during the whole twenty-four hours at the charterer's option." It appears to me, therefore, that there is a charter-party day created, both at the port of loading and at the port of discharge, which may work out in fact very differently at the two ports, but which is to be made up by a clear working day of twenty-four hours with some additional qualifications with regard to time where the weather does not permit of work, or Sundays or holidays or night hours when under ordinary circumstances the stevedores would not work. On that question my decision is in favour of the defendants.

The defendants then contend that they are entitled to take ten days for the loading and dd to that ten days for discharging, and interpret them as twenty clear working days of twenty-four hours as they would be interpreted according to the circumstances of the port of Marmagoa, and they say this is the meaning of the provision "days to be averaged over all voyages performed under and during the entire currency of this charter to avoid demurrage," before demurrage began at Marmagoa. There are other provisions with regard to demurrage in this charter-party which throw a little light upon it, but I think the real question turns on what is meant by the word "average." It is quite true that the charter-party provides that "any difference or disputes in regard to loading and discharging of the vessel are to be settled at the loading and discharging ports respectively. Charterers' liability in every respect, and as to all matters and things, ceasing on completion of loading. Captains and owners to have a lien on the cargo for all freight, dead freight, and demurrage due under this charter, which they are hereby bound to exercise. A commission of 2½ per cent. on estimated gross amount of freight, dead freight, and demurrage is due to William Shyvers and Co. on loading ship, lost or not lost." All these provisions show that the business men who entered into this charter-party contemplated that at the time the vessel was loaded at Marmagoa it would be possible then to know whether she was on demurrage or not, so that they would be able to exercise a lien for that demurrage or pay the commissions mentioned. It is, perhaps, technically, a sufficient answer to say that some application might be given to those words in the event of the vessel being more than twenty days on demurrage at the port of loading, so that in no possible event, and in no kind of averaging, could there fail to be demurrage due and payable; but still it does show that the shipper is trying to get a good deal out of the words "days to be averaged over all voyages" when he claims that he is entitled to say his ship is not on demurrage at Marmagoa until more than twenty of the charter-party days have expired and yet she is not loaded. I think the words "days to be averaged over all voyages" will not bear this interpretation. Parties often stipulate, and the parties could have stipulated, that so many days are to be allowed for loading and discharging. The other form of averaging days over the voyage or voyages to avoid demurrage carries a different meaning. In my opinion the meaning of the average clause is that a number of days for shipment having been stipulated, and then a number of like days for discharge having been stipulated, the vessel's right to demurrage must be determined upon the events which happen at the port of loading and according to the number of days allowed for loading there, though subsequent events at the port of discharge may entitle the charterers to abate the amount of demurrage incurred at the port of loading by taking credit for the number of days saved, if any, at the port of discharge. The plaintiffs admit that two days were saved at the port of discharge, and the defendants claim these; but my view is that, as a matter of construction, at the end of ten charter-party days for loading at Marmagoa the vessel was on demurrage. The defendants then say the days did not begin until a very much later date than the 30th April, because the vessel was prevented from getting to a berth by causes within the exception clause. Against that the plaintiffs say that there is an express stipulation that the vessel

is to be free of turn, and that she was ready free of turn on the morning of the 30th April, and that from that time onwards no hindrances merely connected with turn can relieve the shippers from the obligation to load. The argument that the present application of the clause of exceptions would be to wipe out the "ready free of turn" clause does not seem to me to be conclusive, because if the exceptions clause is sufficiently clearly expressed, in the events which happened, to subject the vessel to turn, although it is stipulated that she should be free of turn, I think in an instrument of this kind one must give effect to the real meaning of the parties although it would have the effect of striking out something which has already been put in; but I see no incompatibility in construing both the clauses as to exceptions and the clause as to "ready free of turn" so as to give effect to them both. It is necessary to consider the facts. There had been plague earlier in 1908 at Marmagoa, but it seemed to have come to an end before the *Ben Vrackie* arrived there. The plague had caused some scarcity of workmen, and that scarcity of workmen had to some extent caused certain vessels which were before the *Ben Vrackie* to be delayed, but I have no means of estimating how long those vessels were delayed. The *Ben Vrackie* had to wait until some of the other vessels came out of the berths; but before the charterers could avail themselves of the exceptions clause they had to prove a scarcity of workmen, of which it could be predicated that it was beyond the personal control of the charterers to remedy, and that it hindered the loading of the *Ben Vrackie*. Upon the facts I do not think that the defendants have shown that. Now, as to the other vessels I have very small information. The *Walton Hall* began to load, as I understand, about the 6th May, and completed about the 29th May, taking, therefore, twenty days or thereabouts. Whether that was long or short for her and her cargo I have no means of telling, and with regard to the other vessels, the *Matin*, which was loading ore, and the *Dinsdale-hall*, which was discharging coal, and the *Swaledale*, I have again so little information that I can draw no inference at all from the progress of their loading and discharge. The *Singu* seems to have discharged her cargo with rapidity, but it might have been a very small quantity. The *Newby Hall* discharged machinery and did not take long about it, but again I have no means of drawing any inference from that. I think there was some scarcity of labour existing before the *Ben Vrackie* arrived, and the captain gave evidence which agreed in this respect with that of Mr. Eales, who was at Marmagoa on behalf of the shippers, that during the time the *Ben Vrackie* was waiting there was not as much labour and not as good labour available as was usual, although he differed as to the cause of that scarcity. The suggestion has been made that the real cause of there being a scarcity of workmen was the parsimony of the Southern Mahratta Railway Company, but I do not think that suggestion can be made out. The captain who advanced it had not been in Marmagoa before, and the facts that he relied on, that little girls and suckling women were engaged in loading the cargo, appear to be met by the evidence of Mr. Eales, who resided at Madras, that ore was loaded at Marmagoa in a patriarchal sort of fashion, and that all members of the family assisted in earning some sort of wages.

The conclusion I have arrived at is that the epidemic had caused some scarcity of workmen, that that scarcity of workmen to some extent caused vessels prior to the *Ben Vrackie* to be delayed, but I have no means at all of estimating and I cannot guess as to how long the vessels prior to the *Ben Vrackie* were delayed, and the conclusion therefore simply is that at the time when the *Ben Vrackie* arrived other vessels were there in turn before her, and she had to wait her turn until some of them cleared out of the berths. Now, in order that the exceptions might avail the charterer, he must prove in my opinion a scarcity of workmen, because I think epidemics and interventions of sanitary authorities who burned the workmen's huts as a precaution against plague were only material in so far as they produced a scarcity of workmen, and he must prove a scarcity of workmen of which it might be predicated that it was beyond the personal control of the shipper to remedy it, and that it hindered the loading of the *Ben Vrackie*. It is suggested that the scarcity of workmen, which I hold affected the previous vessels, but the *Ben Vrackie* only indirectly, was not beyond the personal control of the shipper, because he might, by paying the necessary expenses and taking the necessary steps, have procured for the Southern Mahratta Railway Company, which was doing the work of loading, a greater supply of labour. It does not appear to me that on the true interpretation of this clause the excuse of scarcity of workmen would be taken away from the charterer merely because he could, by personal effort and personal expenditure, have supplied the Southern Mahratta Railway Company with more labourers to discharge the vessels that were in turn before the *Ben Vrackie*, but it does appear to me that he must show that the scarcity of workmen on which he relied was one which hindered the loading of the said vessel, and, as effect must be given to all the words in this charter, I think that that must be a hindrance of the loading of the *Ben Vrackie* independently of the mere waiting of turn till vessels which were delayed in their loading could vacate their berths. I therefore come to the conclusion that in giving effect to the words "ready free of turn" the application of the exceptions to the prior vessel or vessels is excluded, and I think the same on the construction of the exceptions clause, because that is confined to scarcity of workmen hindering the loading of the *Ben Vrackie*. It seems to me, therefore, that with regard to the scarcity of workmen I cannot hold that the defendants have made out their case, that they were from the time the vessel arrived until the vessel began to load, or during any part of that time, excused by reason of scarcity of workmen or epidemics.

Now they raise a further contention of another matter which excuses them. The turn of the *Ben Vrackie* had in fact arrived when a ship that came in after her, the *Newby Hall*, was put into the berth which the charterers claimed that she should have had and protested against her not receiving. This was done by the Southern Mahratta Railway Company. It was done under some resolution of the board of directors, as to which there is some

contest as to whether or not it had received the approval of the local Portuguese authorities. In neither event was it possible, in my opinion, to describe the thrusting in of the *Newby Hall* before the *Ben Vrackie* as an intervention of sanitary, customs, or other constituted authorities. If it was done in pursuance of the Southern Mahratta Railway Company's resolution, without the approval of the Portuguese authorities, it appears to me then simply to be the act of the owners of the railway line with a wharf, and not covered by the words "constituted authorities" *ejusdem generis* with sanitary and customs authorities. If, on the other hand, it is treated as done under a resolution which was approved by the local authorities, of which I am not satisfied in fact, then it does not seem to me to come under the words "interventions of constituted authorities," but is simply the application of a rule of turn of the port which gave, for some reason or other, priority to vessels of the Ellerman Line to which the *Newby Hall* belonged. In the latter event I think the words "ready free of turn" exclude the application; in the former event it does not come within the words "intervention of the constituted authorities." Now the result of my view of the facts, so far as they have been gone into, and of the construction of the charter, is that the shipowner is right with regard to "freedom of turn," and that he is right with regard to the commencement of the lay days; that the shipper is right as regards the days, but wrong as to the averaging of the days, and that he is wrong in his contention that the exceptions clause offers any answer to the present case. In the result the plaintiffs are, in my opinion, entitled to demurrage for eleven and a half days, and there will be judgment in their favour for 345*l*.

Solicitors for the plaintiffs, *Parker, Garrett, Holman,* and *Howden.*

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

Thursday, Jan. 13, 1910.

(Before HAMILTON, J.)

BAKER *v.* ADAM. (*a*)

Marine insurance—Reinsurance policy—Assignment—Action by assignee of policy—Right of set-off—Marine Insurance Act 1906 (6 *Edw.* 7, *c.* 41), *s.* 50.

A claim for a total loss upon a policy is a claim for unliquidated damages in the nature of an indemnity.

In an action by the assignee of a policy, claims against the assignor for losses on other policies cannot be set off, as the right of set-off by way of defence to an assignee's claim is limited to defences arising out of the contract contained in the policy assigned.

Pellas *v.* Neptune Marine Insurance Company (4 Asp. Mar. Law Cas. 136, 213 (1879); 42 *L. T. Rep.* 35; 5 *C. P. Div.* 34) *followed.*

COMMERCIAL COURT.

Action tried by Hamilton, J., sitting without a jury.

The plaintiff claimed as assignee by indorsement of a marine insurance policy, or, alternatively, as the assignee under three deeds of assignment, to recover 269*l.* 4*s.* 10*d.* losses and premiums payable under the said policy.

The defendant, while denying liability, claimed to set off 240*l.* 11*s.* 9*d.*, amounts due to him in respect of other policies from the assignors of the policy.

Scrutton, K.C. and *Dawson Miller* appeared for the plaintiff.

Bailhache, K.C. and *Leck* appeared for the defendant.

The facts and arguments are sufficiently stated in the judgment.

HAMILTON, J.—This action is brought to recover a total loss under a policy of reinsurance against Mr. Walter Adam, one of the signatories to that policy, and it is brought, not by the original reinsured, who were three gentlemen named Green and a Mr. Churchill, but by a Mr. Baker, who claims in respect of the three Messrs. Green, whose interest amounted to four-fifths of the whole collectively, as their assignee; and he brings the action, as it is said, also on behalf of Mr. Churchill. The three Messrs. Green and Mr. Churchill had been underwriters carrying on business at Lloyd's. They were four names for whom I suppose some gentleman regularly wrote risks, and they had brought their business to an end under circumstances that led to the intervention of Mr. Baker, an accountant. It is pointed out with regard to Mr. Churchill that the only right which Mr. Baker claims for suing on his behalf is, as Mr. Baker says in his evidence, that under some arrangement which is in writing, but not produced to me, he had authority from Mr. Churchill's solicitors to include his claim in this action, and to bring this action as to one-fifth of the interest on his behalf. The retainer of a solicitor does not in itself include authority to request somebody else to sue on the client's behalf, and, as all I know about Mr. Churchill's claim, which may otherwise be a perfectly good one, is summed up in that, I think it is clear that this action is not properly brought on his behalf. Probably that affects nothing but costs, and those only to a very small extent, if at all. Now, as regards the three Messrs. Green, the title which is made by Mr. Baker is that he is assignee from them in three different ways: First, under deeds which I understand to be all in the same form, and by the one executed by Mr. Walter Davis Green, which is dated the 17th May 1909, he was constituted assignee of the policy in question and of Mr. Green's rights under it, and as trustee for Mr. Green and a particular class of Mr. Green's creditors; and it is said, therefore, that as assignee under that deed he is entitled to bring this action. Secondly, it is said that he becomes assignee of the rights of each Mr. Green in the policy in question by virtue of an assignment to him by delivery which took place some time in the month of August 1909. Thirdly, it is said that he becomes entitled as assignee of the policy, which was made by brokers effecting the policy, who were described in it as so effecting it, but the indorsement on the face of the policy was not made until after the issue of the writ. Now, I think it is quite clear that whatever be the effect of the brokers, Messrs. Chandler, Hargreaves, and Co., writing their names on the margin of the policy, it cannot affect Mr. Baker's

(*a*) Reported by LEONARD C. THOMAS, Esq., Barrister-at-Law.

rights in this action, seeing that it took place after the action was begun, and he must sue upon a title which is complete at the time he begins to sue; and therefore I need not consider at all whether Messrs. Chandler, Hargreaves, and Co. were the parties to indorse, and what the effect of their names in the margin would be. Then with regard to the assignment, which is said to have taken place by the mere delivery of the policy by Messrs. Chandler, Hargreaves, and Co., the facts appear to be these: the solicitors who were acting for Mr. Baker (I take this from his evidence, which I accept) having received the policy from him, which he had received from Messrs. Chandler, Hargreaves, and Co., pointed out to him that it had not been indorsed as was customary, and asked him to return it to Messrs. Chandler, Hargreaves, and Co. to be indorsed. This was done after the commencement of the action. Then Mr. Baker says that it was a mere oversight that it was not indorsed when first handed over. Having regard to the nature of the business, I do not entertain any doubt that Messrs. Chandler, Hargreaves, and Co. handed over the policy with the assent and concurrence of the assured, the Messrs. Green, who had been their principals, and I think it is clear also that they handed it over with the intention, whether it was an effectual intention or not, to assign such interest in the policy as could be assigned. Sect. 50 of the Marine Insurance Act 1906 provides that "a marine policy may be assigned by indorsement thereon, or in other customary manner," and it is suggested that what Messrs. Chandler, Hargreaves, and Co. did amounted to an assignment in a customary manner—namely, by delivery. In any case I think it is clear that the delivery, to satisfy those words, must be one with the intention of assigning, and in fact I think there is sufficient evidence to show that there was such an intention to assign, but I do not think that, so far as the Marine Insurance Act is concerned, that mode of dealing with the policy constituted any sufficient assignment. What is the customary manner of assigning a marine policy appears to me to be essentially a question of evidence. It is pointed out that in the last edition of Arnould on Marine Insurance, published in Sir Joseph Arnould's lifetime (vol. 1, p. 211), it is stated that "an assignment may be either in writing or by simple delivery of the policy: it is frequently effected by indorsement on the back of the instrument." That statement is still found in the sixth edition of Arnould, and Mr. McArthur in his very valuable book on marine insurance makes a similar statement also, adding, however, at p. 57: "It is usually made by the indorsee in writing upon the body, margin, or back of the policy," but the only authority he cites for the delivery of the instrument with the intention to assign it as a customary mode of assignment is the passage in Arnould's sixth edition; and when Arnould's book fell into the hands of the present editors, and received a really thorough revision, it was pointed out at once in the seventh edition, sect. 177, in a note, that "the statement that it may be assigned by simple delivery of the policy is retained on Arnould's authority, but the editors have been informed that the present practice is to indorse the assignment on the policy." I have no doubt at all that policies are very often handed over to persons who, not being persons who could be proved to be the original assured, because they were intended to be covered are entitled, if at all, as assignees. They thereupon recover on the policy without question raised, but that is because the percentage of cases in which marine insurance results is so very small. In the ordinary case, however, where a policy is handed over, it is handed over either by way of passing a special property and security, or by way of assurance to a buyer who gets the general property. The policy has been effected with the intention of conveying such an interest so that the recipient of the policy could have sued on it altogether independently of an assignment; and, as I have never seen or heard of a case where a new title by way of assignment was obtained merely by delivery of the policy itself, I am not satisfied in the present case, in the absence of evidence, that it is now, within the words of the Marine Insurance Act, a customary manner of assigning a marine policy simply by handing it over. If there was evidence on the subject of course it would have to be dealt with; but the only evidence that there is is that Mr. Baker was advised by his solicitors, who are very experienced gentlemen, that it had not been indorsed as was customary. It appears to me, therefore, that if it was necessary for Mr. Baker to rely upon some assignment other than that contained in the deed of May, he would have to do so in another action, setting up the assignment by indorsement in an action commenced after it took place; or setting up the assignment by simple delivery after calling some evidence, if it was procurable, that such a mode of assignment is now part of the custom of underwriters and merchants. It appears to me, however, that the deed of May is a perfectly sufficient assignment to entitle Mr. Baker to sue, nor, indeed, do I understand that that is now disputed, the point that it was bad for want of registration under the Deeds of Arrangement Act having been persisted in until the trial and then at once abandoned on the opening of the case by the defendant. The defendant's case is that the assignment upon which Mr. Baker must rely being the deed of May 1909, he is entitled to say that he in his turn, being also an underwriter at Lloyd's, had effected a policy of reinsurance with the Messrs. Green and Mr. Churchill, that he has claims arising out of that policy of reinsurance which are recoverable from them, and that to the extent of 240*l.* 11*s.* 9*d.* he is entitled to avail himself of those claims as an answer to the present claim, because he can set them off, and so far establish a defence which extinguishes the present claim. Some money has been paid on account, and some further moneys have been paid into court, and the issue therefore turns upon the 240*l.* 11*s.* 9*d.* which is purported to be set off. As to this, the great majority of claims in money are for total losses on different vessels. Others ranging, I gather, from 32*s.* down to 1*d.* are claims which I presume are either for the return of premiums or fractions of salvages or what not but, at any rate, one thing is quite clear, and, as I understand, uncontested, that no one of these items of set-off has any more to do with the policy which is assigned to Mr. Baker, and which Mr. Baker puts in suit, than is derived from the fact

that it is a cross-insurance effected between two sets of gentlemen who carry on business at Lloyd's. It has long been decided, certainly as long ago as *Luckie* v. *Bushby* (13 C. B. 864), that a claim for a total loss upon a policy of insurance is a claim for unliquidated damages in the nature of an indemnity. It is obvious, and it is not disputed, that that is not such a claim as falls within the old statutes of set-off (2 & 8 Geo. 3), and I understand it to be conceded by Mr. Bailhache that if the assignment to Mr. Baker of the policy he puts in suit is to be deemed to be an assignment to which sect. 50 of the Marine Insurance Act applies, then, subject to a point arising upon the mutual credit section of the Bankruptcy Act, it would not be practicable for Mr. Adam, the defendant, to set up these items on cross-claim or set-off at all, the reason being that in the words of sect. 50 (2) of the Marine Insurance Act, which I take to be exhaustive of what the defendant is entitled to do by way of defence to the assignee's suit, "the defendant is entitled to make any defence arising out of the contract which he would have been entitled to make if the action had been brought in the name of the person by or on behalf of whom the policy was effected." That clearly has the same effect as it was decided the old Act of 1868 had in the case of *Pellas* v. *Neptune Insurance Company* (*sup.*), of limiting the right of set-off by way of defence to an assignee's claim on a policy to defences arising out of a contract contained in the policy assigned and put in suit. It is, however, said, first of all, that the assignment by the deed of May 1909 is not an assignment to which the Marine Insurance Act applies; and, secondly, it is said that if it is, there is a term in that assignment which imposes such a limitation upon the assignee's rights as compels him to submit to a defence which, under the Marine Insurance Act, alone would not be open to Mr. Adam. The first point in that argument depends upon the assumption that this assignment by the deed is one to which the Marine Insurance Act of 1906 does not apply, and I have not been able to follow, still less to be convinced by, that argument. It clearly does assign stocks, shares, and moneys, and all moneys due to the assignor in respect of the underwriting business, together with all books of account, papers, policies, and writings relating to the said underwriting business hereinafter called the trust property, nor is it disputed that such assignment of this policy as takes place under these words makes the trustee, the plaintiff, the beneficial owner. It is said that the principal object of this assignment is to assign moneys due, and that the policy is only assigned, as books of account and letters are assigned, for the purpose of facilitating the collection of moneys due. The object of the whole assignment is to enable an insolvent person to make terms with a particular class of his creditors, and is, therefore, of a kind quite familiar outside the region of marine insurance. If the defendant's counsel went on to say that this was not an assignment of the policy at all, but only a piece of paper upon which the policy is written; if he were prepared to say that it is an assignment only of moneys due—that is to say, debts, and not of claims for marine losses, which are unliquidated damages—the argument would have been easier to follow; but he does not raise, as I understand, either of these contentions. What he says is that the Marine Insurance Act does not prescribe in a mandatory way the form in which a marine policy is to be assigned. It may be assigned in a customary manner, but it does not say that it shall be assigned in no other manner, and, therefore, it is open to the assignor to assign, as he can assign any other of his contracts or rights, taking advantage of the Judicature Act, sect. 25 (6). I understand it to be said that I ought to infer from the fact that this is not an incident in the ordinary course of dealing with marine policies, but is an incident in the ordinary course of making a composition with creditors, that the intention of this deed was that the parties should avail themselves of the right of assignment given by the old equitable rules, and the remedies further given by the Judicature Act, and that they did not intend to avail themselves of the Marine Insurance Act 1906.

I can see no ground for any such intention, and I do not think that even if they had been entirely ignorant of the provisions of the Marine Insurance Act 1906, and had had the deliberate intention of utilising the Judicature Act, that would have prevented the plaintiff from obtaining any rights which are given to him by the Marine Insurance Act of 1906, because it is quite clear that this case falls within sub-sect. 2 of sect. 50 of that Act. There is a marine policy. It has been assigned. It has been assigned so as to pass the beneficial interest to Mr. Baker (it is true upon trust) and thereupon the assignee of the policy, Mr. Baker, becomes entitled to sue thereon in his own name, notice or no notice, although in fact he has given notice to the defendants. It appears to me, therefore, that the plain words of the Marine Insurance Act entitle him to sue and to take the special benefits which were given by statute to assignees of marine insurance policies before any special statute was passed to facilitate suits by the assignees of other *choses in action* in their own names. If, however, the argument had been established that the deed in question is a deed which I must deem to be independent of the Marine Insurance Act 1906, I am still unable to fall in with the argument which is advanced to show that the present set-off is available by way of defence. The argument is one which, first of all, requires that I should assume that a portion at least of what was said in a considered judgment of the Court of Appeal in the case of *Pellas* v. *Neptune Insurance Company* (*sup.*) is wrong, although that case has never, so far as I know, been so much as questioned, and it is certainly binding upon me. It then involves that I should assume that a portion of the judgment of the Privy Council in the case of *Government of Newfoundland* v. *Newfoundland Railway Company* (58 L. T. Rep. 285; 13 App. Cas.), which, I believe, is technically not binding upon me, is insufficiently expressed, and expressed in a somewhat misleading way; and then it assumes that I shall be able to find, as a matter of fact, that there is such a unity between the two transactions which are the subjects of the policy sued on and the policy set up in defence, or such a connection as will establish such an equity arising out of the latter and attaching to the former, as would enable me to say that prior to the Judicature Act a set-off of this sort would have been available to Mr. Adam. I do not think that any of

these arguments avail. The proposition in the Privy Council, which, of course, I unhesitatingly accept, states quite clearly that "unliquidated damages may now be set off against an assignee if flowing out of and inseparably connected with the dealings and transactions which also give rise to the subject of the assignment." Those words appear to me to have been used advisedly, and all the more so because they follow on a quotation from Lord Romilly in *Smith* v. *Parkes* (16 Beav. 115), which, isolated from its context, might have seemed to show that it was enough that they should flow out of previous dealings and transactions between the same parties, and, therefore, the addition of the words "which also give rise to the subject of the assignment" is a deliberate and intentional addition. When the judgment of Lord Romilly in *Smith* v. *Parkes* (*sup.*) is looked at, it appears to me to be only an illustration of the cases. There are plenty, where the transactions the subject of the claim and the set-off were so closely and inseparably connected together that the transactions set off would constitute equities attaching to the transaction out of which the claim arose. That was because there was a retiring partner who had assigned a sum of money which was to represent his interest in the firm and was also indebted to the firm for money lent to him, and it was held that the assignee could not recover the amount of the sum representing the retiring partner's interest in the firm without submitting to have set off against that the sum which the retiring partner owed to the firm for money lent to him. That appears to me to be a tolerably plain case of a debt, not merely inseparably connected with his previous dealings and transactions with the firm, but also such as would constitute an equity attaching to the transaction, which always binds the assignee because it has attached to the transaction and to the assignor. The other case which was quoted by Mr. Bailhache is the case of *Bankes* v. *Jarvis* (88 L. T. Rep. 20; (1903) 1 K. B. 549), a case where it appears to me to be assumed throughout that except for the question that the claim was damages, and not debt, the set-off could have been availed of before the Judicature Act in proceedings in equity against the plaintiff, because the plaintiff was nothing but a bare trustee for the debtor. The contention that I ought to hold that Order XIX., r. 3, has given fresh rights as well as altered procedure does not appear to me to apply to the set-off in the present case, because that is, after all, a provision for the purpose of enabling the sections of the Judicature Act giving effect in the same proceedings to equitable as well as legal rights to have their proper effect, and it only enables the defendant to set off by way of counterclaim or *pro tanto* by way of defence any right or claim which he would have had independently of the rule itself, and it is clearly stated in *Pellas* v. *Neptune Marine Insurance Company* (*sup.*) by Cotton, L.J. in the course of the argument, and referred to in the judgment as an accurate statement of the law, that equity never would have recognised in favour of a defendant to a claim by an assignee of a policy, a set off of another claim for what are really unliquidated damages—namely, a claim for loss on another policy. That is to be found at p. 36 in 5 C. P. Div., per Cotton, L.J. during the argument, and it is referred to again in the judgment which was delivered by Bramwell, L.J. It appears to me, therefore, that the contention that, assuming the Marine Insurance Act does not apply, the defendant has the right to set up as an answer or set off claims on another policy is one which is not sustainable. Then the matter is put in another way. It is said that by virtue of the very terms of the assignment, whatever the Marine Insurance Act may say, there is given to Mr. Adam the right to have the set off recognised because the trustee is trustee only, and Mr. Baker has merely to deal with the funds he collects according to the law of bankruptcy in favour of the creditors for whom he is a trustee, and therefore, as the "mutual dealing" section of the Act would undoubtedly in bankruptcy entitle Mr. Adam to set off these sums of money, Mr. Baker might submit to the same set-off. I think that argument is fallacious.

It may be that if the assignor has so limited, by the terms of his deed of assignment, the interest that he transfers to the assignee, then the assignee has not got the right to claim any more than the assignor has given to him, and cannot. therefore, resist the defence of Mr. Adam, which, had it been a set-off against an unrestricted assignee, would have been unavailable to him under sect. 50 of the Act, but when one comes to look at the terms of this deed I think an important distinction arises. First, Mr. Baker has trusts declared, the first of which is that he is to call in, collect, sue for, and institute and prosecute proceedings for the recovery of the whole or any part of the book debts and other credit claims and assets forming part of the property of the debtor, and he therefore has a full assignment of the claims under his policy upon trust to get in those claims. It is only after that that he is to stand possessed of the net proceeds of the sale, calling in, collection, and conversion of the trust property in trust, among other things, to apply them in paying and discharging rateably, according to the law of bankruptcy and without prejudice or priority, and by such dividends as the trustee shall think fit, the debts due or to become due from the debtor to the creditors. The assignment is, none the less, a complete and unrestricted assignment, because there is a trust in favour of certain persons, obliging the trustee to make a particular appropriation of the fruits which he derives from the assignment, and therefore I do not think that in the first instance it can be said that the assignment is a restricted assignment. If it were, however, I think there would be a serious difficulty in the defendant's way, which is that if the full benefit has not been assigned by the original assignment, then there would remain in the assignor something further which he could assign, and then when he came to assign that by delivery or indorsement he would come within the words of the Act, because he would be then assigning so as to pass the residue of the beneficial interest in the policy, and therefore, on the defendant's own showing, he would have got outside the operation of the deed altogether; but even if the trust contained in the words about paying and discharging according to the law of bankruptcy is a trust available in favour of the defendant, the assignment is, in the first instance, in any view, entirely unrestricted; I do not think the trust is available to the defen-

dant, even though he may claim to have it enforced by proper pleadings in this action, for two reasons. First of all, it is a limited trust, and in favour only of the creditors who are specifically defined in the policy. There are persons who have signified their assent to these presents in writing, whose names are affixed to the second schedule, and they are alone to be entitled to the benefit of these presents. For some reason which would be mysterious were it not that both parties agree that it is so, it is not the practice to carry out the words of this recital by inserting anything in the schedule at all. The schedule is a blank. I do not think, however, that it is necessary to rely upon that. I think it is clear that a person cannot be a creditor having the benefit of these presents unless he has at least signified in writing his assent to them, and all that I know about Mr. Adam is that he has signed a cheque for a sum of money which is not the full amount of the claim, that he contested his liability to pay any more up to a certain point, and contested his liability to pay the bulk of it up to the present moment, and that until yesterday, instead of assenting in any manner to these presents, he was contending that they were entirely void. It appears to me, therefore, that he is not a creditor within the meaning of this clause. Furthermore, I cannot read the words "according to the law of bankruptcy" as necessarily bringing into this deed any obligation to regard the mutual credit section in favour of a person in the situation of Mr. Adam. This deed is not to be carried out strictly according to the law of bankruptcy, because it is essentially a deed for the benefit of a limited number and not of all the creditors. Therefore I think the words "according to the law of bankruptcy" are only descriptive of a rateable payment without prejudice or priority, and by a series of instalments or dividends, and it does not appear to me that those words are sufficient to import into the distribution of the money an obligation to allow a set-off which, in the first instance, according to the terms of the deed is not to be allowed, because the trust is to collect and get in the proceeds of all these claims in full and then proceed to pay and apply them as follows. The result, therefore, is that it seems to me that Mr. Adam is not entitled to make the set-off or defence which he raises in this action. I understand that there is no dispute as to figures. Mr. Baker recovers judgment for the amount represented by the interests which have been assigned to him—namely, those of the three Messrs. Green—and he gets his costs of the suit. I do not suppose it will be necessary to bring another suit in respect of Mr. Churchill's claim.

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

Solicitors for the defendant, *Ballantyne, McNair, and Clifford.*

Monday, Jan. 24, 1910.

(Before Bray, J.)

Royal Mail Steam Packet Company v. River Plate Steam Packet Company. (a)

Charter-party — Dispatch money — "Running day saved."

By a charter-party twenty running days were to be allowed for discharging the cargo, "holidays and time between 1 p.m. Saturdays and 7 a.m. Mondays excepted," the owners to pay "dispatch money for each running day saved." On arrival the ship had sixteen days three hours left to discharge, and in the computation of this period of time holidays and the time between 1 p.m. on Saturdays and 7 a.m. on Mondays were not to be taken into account. The lay days began to run at 7 a.m. on Monday the 15th Feb. 1909, and the cargo was finally discharged at 10 a.m. on Saturday the 27th Feb. 1909. The time occupied in the discharge and chargeable in the computation of lay days under the charter-party was eight days sixteen hours, thus leaving seven days eleven hours to make the sixteen days three hours unconsumed. If the charterers had detained the ship during the whole of her lay days—namely, for the above-mentioned seven days eleven hours calculated in accordance with the terms of the charter-party—the lay days would have expired on the 10th March 1909 at 9 a.m., or ten days twenty-three hours after the time when the discharge was actually completed.

Held, that the words "running days" meant consecutive days, and that the charterers were entitled to dispatch money for the ten days twenty-three hours, which were "running days saved" to the shipowner within the charter-party.

Award in the form of a special case.

The Royal Mail Steam Packet Company hereinafter referred to as "the Royal Mail" are the owners of a fleet of steamships employed in the service of regular lines between this country and West Indian and Central American Ports and for the purposes of their business they charter steamships from other owners.

On the 19th Nov. 1908 the Royal Mail chartered a steamship named the *River Plate* from the River Plate Steamship Company Limited, hereinafter referred to as "the River Plate Company," who were the owners thereof.

By the charter-party the River Plate Company agreed to let and the Royal Mail agreed to hire the steamship *River Plate* for a voyage from Hull and London to Monte Video, Buenos Ayres, and Rosario with general cargo, subject to the conditions and upon the terms therein more particularly set out.

The question at issue between the parties arose with regard to the amount of dispatch money to which the Royal Mail were entitled for running days saved in discharging the vessel and involved the question whether, in calculating the time saved, the Royal Mail were entitled to credit for time which was in fact saved, but which if not so saved would not have been counted as lay days.

The material clause in the charter-party was as follows:

Twenty running days from 7 o'clock a.m., after the vessel is reported at the Custom House and in berth and

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

in every respect ready to discharge at each port shall be allowed charterers for the discharging of the cargo (holidays and the time between 1 p.m. Saturdays and 7 a.m. Mondays excepted) and all or any days on demurrage over and above the said lay days shall be paid for at the rate of 33*l.* per running day; the owners of the ship to pay 10*l.* per day dispatch money for each running day saved. Parts of days to count as parts of days and demurrage or dispatch money to be paid *pro rata*.

The steamer having duly loaded a part cargo at Hull and completed her loading in London proceeded to the River Plate and discharged her cargo at Monte Video, Buenos Ayres, and Rosario.

On arriving at Rosario the steamship *River Plate* had under the terms of the charter-party admittedly sixteen days and three hours left to discharge, and in the computation of this period of time holidays and time between 1 p.m., on Saturdays, and 7 a.m. on Mondays were not to be taken into account.

The lay days at Rosario began to run at 7 a.m. on Monday the 15th Feb. 1909, and the cargo was finally discharged at 10 a.m. on Saturday, the 27th Feb. 1909, so that the time occupied in the discharge, and chargeable in the computation of lay days under the charter-party, was eight days sixteen hours, thus leaving seven days eleven hours to make up the sixteen days three hours unconsumed.

The following table shows in convenient form how the above-mentioned period of eight days sixteen hours was arrived at:—

Lay time commenced to count 7 a.m., Monday, 15th Feb.:				Occupied. Days.	Occupied. Hours.		Allowed. Days.	Allowed. Hours.
							16	3
7 a.m.,	Monday, 15th Feb., to	Midnight,	Monday, 15th Feb.	—	17		—	—
Midnight,	Monday, 15th Feb., to	,,	Tuesday, 16th Feb.	1	—		—	—
,,	Tuesday, 16th Feb., to	,,	Wednesday, 17th Feb.	1	—		—	—
,,	Wednesday, 17th Feb., to	,,	Thursday, 18th Feb.	1	—		—	—
,,	Thursday, 18th Feb., to	,,	Friday, 19th Feb.	1	—		—	—
,,	Friday, 19th Feb., to	,,	Saturday, 20th Feb.	—	13		—	—
		Monday,	22nd Feb., Holiday	—	—		—	—
		Tuesday,	23rd Feb., Holiday	—	—		—	—
,,	Tuesday, 23rd Feb., to	Midnight,	Wednesday, 24th Feb.	1	—		—	—
,,	Wednesday, 24th Feb., to	,,	Thursday, 25th Feb.	1	—		—	—
,,	Thursday, 25th Feb., to	,,	Friday, 26th Feb.	1	—		—	—
,,	Friday, 26th Feb., to	10 a.m.	Saturday, 27th Feb.	—	10		—	—
				8	16	Less	8	16
						=	7	11

If the Royal Mail had detained the steamer during the whole period of her lay days — viz., for the above-mentioned seven days eleven hours, calculated in accordance with the terms of the charter-party, the lay days would have expired on the 10th March 1909 at 9 a.m., or ten days twenty-three hours after the time when the discharge was actually completed, as shown by the following tabulated statement:—

				Occupied. Days.	Occupied. Hours.		Dispatch. Days.	Dispatch. Hours.
10 a.m.	Saturday, 27th Feb., to	Midnight,	Saturday, 27th Feb.	—	3		—	14
Midnight,	Saturday 27th Feb., to	,,	Sunday, 28th Feb.	—	—		1	—
,,	Sunday, 28th Feb., to	,,	Monday, 1st March	—	17		1	—
,,	Monday, 1st March, to	,,	Tuesday, 2nd March	1	—		1	—
,,	Tuesday, 2nd March, to	,,	Wednesday, 3rd March	1	—		1	—
,,	Wednesday, 3rd March, to	,,	Thursday, 4th March	1	—		1	—
,,	Thursday, 4th March, to	,,	Friday, 5th March	1	—		1	—
,,	Friday, 5th March, to	,,	Saturday, 6th March	—	13		1	—
,,	Saturday, 6th March, to	,,	Sunday, 7th March	—	—		1	—
,,	Sunday, 7th March, to	,,	Monday, 8th March	—	17		1	—
,,	Monday, 8th March, to	,,	Tuesday, 9th March	1	—		1	—
,,	Tuesday, 9th March, to	9 a.m.	Wednesday, 10th March	—	9		—	9
				7	11		10	23

The question at issue between the parties was whether the Royal Mail were entitled to be paid dispatch money under the charter-party for seven days eleven hours, or for ten days twenty-three hours.

The Royal Mail Company contended that, according to the terms of the charter-party they were entitled to be paid 10*l.* per day dispatch money "for each running day saved," and that the running days which had been saved were the ten days twenty-three hours above referred to.

The River Plate Company denied the Royal Mail Company's contention, and insisted that they were only bound to pay dispatch money for seven days eleven hours. In support of their contention they relied upon the case of *The Glendevon* (7 Asp. Mar. Law Cas. 439; 70 L. T. Rep. 416; (1893) P. 269), but the form of charter-party in that case differed materially from the charter-party in question, and in the umpire's opinion the decision in that case did not support their contention.

In the charter-party in question Sundays and holidays are included in the term "running days" and if in the computation of the days for which dispatch is to be paid Sundays and holidays were excluded dispatch money would

not be payable "for each running day saved" as the charter-party provides that it shall be.

The umpire was of opinion that the contention of the Royal Mail was well founded and that they were entitled to dispatch money in respect of the ten days twenty-three hours claimed by them.

The owners paid to the charterers 74*l.* 11*s.* 8*d.* being dispatch money for the seven days and eleven hours at 10*l.* per day. The charterers claimed 35*l.*, the difference between the sum of 74*l.* 11*s.* 8*d.* and 109*l.* 11*s.* 8*d.*, being dispatch money for the ten days and twenty-three hours at 10*l.* per day.

Scrutton, K.C. and *Leck* for the charterers, the Royal Mail Steam Packet Company. The words "each running day saved" mean saved to the shipowner, and it makes no difference that it is a day upon which discharging need not be carried on. They referred to

Laing v. *Hollway*, 3 Q. B. Div. 437.

In *The Glendevon* (*sup.*) the words "running day" are not in the charter-party, and in *Nelson and Sons Limited* v. *Nelson Line, Liverpool, Limited* (10 Asp. Mar. Law Cas. 544; 97 L. T. Rep. 661; (1907) 2 K. B. 705) those words are not to be found.

Bailhache, K.C., *D. Stephens*, and *George P. Langton* for the owners, the River Plate Steam Packet Company. In order to calculate the dispatch money, days within the exceptions cannot be taken into account. The decision in *The Glendevon* (*sup.*) covers this case, and the judgments of Vaughan Williams and Buckley, L.JJ. in *Nelson and Sons Limited* v. *Nelson Line, Liverpool, Limited* (*sup.*) shows that the *Glendevon* (*sup.*) was right. In *Laing* v. *Hollway* (*sup.*) the charter-party was different from the one in the present case, and the statements of Bramwell, L.J. were *obiter dicta*.

Bray, J.—In my opinion the charterers are right here and they are entitled to dispatch money for the ten days twenty-three hours. The question arises under a clause in a charter-party which provides that twenty running days shall be allowed the charterers for the discharge of the cargo, holidays and time between 1 p.m. on Saturdays and 7 a.m. on Mondays excepted, and that the owners shall "pay 10*l.* per day dispatch money for each running day saved." When the ship arrived at Rosario there were sixteen days three hours of the lay days left in which to discharge, and they began to run at 7 a.m. on Monday the 15th Feb. and excluding holidays and the week-end periods they would not have expired until 9 a.m. on the 10th March. The actual time occupied at Rosario was eight days sixteen hours, and deducting that from sixteen days three hours there is left seven days eleven hours, and the contention of the owners is that the charterers are only entitled to dispatch money for those seven days eleven hours, but the charterers contend that dispatch money is payable in respect of the whole of the period between 10 a.m. on the 27th Feb., when the discharge was completed, and 9 a.m. on the 10th March, when the lay days expired. The material clause in the charter-party is set out in the award and is as follows: [His Lordship read the clause, and continued:] The first point to consider is what is the meaning of the word "saved." Apart from authority I should have come to the conclusion that the contention of the charterers is right—namely, that "saved" means saved to the shipowners, and that the charterers having here saved the owners ten days by getting the ship away ten days sooner than they were bound to, are entitled to dispatch money for that period.

I have to consider whether there is any authority which prevents my deciding the case in that way. In *Laing* v. *Hollway* (*sup.*) the charter-party contained the words "Dispatch money 10*s.* per hour on any time saved in loading or for discharging." Those words are not quite the same as the words here, and one ought to see whether any principle was laid down in *Laing* v. *Hollway* (*sup.*), which decides this case. In the course of his judgment, which was the considered judgment of the court, Bramwell, L.J. said: "Then what isthe meaning of 'time saved in loading or discharging'? The literal meaning, we suppose, would be doing those things in less time than they might be done in with ordinary dispatch—*i.e.*, if ordinary dispatch with the ordinary number of hands and ordinary diligence would load and unload in twenty days or 240 hours, then extraordinary dispatch, extraordinary number of hands, and extraordinary diligence in doing those things in fifteen days or 180 hours, the difference, five days or sixty hours, is time saved. Because, strictly speaking, time is not saved in doing a thing by working twenty-four hours round instead of twelve in one day and twelve another; twenty-four have been consumed in each case. Time is saved by getting from A. to B. if a man runs in one hour instead of walking in two. But nobody suggests that this is the meaning. 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." It is admitted that if that was not a mere dictum it is a decision against the contention of the owners in this case. I am not sure it was necessary for the decision in that case and in view, also, of the fact that the words there are not the same as those here, I do not decide this case on the footing that I am bound by that passage in *Laing* v. *Hollway* (*sup.*). The next case to be considered is *The Glendevon* (*sup.*), where the charter-party provided that the cargo was to be discharged at the rate of 200 tons per day, weather permitting (Sundays and *fête* days excepted), according to the custom of the port of discharge, "and if sooner discharged to pay at the rate of 8*s.* 4*d.* per hour for every hour saved." The charterers' contention was that the time saved ought to include a *fete* day and a Sunday which came after the discharge had been completed but before the lay days had expired, and Sir F. Jeune puts the matter to be considered in this way. He says: "The question is whether dispatch is to be counted in respect of the twenty-four hours of the 8th Dec., which was a *fete* day, and the twenty-four hours of the 11th Dec., which was a Sunday, that is forty-eight hours in all at 8*s.* 4*d.* per hour, making the 20*l.* claimed by the defendants by way of set-off against freight." It is to be observed that he does not differ from the meaning of the word "saved" in *Laing* v. *Hollway* (*sup.*), but the question was whether dispatch money was to be

paid in respect of the whole time saved, or the time other than Sundays and *fete* days. After quoting from the judgment of *Laing* v. *Hollway* (*sup.*), where Bramwell, L.J. said, "The owner would sail away by what has happened 216 hours sooner than he would have done but for the defendant's dispatch," and "It was admitted by the plaintiff that the demurrage would be payable on this footing, then why not the dispatch money?" the President says that he does not think "that either of these phrases really lend themselves to the arguments put forward by the appellants in this case." That is true, because in *The Glendevon* the demurrage clause in the charter-party was entirely distinct from the dispatch clause. The real ground of the decision in *The Glendevon* is, I think, contained in the following passage in the judgment of the President: "But the argument which the counsel for the respondents has put as regards the other exception in the clause appears to me to be unanswerable. They point out that days during which the weather does not permit discharge stand on the same footing as regards the charterer's right as Sundays and *fete* days; that is to say, the charterer need not discharge on Sundays and *fete* days, and need not discharge if the weather does not permit on other days, but if Sundays and *fete* days are to be reckoned in as time saved for the purpose of the payment of dispatch money, then the days during which the weather does not permit discharge ought to stand on the same footing. I confess I am unable to see any answer to that argument, and the results would be so extraordinary as to be unintelligible. It would come to this, that after the ship was discharged the charterer would have the right to say that on a large number of days, it might be even weeks or months, he was prevented by the weather from discharging, and therefore he was entitled to add these in as days of twenty-four hours, for each hour of which he was entitled to have 8*s.* 4*d.* That is an absurdity." As the charter-party in *The Glendevon* (*sup.*) was in many respects different from this charter-party, I do not think that the decision in that case is conclusive of the present case. The other case which I have to consider is *Nelson and Sons* v. *Nelson Line, Liverpool* (*sup.*), in which case the charter-party contained the words "For each clear day saved in loading the charterers shall be paid or allowed by the owners the sum of 20*l.*" The charter-party allowed seven weather working days (Sundays and holidays excepted) for loading, and two of the days on which the loading was done were in fact holidays, and one of the questions in the case was whether the charterers were entitled to dispatch money in respect of days saved which were Sundays or holidays. On this point Vaughan Williams, L.J. merely stated that he agreed with the judgment of Buckley, L.J., to which I will refer. Fletcher Moulton, L.J. delivered a dissenting judgment in which he stated that in his opinion the decision in *The Glendevon* (*sup.*) could not be supported, both on the ground that it was wrong in law and also that the opposite principle had been laid down in *Laing* v. *Hollway* (*sup.*). The judgment of Fletcher Moulton, L.J. strongly commends itself to me, and I agree with the reasons given by him. It is therefore important to consider what bearing the judgment of Buckley, L.J. has upon the question involved in this case. Referring to the argument put forward on behalf of the charterers, he says: "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 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 some one as having saved me trouble. The fallacy of the appellants' argument may be indicated by following up 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 payment is to be made for any saving effected in the seven days allowed for loading." Buckley, L.J. then refers to *The Glendevon* (*sup.*), which he thought was rightly decided, and he distinguishes *Laing* v. *Hollway* (*sup.*) on the ground that in that case the word "saved" clearly meant saved to the shipowner, whereas in *Nelson and Sons* v. *Nelson Line, Liverpool* (*sup.*) the language of the charter-party pointed to the saving of the charterers' loading days. So far, therefore, from the judgment of Buckley, L.J. being in favour of the owners here, it seems to me it is against them. Applying that reasoning to the language of this charter-party, I think the word "saved" must be construed as meaning saved to the shipowner, as in *Laing* v. *Hollway* (*sup.*). I think the words "running days" mean consecutive days, and I do not think that because the charter-party says that holidays and week-ends are for the purpose of loading and discharging to be excepted from the running days, that is a definition of "running day." For the purpose of demurrage the running days include Sundays and week-ends, and I think that for the purpose of calculating dispatch money they must also be counted, as they are days saved to the shipowners. My judgment must be for the charterers.

Judgment accordingly.

Solicitors: *Holman, Birdwood, and Co.; A. W. Kingcombe.*

Thursday, Jan. 27, 1910.

(Before Hamilton, J.)

Glasgow Navigation Company Limited v. Howard Brothers and Co. (*a*)

Charter-party — Discharge according to custom of port—Cargo of lumber—Stowage in barges —Custom of port of London.

By the custom and practice of the port of London in the case of cargoes of lumber, the receiver is liable only to provide sufficient open craft alongside ready to receive the goods, and is under no obligation to have any men thereon to receive the goods from the ship's tackle or to stow the goods therein.

The shipowner is bound to do the whole work of delivering the goods into the barges, whether dock company's barges or outside barges, and of stowing the goods therein in the reasonable and ordinary manner so that the goods may not be damaged or imperilled, and so that the barges may be loaded to the usual and to a reasonable extent and may be safely and properly navigable.

Commercial Court.

Action tried by Hamilton, J., sitting without a jury.

The plaintiffs, the owners of the steamship *Basuta*, claimed to recover 21*l.* 5*s.* 10*d.* as the cost of stowing craft with pitch pine lumber consigned to the defendants under bills of lading dated the 10th to 17th June 1908, and carried in the plaintiffs' steamship *Basuta* from Pensacola to London. They claimed for work done for the defendants, and, alternatively, for damages for breach of contract by charter-party dated the 8th April 1909.

The charter-party provided that the cargo was

> To be brought to and taken from alongside the steamer . . at charterer's risk and expense. . . . If discharged in London, cargo shall be discharged as customary with customary steamer dispatch, in accordance with the custom of the port, as fast as the steamer can deliver during ordinary working hours of the port, Sundays and holidays (unless used) excepted. . . . The bills of lading shall be prepared by the shippers of the cargo in the form indorsed on this charter . . . freight, and all conditions, clause and exceptions as per this charter.

It was also provided by the bills of lading that

> If discharged in London, cargo should be discharged as customary with customary steamer dispatch.

It was alleged by the plaintiffs that prior to the discharge of the *Basuta* in the Thames, their agents wrote to the defendants on the 18th July 1908 stating that, while repudiating liability to pay any part of the cost of stowing the defendants' goods in lighters alongside, they would, in case of the defendants' refusal to supply the necessary labour, engage labour at the cost of 1*s.* 6*d.* per standard for the defendants' account. The defendants refused to supply labour, and the plaintiffs engaged the firm of Messrs. J. Fry and Co. to carry out the work of stowage. The plaintiffs alleged that this was rendered necessary to avoid detention of the steamer, demurrage of barges, and damage to cargo; that the defendants neglected and refused to take delivery alongside in terms of the charter-party, and that their (the plaintiffs') obligations in relation to the cargo ceased when the cargo was lowered into the lighters alongside. They further alleged that, in accordance with the custom of the port of London, the cost of securing proper and effective stowage in the lighters alongside was for account of consignees.

The defendants by par. 3 of their defence alleged that

> By the custom and practice of the port of London in the case of cargoes of lumber (including both Baltic and pitch pine lumber) the receiver, instead of being liable to receive the goods from the ship's tackle alongside into craft, is liable only to provide sufficient craft alongside ready to receive the goods, and is under no obligation to have any men thereon to receive the goods from the ship's tackle or to stow the goods therein, and the shipowner is bound to do the whole work of delivering the goods into barges, whether dock company's barges or outside barges, and of stowing the goods therein in a reasonable and ordinary manner, so that the goods may not be damaged or imperilled, and so that the barges may be loaded to the usual and reasonable extent, and may be safely and properly navigable.

They also alleged that they committed no breach of the charter-party or bill of lading; that they tendered sufficient lighters and called upon the plaintiffs to deliver in the ordinary and customary manner, and that the plaintiffs did so; and that if the plaintiffs did anything more it was gratuitous and was not done at the request of the defendants, either express or implied, or on their behalf. They denied that the obligations of the plaintiffs in relation to the cargo ceased when the cargo was lowered into the lighters alongside, or that the cost of securing proper and effective stowage was by the custom of the port of London for the account of the consignees.

The plaintiffs, by their reply, denied the existence of the custom alleged by the defendants that the cost of stowing in barges was for the account of the shipowners and not the consignees.

The remaining facts and arguments are sufficiently stated in the judgment.

Bailhache, K.C. and *Groser* for the plaintiffs.

Scrutton, K.C. and *Chaytor* for the defendants.

Hamilton, J.—This action is brought by the owners of the ship *Basuta* against the consignees of a parcel of pitch pine sawn goods carried by that vessel, for their proportion of sums paid by the shipowners to the stevedores in respect of the cost of stowing craft with pitch pine lumber consigned to the defendants. The main question in the action is, What is the custom of the wood trade in the port of London with reference to the discharge of goods such as these? It is common ground that there is a custom referring to pitch pine sawn goods, whether it be in the form of planks, deals, or battens, and it is quite clear, I think, from the form of the Pix Pinus charter of 1906, which was negotiated and agreed between representatives of the wood trade and representatives of the shipowners, that there is in London a custom of the port referable to the discharge of such goods. The question between the parties is, as to the extent of that custom in connection with the mode in which the timber is stowed and arranged in the craft which the merchant sends in the case of overside delivery, not into dock barges. To deal with the description of the process first, I have heard a good deal of evidence on both sides as to what the particular details of the operation are, and I have had

(*a*) Reported by Leonard C. Thomas, Esq., Barrister-at-Law.

photographs shown to me, which have been proved or accepted, which show clearly enough how it is or may be done. There is something called rough-stowage in the barge of which the photograph B has been put in as an example, and of which also, I think, a photograph of the barge, the *Unity*, *ex* the *Warrior*, has also been put forward as an example. These are photographs which have been actually taken since disputes about the custom became acute in the course of the last two years or so between the shipowners or receivers of cargo and stevedores. I am quite satisfied that the mode of depositing the timber in the barge, shown in these photographs, cannot be called stowing at all. I am quite satisfied that it is not, never has been, and I hope never will be, a recognised mode in which timber may be properly placed by anybody in these barges. It is obvious, as was pointed out by one of the witnesses, that the way in which it has been done has been to lower the sling into the barge, unhook the sling, and then as the timber falls so let it lie. I am quite convinced that that does not form any dealing which is recognised by any practice in the port. When you come to stow the planks it is, of course, evident that in order to do it so that the vessel may carry a full load and carry it with safety they must be stowed with some measure of regularity. One of the witnesses called for the defendants said, and I quite agree with him, that too much fuss has been made about the difference between the stowage which may be customary for the dock company's barges which do not leave the dock, and the stowage that is expected in the case of merchants' craft which may have to go up river or down river and into canals. It appears to me that the amount of time, trouble, and labour which the two operations involve, though not substantial, is considerable. There has also been some conflict as to the relative weight of equal baulks of pitch pine, what is called light wood or soft wood coming from the Baltic. Pitch pine is not technically a hard wood, and there appears to me to be no ground for making any marked distinction between one kind of pine and another kind of pine. The difference in weight between the two is not great, and, although the planks may be sometimes of a larger size when coming from the Gulf of Mexico than when coming from the Baltic, I do not think there is such distinction between the two as to make it likely that people connected with the trade would make any great difficulty about the obligation to stow conveniently and suitably a merchant's craft as distinguished from craft to be used in dock. The history of this trade goes back to, at any rate, the year 1875, according to the evidence that I have had before me. First of all, as to contracts, a Pix Pinus charter came into existence in 1898, and shortly after that came into general use. A revised Pix Pinus charter came into existence in 1906, and also shortly after there came into use, in each case, an appropriate bill of lading accompanying it. The point for the purpose of this case of the 1898 charter was that it struck out from the obligations of the charterers any custom of London, when the port of discharge happened to be in London, with reference to the mode of discharging. The point of the charter of 1906 is the express provision that in the case of delivery in the port of London the discharge shall be as customary in accordance with the custom of the port. The charter-party in this case was the Pix Pinus charter of 1906.

The plaintiffs contend that, although there is a custom which they are prepared to abide by, it goes no further than the placing of the timber by the ship's stevedores' men into barges sent with a navigating lighterman by the merchant and the placing of the lumber in that barge is what they call stowing as distinguished from stowing and trimming, placing, that is to say, with a certain amount of regularity, and a certain amount of care, but not such as either to fill the barge economically or to make it conveniently stowed for the purpose of different destinations to which it is going to be sent. The defendants say that the obligation in such a case is to stow it so that the barge may carry a load up to its full capacity, and may have that load so trimmed and disposed of that the navigation will be left free, that the lighterman will have room to row if necessary, have access to his pumps, and have his head sheets and, I suppose, his stern sheets left clear; and also, if the barge can carry it, that there shall be a deck load, that is to say, there being no deck, a load above the gunwales laid upon binders to a height which the craft will be able to carry.

I think the question of what was the state of the trade and what was the custom existing in 1897 is of very great importance in the present case, because it is not the contention of the defendants that the custom has grown up since 1906, but that it existed before 1898, and that the reason why you find a different practice between 1898 and 1906 is that the current charter in use had excluded the application of the custom in the case of pitch pine sawn goods. The case for the plaintiffs is that there was a custom before 1898, but that it did not extend to this last operation which the plaintiffs call trimming, and also, as I understand, it did not extend to pitch pine, because the plaintiffs' witnesses say there was so little pitch pine sawn lumber coming into the port that there was no occasion to apply it. The result, therefore, is that the question of what the custom was prior to 1898 becomes highly material because each side claims that the custom which exists now is the same as that existing then, and also the question whether it applied to pitch pine sawn goods or not in 1898 is, though not to the same extent, also material. There have been called on the part of the plaintiffs a number of witnesses, several stevedores, and two representatives of firms of shipbrokers and shipowners and charterers of ships. There have been called on the part of the defendants a greater number of witnesses, most, if not all of them, either the principals in or prominent *employés* in firms of timber importers in the port of London, and in addition a gentleman now in the employment of the London Port Authority, and for very many years in the employment of the Surrey Commercial Dock Company in a capacity which brought him into immediate contact with this question. I do not think it is necessary for me to go through the evidence of these gentlemen. It is obvious that all of them may be said to have a certain degree of self-interest, because each represents the side which his trade attaches him to, but I have no reason to think that any of them have endeavoured to give me anything but the

experience that their knowledge of the business has given them. I think that the importance which I should attach to the witness from the shipowners, Messrs. Runciman and Co.'s representatives and Messrs. Harris and Dixon's representatives, is very considerably diminished by reason of the fact that I think their conclusion is largely based upon the fact that the ship does not *eo nomine* pay for this stowing, or stowing and trimming, at all, and that looking back upon their records they find that the shippers never have paid the stevedores for stowing. That seems to be the fact. The shipowner always has paid a rate to his stevedore for discharging the vessel, and there is no further charge made to him by the stevedore for also stowing the barge. From that these witnesses for the shipowners argue that there is no evidence in their books to show a custom by which the shipowner stows in the way now contended for because they never found it paid for, and if it is done, though it is no business of theirs to inquire who pays for it, they presume that it is paid for by the merchants, because it is done for the merchants except in the case of discharging into dock barges, where the stevedores themselves say they do it, and are not paid at all, but they consider that it is worth their while to do it for nothing because at times their work is facilitated by getting dock barges. I do not think, therefore, the shipowner witnesses have quite brought themselves to face the real question, which is not what the shipowner pays for and finds entered in his books as stowage, but what the stevedore does under the obligations to the shipowner. It really comes to a large extent to be a question of what is included in the term "discharging," and it is agreed that custom would in that term include some stowage in the barge, and the shipowner who has his vessel discharged by the stevedore has, of course, by means of the stevedore to do some work in the barge. On the other hand, the evidence for the receivers, the defendants, is of people whose memory goes back very markedly further than the memory and experience of the plaintiffs' witnesses, people who have been in a prominent position in the trade before 1898 as well as now, and who have both perfect means of knowledge and, I think, ample means of recollection as to what the custom was and to what goods it applied before the charter-party of 1898. I have weighed the two bodies of evidence against one another, and, without undertaking the invidious task of comparing one witness with another by name, I have come to the conclusion that, as far as the evidence before me is concerned, I ought to accept, and I do accept, the defendants' evidence with regard to the custom. Then, there are one or two considerations that are advanced to qualify the value of the weight of evidence of which I have spoken merely as balanced against the weight of the plaintiffs' evidence. First of all, a point has been made with regard to a payment of 7*s.* 6*d.* per barge, irrespective of the size of the barge, which has been paid for a generation by the merchant, although sometimes the stevedore sends in the account to the merchant's lighterman and gets the money from him; but sometimes, as in the case of the present defendants, he collects it from a merchant direct. In every case, no doubt, it is a charge which must ultimately fall upon the merchant and be a merchant's charge, and it is said that, although 7*s.* 6*d.* per barge is a small sum, merchants do not pay a sum like that for nothing, and that the only explanation of it must be that it is a sort of recognition of an obligation, something like a quit rent, I suppose—a recognition of the fact that there is work done by the stevedore to the barge for them and on their behalf for which the stevedore is not remunerated elsewhere, and hence it is a payment which may become quite a substantial one and be an adequate recompense for the cost of stowing, which everybody agrees 7*s.* 6*d.* in the case of a large modern barge could not possibly be. As to this, however, I have had the history of this charge given, and given by a witness of each side, who concurred in the result of their evidence. Both of them had abundant means of knowing from different points of view how and when it originated. Between 1875 and 1886, Mr. Bernardes, now a stevedore but then a labourer in the docks, was engaged in doing the stowing of this kind of timber. He speaks of stowing light wood in barges delivered alongside, and his account of it is that, in order to induce the workmen with whom he was working to be careful in doing the work that they were paid to do by their employers as stevedores, the merchant's representatives who went down to the docks gave them a few shillings per barge. Then he says that the men quarrelled about the 2*s.* or 3*s.*, evidence which I accept, and that the employers did not see why the men should have the money, so the lighterman paid the stevedore 5*s.* a barge, which has since grown to 7*s.* 6*d.* The defendant Mr. Howard, then a young man in the business, in the course of his duties at that time had to go down to the docks and watch the discharge of timber. He says that originally the ship put the goods into craft, stowed and trimmed them, and no payment by the merchant was thought of. About 1880, a merchant's man going down to the docks was pestered by the men for drinks, and as they had the power to make it awkward if the barges were not nicely trimmed it was done. One or two other witnesses on the defendants' side gave corroborative evidence. I think that that explanation shows at any rate this—that that continued payment of 7*s.* 6*d.* is not in recognition of some obligation on the part of the merchant to pay as for a service rendered to him. Mr. Bailhache, of course, points out that that origin is intelligible if the payment continued to be made to the men, but that, as it is paid to the employer of the men, the stevedore, that historical origin does not explain the matter. One of the stevedore witnesses, who had not however, gone into the business in London before 1900, so repudiates the idea that it is a gratuity that, as I understand, he returns the money when it is treated as a gratuity and only consents to accept it when it is treated as contractual payment for honest labour. Still, I do not think those difficulties can stand in the way of the evidence that I have had. I do not know by what process it is that the covetous employers have diverted to themselves what in 1875 went for the refreshment of the workmen, but the fact is there, and both parties appear to agree in the account that they give of it. As the best use that is made of it by the plaintiffs is as proof of a constant recognition at all times by the merchant that the custom does go so far as they say it goes, I think that the proof in that respect fails.

Another part of the plaintiffs' case, and I think the strongest part of it, consists in the examination of judgments or the summings-up that have been delivered in the fairly numerous cases in which the question of this custom has been before the courts. There were two cases prior to 1897, one of which was before Huddleston, B. in 1890—*Fenwick* v. *Howard and Co.* (*Times*, June 23, 1890); another before Mathew, J. in 1896—*Dundee Dock Line Company* v. *Howard*, the judgment in which case is cited in 2 Com. Cas. 73; and then there is the case of *Aktieselkab Helios* v. *Eckman and Co.* (8 Asp. Mar. Law Cas. 244; 76 L. T. Rep. 537; (1897) 2 Q. B. 83). The significance of those cases, I think, is this: It is not contended that they are binding upon me as authority, and, of course, I must arrive at my conclusion to-day, whatever the value of it may be hereafter, according to the whole of the evidence that is before me. But it is said, and said with great justice, that if the trade, which to a certain extent by the same witnesses as have been called to-day was endeavouring to prove this custom in 1897 in the *Helios* case (*sup.*), which custom is said to be the same custom as that which exists to-day, either they did not venture to put their custom as high as they are putting it now, or, having ventured so far, were disbelieved by the judge who heard them, then I ought to hesitate long before accepting evidence to-day which would lead them further to a more advantageous result than the point they had reached in 1897. But after attending to Mr. Bailhache's argument on these cases I have come to the conclusion that there is nothing in them that ought to lead me to say that I doubt the evidence which has been given before me in the course of the present trial.

It was not necessary for the success of the merchants in any of the first three cases that they should go into the question of the complete stowage of the merchant's craft in any detail; not only that, but that on the form of the charter-party in the *Helios* case (*sup.*) a complete establishment of the custom on that point would have favoured the argument which was advanced by the plaintiffs that the custom as proved was in conflict with the charter-party in its terms, and it may well be that in the course of giving the evidence the perspective of the different parts of the custom was more or less adjusted to the point of view at which it was desired the court should arrive. At any rate, the judge who heard the witnesses, Collins, J., merely says, with regard to this part of the custom, that "Whether the obligation extends to the duty of trimming or whether that is an extra nicety to be done at the merchant's expense if he wishes to have it done, I do not think it is necessary for me to decide in this case," and he did not decide it. Although there are expressions used in the judgment of Smith, L J. in the Court of Appeal in that case which are relied upon as showing that he scrutinised the evidence and disbelieved it because he says, "I think that they failed to prove a custom that the shipowner should stow the timber in the lighters and the learned judge refused to find such a custom," to my mind it is only an expression of the fact that as the learned judge had not found that part of the custom the Lord Justice treated it as not found also. I do not myself think that he purported to find a result which involved disbelieving the witnesses whom Collins J. had seen and had not said that he disbelieved, and I think he was only expressing sufficiently accurately for the purpose of that case the extent to which the learned judge had limited his finding as to the custom. But even if it were otherwise, I do not think that the view that he may have formed on notes of the evidence, the extent and fulness of which I cannot judge, ought to induce me to doubt the evidence of witnesses whom I have seen and whose evidence I accept. There was a subsequent case before the Common Serjeant in 1902 of *De Wolf* v. *Churchill & Senim* (unreported) where the Common Serjeant summed up to the jury, putting before them for their consideration a custom, but more extensive than that found by Collins, J. in the *Helios* case (*sup.*). I think the same consideration applies to the summing-up of the Common Serjeant as to the judgment in the *Helios* case (*sup.*), that is to say, that the case did not render it necessary to find or consider the full extent of the custom, and therefore attention was directed, not unnaturally, to that which was immediately material, without investigating the other portion of the custom, which was not necessary for the determination of the immediate issue. Therefore, I have come to the conclusion that the cases between 1890 and 1902 are not in conflict with the evidence given by the defendants now, and that the view taken of the evidence by the courts before which it came ought not to weigh against my acceptance of the evidence of the defendants in this trial. There have been other cases in which the custom, in the sense in which it is now under discussion, has been presented to the City of London Court to a certain extent on evidence the same as that called before me; but I think as to this part of it I must go entirely on what I have heard and not on conclusions of the learned County Court judge, because those conclusions are not used for the purpose of diminishing the weight of the evidence which I accept, but for the purpose of commending it to my acceptance. I think I must accept it on its merits, though I might discredit it on the view taken by other courts at an earlier date.

The result, therefore, is that I find that the custom is proved, and when I say proved, I think it is proved in the terms set out in par. 3 of the points of defence, with the qualification made by one of the witnesses, that the craft in question is open craft, because obviously the stowage of deck craft and sailing deck craft would be very much more complicated. It appears to me that the weight of the logs and the difficulty of handling them with what are called pickeys and things of that kind has been considerably exaggerated, and that there is so little substantial difference between the stowage of the deck craft, which is in a very large number of cases identical in point of build with the river craft, and the stowing of the regular merchant's craft, as not to be enough to make it unreasonable to accept the evidence of the witnesses about custom on that ground.

It is then said that the custom is not reasonable and is not clear, and that therefore it is bad. It appears to me to be an eminently reasonable custom. I can see no business sense

in a custom which requires the merchant's craft to go away so stowed that it will not carry on that journey a full burden. If the alternative is, as I suppose it is, that the merchant should have his own gang of men on the lighter performing at his own expense what Collins, J. called the extra nicety of trimming, I can only say, on my view of the facts, nothing would be so conducive to difficulties and disputes as the employment of two gangs of men under two different masters and responsible to two different parties upon the same barge taking delivery of lengths of timber, some of which are 25ft. long, and which require that no one shall get in their way, and when being handled that they should be handled as rapidly as possible. It is said also that the custom is bad because it is not certain. I think it is perfectly clear, and that it is really a fallacy to call it uncertain. What is really meant by this objection is that it does not apply in the same way to different adventures on which different barges are going, but just as the custom is not uncertain because one barge differs from another in size, although the amount of timber to be stowed in each barge is uncertain till you see the barge, so it is not uncertain by reason of the fact that one barge is going up the Regent's Canal under low bridges, and another is going up to Brentford, or above locks, and another barge may be going down the stream to some wharf. As soon as you know what the barge is and where it is going to, and what the custom requires to be done, it is certain at once. I can see no element of uncertainty so as to make the custom bad. I think, therefore, that the custom as pleaded in par. 3 is not only established, but must be upheld in law, and must be found in the terms of that paragraph. There is no counter-claim asking for a declaration; therefore, I need not make one.

Now comes the other point in this case. This dispute has been hanging over for a couple of years. It is obvious that there is one class of persons who have suffered by the change made in 1906. Behind the back of the stevedore the charter was altered, and the stevedore thereupon found that if the custom was to come in again he would lose the 1*s.* 6*d.* a standard that he had been getting. It is easy to say that he must raise his rates to the shipowner, but as a business operation it is not so simple to raise your rates to the shipowner to an extent which will correspond to the 1*s.* 6*d.* which had been got separately from the merchant when the custom was excluded. Accordingly this dispute has been sometimes advanced in the shape of claims by the stevedore on the merchant, and sometimes by claims by the shipowner on the merchant, and when this case came on there were actually pending cases in which the receiver of the cargo was suing the owner for damages for putting the timber pell-mell into the barges, as I understand is shown by photograph B. In these circumstances the plaintiffs wrote the letter of the 18th July to the defendants, and, as they got a reply both from the present defendants and the solicitors of the other consignees by that vessel, I presume they wrote to all the consignees, and that the attitude taken up by the consignees was taken up in concert and under advice. The proposal made by the plaintiffs was to avoid trouble and friction; the shipowners, while putting forward their view of the custom and contending that there was no liability to do so, proposed to do the work in the way claimed by the receivers under protest and without prejudice, claiming and notifying a claim for a right to a refund. Now the plaintiffs received an answer on the 18th July from the defendants, and from the solicitors to the other consignees on the 20th July. The plaintiffs' case is not that there was any express promise to refund this money which they were expending. They contend that there is an implied promise. Now, apart from the letters, as the stowing of a barge so that it may conveniently go up the Regent's Canal rather than to the other side of the dock or along to a wharf is a thing manifestly for the advantage of the merchant, one would infer from the fact alone that it was done by the stevedore, and that the merchant knew it and took advantage of it, that the merchant impliedly promised to pay a *quantum meruit* to the stevedore; but as soon as you introduce the question of custom and establish the custom that it shall be done by the shipowner, then if the stevedore does it the inference of fact is that he is doing it on the credit of the shipowner and not the merchant, seeing that he does it with knowledge of the custom, and thus consequently no promise can be implied in the present case that the merchant will pay, although he will benefit by the work being done, merely because he knew of the work being done. The plaintiffs attempt to allege an implied promise in the case, but that appears to me to be a letter written by the defendants negativing in terms any promise at all, and therefore negativing any implication of promise at all. I do not know why the course was taken of declining to fall in with the shipowners' proposal. I think it was a cantankerous course to take. I think the course which the shipowners took was in accordance with a desire to get the business through without trouble and friction, and submitting to the court a question which was already in litigation in one form; but that does not affect the legal right of the defendants to take the course which they did, although it does not constitute a ground for saying that had they succeeded on that ground alone they would have succeeded without costs, as the legal right of what they did was to negative the possibility of any implied promise arising. Therefore I think on this part of the case the plaintiffs fail to show an implied promise. It is not necessary to say that the other ways in which the plaintiffs put the case in their particulars fail; they put it that there was a custom of the consignees to have done and pay for this work. No such custom has been proved. The payment made by the consignees from 1898 to 1906 for this class of work was because by the charter-party that custom was excluded on both sides, and no new custom grew up in the interval. Therefore the result is that there is judgment for the defendants with costs.

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

Solicitors for the defendants, *Trinder, Capron, and Co.*

Monday, Feb. 7, 1910.

(Before HAMILTON, J.)

WHINNEY v. MOSS STEAMSHIP COMPANY LIMITED. (a)

Bill of lading—Lien—Unsatisfied freight due by limited company — Shipment by receiver and manager—Right of shipowners to exercise lien as against receiver and manager.

A limited company had for a number of years shipped ale to their agents at Malta by the defendants' line, under a bill of lading which contained a clause giving the shipowners a lien for freight due thereon, and also for any previously unsatisfied freight due from shippers or consignees. The plaintiff, who had been appointed receiver and manager of the company, gave the defendants instructions to ship a further quantity of ale to Malta as follows: "Please deliver ale as below to yours respectfully, Ind, Coope, and Co. Limited. By Arthur F. Whinney, Receiver and Manager, C. C. C." The address given for the delivery of the ale was "Ind, Coope, and Co. Limited, care of Turnbull, jun., and Somerville, Strada Reale, Valetta, Malta." The defendants, in reply, notified the plaintiff of the amount of freight, and enclosed a bill of lading in the same form as that used on previous shipments by Ind, Coope, and Co. Limited. On arrival of the ale at Malta, the defendants claimed to exercise a lien on the particular shipment in respect of previously unsatisfied freight.

Held, that they were entitled to do so.

COMMERCIAL COURT.

Action tried by Hamilton, J., sitting without a jury.

The plaintiff, who was receiver and manager of the firm of Ind, Coope, and Co. Limited, claimed the sum of 171*l.* 19*s.* 10*d.* as money had and received by the defendants to the use of the plaintiff.

The plaintiff was appointed receiver and manager on the 5th Jan. 1909, and on the 13th Jan. 1909 he sent the following letter to Messrs. James Moss and Co., the managers of the defendant company:

The Brewery, Burton-on-Trent, Jan. 13, 1909.—Please deliver ale as below, charging to yours respectfully, Ind, Coope, and Co. Limited. By Arthur F. Whinney, Receiver and Manager, C. C. C. Ind, Coope, and Co. Limited, care of Turnbull, jun., and Somerville, Strada Reale, Valetta, Malta.

In their reply the defendants said:

Please check the enclosed bill of lading, and, if found incorrect, please return to us immediately, as otherwise we can take no responsibility.

The bill of lading accompanying the letter contained the following clause:

3. That the shipowner, his managers, servants, and agents shall have a lien and right of sale by public auction over the goods shipped hereunder, not only for the freight and charges due thereon, whether payable in advance or not, but also for all amounts in anywise to become payable to them under the provisions of this bill of lading, although the same may not then be ascertained. And also in respect of any previously unsatisfied freight, inland or forwarding charges, primage, porterage, fines, costs, and other charges or amounts due either from shippers or consignees to the shipowner, or to the owners of any steamers of the Moss Line, or to their Liverpool agents, and also for the costs and expenses (if any) of exercising any such lien, and to deduct from the proceeds of any sale the costs of and incidental thereto, or to the exercise of any such lien as aforesaid.

The ale was duly shipped under that bill of lading, and, as the defendants had a claim against Messrs. Ind, Coope, and Co. amounting to 171*l.* 19*s.* 10*d.* for unpaid freight in respect of former shipments, they claimed to exercise a lien for it upon the particular shipment, and refused to deliver the ale unless the amount due was paid.

The plaintiff paid the amount under protest, and now claimed to recover it back.

Darby (*Leck* with him) appeared for the plaintiff.

Dunlop appeared for the defendants.

HAMILTON, J.—On the 2nd Feb. 1909 Mr. Arthur F. Whinney, the plaintiff, in order to obtain the release of a quantity of beer at Malta, upon which the defendants, the carriers of it, were claiming the right to exercise a lien which he disputed, paid to them a sum of 171*l.* 19*s.* 10*d.* upon the terms that they should undertake to refund it if it was subsequently found that his contention was correct, and that the shipowners' (the defendants) contention was incorrect—namely, that they had no right to exercise the lien as against Mr. Whinney. It is for the return of that money that this action is brought. The question, and the only question, raised is as to whether or not the defendants, the steamship company, were entitled to exercise a lien for this sum as against Mr. Whinney, and both parties agree that the question turns upon ascertaining what is really the contract between the plaintiff and the defendants. For many years the Moss Steamship Company have carried by their line beer consigned by Messrs. Ind, Coope, and Co., of Burton, to Messrs. Turnbull and Somerville, at Malta, who were their selling agents there. The practice had been to advise Messrs. James Moss and Co., the managers of the Moss Steamship Company's line, that beer was being sent forward; then James Moss and Co., having shipped the beer, sent a bill of lading to Burton and another bill of lading to Messrs. Turnbull at Malta. Originally the terms had been monthly accounts for the freight, no lien being exercised upon the goods. As Messrs. Ind, Coope, and Co. approached the position in which they were found at the beginning of 1909, they required longer credit, and began to pay their freight accounts by three months' bills. Eventually they did not even pay the three months' bills, and the result was that prior to the shipment in question, that was the shipment by the *Ramses* in 1909, 171*l.* 19*s.* 10*d.*, the amount in question, was overdue by Messrs. Ind, Coope, and Co. for freights carried for them by the Moss Steamship line. Now under these circumstances, orders having come forward for beer from Malta on the 13th Jan. 1909, the deputy of Mr. Whinney, the plaintiff, gave Messrs. James Moss and Co., of Liverpool, instructions in these terms: "Please deliver ale as below, charging to yours respectfully, Ind, Coope, and Co. Limited. By Arthur F. Whinney, Receiver and Manager, C. C. C. Those are, I suppose, the initials of the gentle-

(a) Reported by LEONARD C. THOMAS, Esq., Barrister-at-Law.

man who actually signed for Mr. Whinney. Then the particulars below for delivery of the ale give marks and numbers, and say: "Ind, Coope, and Co. Limited, care of Turnbull and Somerville, Strada Reale, Valetta, Malta. Certificate attached. Please account to us for drawback." I think it is clear that that was an instruction to ship, to prepare a bill of lading, to insert in that bill of lading as consignees the name Ind, Coope, and Co. Limited, and I think "care of Turnbull and Somerville" was an address, and an address only, and did not make them consignees to be named in the bill of lading; nor could Ind, Coope, and Co. Limited, in that connection be read as merely a discription of the principal for whom Turnbull and Somerville were to be the consignees. In no respect did this transaction differ from the transactions prior to the 5th Jan. 1909, except the appearance of Mr. Arthur Whinney's name and description. On the 16th Jan. Messrs. James Moss and Co. replied, addressing Messrs. Ind, Coope, and Co.: "We beg to inclose herein shipping documents for your goods forwarded according to your instructions per *Ramses* for Malta. We place to your debit the amount of our expenses thereon as per statement at foot." The bill of lading forwarded to Burton, and also to Malta, is in a form that had been in use by the Moss Steamship Company, and had been applied to the transactions with Messrs. Ind, Coope, and Co. Limited for a period of, I think, nearly ten years. It does not name the shipper. It begins: "Received from James Moss and Co., of Liverpool, as agents, for shipment on the *Ramses* to be delivered in the like order and condition at Malta as per instructions of the 15th Jan. to Messrs. Ind, Coope, and Co., care of Messrs. Turnbull and Somerville." That form of bill of lading was probably not read by anybody. The letter of the 16th Jan. which encloses it, bore the statement: "One bill of lading sent to consignee. Please check the enclosed bill of lading, and if found incorrect return to us immediately, as otherwise we can take no responsibility." That is a warning and request that the bill of lading should be checked. I am satisfied that that has no reference whatever to the terms of the bill of lading, and it only meant matters to be billed in pursuance to the instructions of the 13th Jan. but that included the description and address of the consignee, and I assume to that extent the bill of lading was duly checked, and certainly no exception was taken to it.

Now as a matter of fact Mr. Whinney had on the 5th Jan., under an order confirmed on the 15th Jan., been appointed receiver and manager of the undertaking of Ind, Coope, and Co. on behalf of the plaintiff and all other holders of first debenture stock, on whose behalf the action of *Fisher* v. *Ind, Coope, and Co. Limited* and others had been commenced. It was in his capacity as managing and carrying on the business of Ind, Coope, and Co. under the order that Mr. Whinney, or his representative, caused this beer to be shipped to Malta. I find that attention was drawn to the terms of the bill of lading, and I have no doubt, as a matter of fact, that Mr. Whinney's personal attention was for the first time drawn to the terms of the bill of lading somewhat accidentally—namely, on the 25th Jan. —when Mr. Whinney, having received an account from the debts of the sums then claimed against Ind, Coope, and Co., had drawn attention to the date of his appointment, had admitted his responsibility for the charges on this particular shipment per *Ramses*, and had disputed liability for the prior outstanding debts of Ind, Coope, and Co., referring Messrs. Moss in that respect to their rights of proof as ordinary unsecured creditors. It is in answer to that that on the 25th Jan. his attention was drawn to a clause which was in the bill of lading. That clause is the third of, I will not say the small, but the smallest print clauses of this document, and it provides in terms that the shipowner "shall have a lien over the goods shipped hereunder not only for the freight and charges due thereon, but also for all amounts in anywise to become payable to them under the provisions of this bill of lading, although the same may not then be ascertained. And also in respect of any previously unsatisfied freight, inland or forwarding charges, primage, porterage, fines, costs, and other charges or amounts due either from the shippers or consignees to the shipowner or to the owners of any steamers of the Moss Line." Now it is clear as a matter of fact that the sum in dispute in this action, 171*l.* 19*s.* 10*d.*, is in respect of previously unsatisfied freight and shipping charges due from Messrs. Ind, Coope, and Co. claiming to exercise the lien referred to in the bill of lading, the Moss Steamship Company purported to be entitled to refuse the delivery of any of this beer unless the whole amount of their account was paid. Mr. Whinney's case was then, and is now, "I was personally liable upon the contract of carriage I desired to have on beer shipped by the *Ramses*, and freight and charges on the *Ramses* shipment I am willing to pay (and he did pay the charges), but I am not liable, nor is it any part of my contract that I should be even indirectly liable, for what is wholly an outstanding debt of Ind, Coope, and Co., now in difficulties." Both parties are therefore agreed on the question of what is the contract.

Admitted that it is a contract between the plaintiff and the defendants, admitted that the plaintiff is personally liable, on that contract, the contest is to what extent his liability goes. Now Mr. Darby says, and says with great truth, that the bill of lading is not the contract, but only evidence of the contract. What the contract itself is is to be ascertained, not merely by looking at the bill of lading, but at the previous and surrounding circumstances. It appears to me, however, that the only inference I can draw from the previous documents—namely, the instructions to ship and the acceptance of those instructions, is, first of all, that "Ind, Coope, and Co. to the care of Turnbull and Somerville" should be entered in the bill of lading as the consignees, and it was therefore part of the contract that they should be the consignees; and, secondly, that I must infer that the course of business which had been pursued for so long, and which necessarily involved shipment on the terms of the usual bill of lading of the Moss Steamship Company, was to be followed in this case, and that the bill of lading was to be the regular Moss Steamship Line bill of lading. I think, therefore, that as a matter of fact Mr. Whinney had this beer forwarded upon the terms that it should be consigned to Ind, Coope, and Co. I think, having

regard to the terms of the letter of the 13th Jan. "charging to yours respectfully, Ind, Coope, and Co.," that Ind, Coope, and Co. were the shippers, the principals for whom Messrs. James Moss and Co. as agents received the goods and put them on board, and that, therefore, the bill of lading is according to its terms to be treated as a contract with Mr. Whinney. The circumstance that Mr. Whinney as receiver and manager was in this respect making himself personally liable upon the contract, and therefore would not be likely to make himself personally liable to pay any outstanding debts of Ind, Coope, and Co, is one which has force, but it seems to me to be quite adequately rebutted by the surrounding circumstances, because he gave instructions that the goods were to be shipped on the terms that the contract was to contain the usual clause of the bill of lading so long in use, and he gave instructions for the shipment of the goods in continuation of a course of business, and with no such indication that the terms of that business were to be limited in such a way as would lead to the inference that any different contract arose in the case of this contract from the contract that had arisen in the case of prior shipments. I do not mean to say that "charging yours respectfully, Ind, Coope, and Co. Limited, by Arthur Whinney, Receiver and Manager," is enough to justify me in saying that I must infer a contract which excludes that part of clause 3 of the conditions of the bill of lading which refers to the defendants' previously unsatisfied freights due from Ind, Coope, and Co. as shippers or Ind, Coope, and Co. as consignees.

Thereupon the second point is made which is one not so much upon the construction of the contract, but as to whether there is not a second ground for inferring that the use of that clause 3 is not to be treated as part of the contract of carriage. Mr. Darby says, again with great truth, that it has often been urged, and he cites *Crooks* v. *Allen* (4 Asp. Mar. Law Cas. 216; 41 L. T. Rep. 800; (1879) 5 Q. B. Div. 38), that unusual clauses in bills of lading are not necessarily to be treated as part of the contract merely because the document has been handed to the shipper, and has been received by him without objection. He suggests that that ought to be in large print, or otherwise special attention ought to be drawn to this particular clause, and as that has certainly not been done either by the terms of the bill of lading or, in my opinion, by the request to take the bill of lading contained in the letter of the 16th Jan., he says I ought not to treat the words in question in clause 3 as part of the contract. Now, it is quite true that the courts have often commented on the small type, and not only on the small type but on the colour of the print and the obscure typography of important clauses in bills of lading, but it appears to me that unless these are relied upon as evidence of some deception, innocent or otherwise, on the part of the shipowner or his principals as proof of some illusion in the mind of the shipper preventing him being *ad rem* in this regard with the shipowner, these are considerations more for an oculist than a legist, and that one cannot lay down as a matter of law that the type, the colour of the ink, or the forbearance to break up paragraphs into reasonable separate sentences can affect either the construction of the document or the just inference as to what was the result of the acceptance of the document. If this bill of lading had been put before the shippers in this case for the first time, as I gather was the case in *Crooks* v. *Allen* (*sup.*), or if a bill of lading with a new and important clause coyly lurking in the middle of thirty or forty sentences were put before an old customer of a line who had got accustomed to the old form, and had no notice of any change in the new one, there would then be material, and in the latter case strong material, for saying that until there was ground for thinking that his mind was aware of the change of the term he could not be held to have assented to that term because he had allowed his goods to be carried under that bill of lading; but here is a clause, although I agree that it is a stringent one, which is not in my experience an extraordinary one. I am not able to refer to other bills of lading, but I am quite certain that I have seen clauses of this kind before. It is, at any rate, a clause that has been in force in Ind, Coope, and Co.'s business for many years. The people at Burton who were attending to the practical part of the business were apparently cognisant of the whole business and had taken part in it; and I do not think, therefore, that there is any evidence here which ought to lead me to the conclusion that something old was being foisted on the shipper under the disguise of an innocent-looking or unnoticeable form of words in small print. No doubt Mr. Whinney did not read the bill of lading; it is not proved that he did not, but I think I should be shutting my eyes to the ordinary course of business if I believed he had. I do not believe that anybody read the bill of lading, but I believe the terms of the bill of lading must have been perfectly well known at some time or other to Ind, Coope, and Co., and I think it highly probable that they were perfectly well aware that if they obtained extensions of credit in respect of an account which was getting more and more into arrear, not merely on the strength of their bills of exchange, but also by reason of the fact that they were shipping goods by the line, the Moss Steamship Co. would not have any actual security for quite a considerable amount which they could exercise at any time it became necessary. I do not therefore think that there is anything in the circumstances of this evidence that would justify me in saying that the contract of carriage, the instructions for the shipment, or the receipt of the bill of lading were on any terms other than those contained in this regular form of the Moss Steamship Line. The result is that the words in respect of any previously unsatisfied freight, &c., due either from the shippers or from the consignees to the shipowner were part of the contract with Mr. Whinney, that the defendants having got 171*l.* 19*s.* 10*d.* of unsatisfied freight due both from the shippers and from the consignees of this bill of lading, were entitled to exercise a lien on the goods for it, that consequently the money which was paid to them on the terms that it was to be accounted for if wrong is not repayable now, and therefore they are entitled to judgment in this action with costs.

Solicitors for the plaintiffs, *Davidson* and *Morris*.

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

Feb. 11, 14, 15, *and* 16, 1910.

(Before HAMILTON, J.)

JARDINE, MATHESON, AND CO. LIMITED *v.* CLYDE SHIPPING COMPANY LIMITED. (*a*)

Charter-party—Cargo — Contract to load "not less than 6500 tons, but not exceeding 7000 tons" —Measure of damages.

A charter-party provided that a ship should proceed to the port of loading and there load "a cargo of beans, not less than 6500 tons, but not exceeding 7000 tons net intake weight of beans in bags, as usual, which the said charterers bind themselves to ship, not exceeding what she can reasonably stow and carry over and above her cabin bunkers, tackle, apparel, provisions, and furniture." It also contained the following clause: "Charterers to have the option of underletting the whole or part of the steamer."

Held, that the words "not less than 6500 tons" constituted a warranty by the shipowners to the charterers that the vessel could carry that quantity, and that the words "not exceeding 7000 tons" was a term binding the shipowners not to ask for more than 7000 tons, but entitling them to receive that quantity if within the capacity of the vessel.

Held, also, that, having in fact shipped under duress and protest a larger quantity of cargo than that required by the terms of the charter-party, the charterers were entitled to have the excess quantity carried freight free.

COMMERCIAL COURT.

Action tried by Hamilton, J., sitting without a jury.

The plaintiffs were the charterers of the steamship *Kish* and the defendants were the owners. The action was brought to recover the amount of freight paid on 360 tons of beans, which the plaintiffs alleged they were not liable to load under the charter-party, but which they had been forced to load by the shipowners.

The charter-party dated the 18th May 1909 (*inter alia*) contained the following provisions:—

1. The said steamer shall after completion of the present voyage or voyages for owners' benefit proceed to load at Dalny, or as near thereto as she can safely get, always afloat, and there being tight, staunch, and strong, and in every way fitted for the voyage, load from the agents of the said charterers at such customary berths as they may direct, a cargo of beans not less than 6500 tons, but not exceeding 7000 tons net intake weight of beans in bags, as usual, which the said charterers bind themselves to ship not exceeding what she can reasonably stow and carry over and above her cabin bunkers, tackle, apparel, provisions, and furniture, and, being so loaded, shall proceed, &c.

6. Captain to produce the log book of the voyage under and preceding this charter-party if so required by the charterers' agents, and to clear his steamer, and to sign bills of ladings as soon as the cargo is on board, and to sail with all possible dispatch.

7. Master to sign bills of lading either for the whole or for portion of his cargo as required by the charterers' agents, at any rate of freight required without prejudice to this charter-party, but not under chartered rates, unless difference be paid in cash before signing.

8. Cargo to be brought to and taken from alongside the steamer at the expense and risk of the freighters. The master to afford all facilities to the charterers or their agents to survey the steamer whenever required by them. The captain to ventilate and dunnage the cargo to the shippers' satisfaction, and, if desired, to construct funnels and ventilators in the customary manner through the hatches as directed by the charterers' agents at charterers' expense. Dunnage and mats to be provided by the captain at ship's expense as customary. No hooks to be used to receive, stow, or deliver the cargo, and no broken bags or loose beans to be stowed away. The captain to keep open the steamer's hatches as often during the voyage as the weather will permit, and to allow charterers' agents free access to the hold during the loading and discharging to enable them to inspect ventilation and dunnage. Water tanks, beams, stringers, bulkheads, masts, and iron decks to be fully dunnaged, and sufficient provision made for escape of condensed steam from the cargo whenever required. If the steamer has no permanent cowls (one fore and aft in each compartment) for ventilating purposes, the master must cut his hatches to provide for such. Permanent battens not to be considered sufficient dunnage if the spaces are so great as to allow any part of a bag to come in contact with the skin of the steamer. Cargo must on no account be loaded in the coamings of hatchways above level decks, if ventilation is interfered with thereby, nor in ballast compartments, bunkers, or cabins, unless with written consent of the charterers' agents. . . .

10. Charterers to have the option of underletting the whole or part of the steamer.

Scrutton, K.C. and *Dunlop* for the plaintiffs.—The contract was merely to load a cargo and not a full and complete cargo. Any quantity within the limits of 6500 and 7000 would satisfy the charterers' obligation under the charter-party:

Miller v. *Borner*, 9 Asp. Mar. Law Cas. 31; 82 L. T. Rep. 258; (1900) 1 Q. B. 691.

Bailhache, K.C. and *Stuart Bevan* for the defendants.—The word "cargo" in the charter-party means an entire loading of the vessel:

Borrowman v. *Drayton*, 3 Asp. Mar. Law Cas. 303 (1876); 3 Ex. Div. 15.

The whole of the charter-party contract must be considered in order to arrive at the meaning of the word "cargo":

Caffin v. *Aldridge*, 8 Asp. Mar. Law Cas. 233; 73 L. T. Rep. 426; (1895) 2 Q. B. 648.

The fact that the contract imposes on the charterers the obligation to load a cargo "not exceeding what she can reasonably stow and carry," and that the charterers "have the option of undertaking the whole or part of the steamer" indicates that they have to load a full and complete cargo. *Miller* v. *Borner* (*sup.*) is distinguishable because the contract in that case required the charterers to load "a cargo of ore say about 2800 tons," and therefore the amount of the cargo was defined. The same decision was arrived at in

Morris v. *Levison*, 3 Asp. Mar. Law Cas. 171 (1876); 34 L. T. Rep. 576; 1 C. P. Div. 155.

The words "not less than 6500 tons but not exceeding 7000 tons" do not relate to the cargo but indicate the carrying capacity of the vessel. The shipowners are entitled to receive 7000 tons if the vessel will carry that quantity:

Carlton Steamship Company v. *Castle Mail Packets Company*, 8 Asp. Mar. Law Cas. 325, 402 (1898); 2 Com. Cas. 173;

Potter v. *New Zealand Shipping Company*, 1 Com. Cas. 114.

That case is only distinguishable from the present in that the words "full and complete cargo" are here omitted, but such omission is immaterial. The work "bunkers" in clause 8 means permanent bunkers only, and has no reference to cross bunkers.

Dunlop in reply.

HAMILTON, J.—At the end of May and beginning of June 1909 a dispute arose at Dalny between the local representatives of the plaintiffs, who were shipping soya beans on board the defendants' vessel the *Kish*, and the captain of the *Kish*, who had his instructions from his owners, and who was thus conducting the dispute on their behalf. The point of the dispute was that the shippers contended that, having put on board, as appears from the log, 76,000 bags of beans, equivalent to about 6600 tons, they had satisfied their obligations under the charter-party of the 18th March 1909, on which this action is brought, and were not bound to ship any more cargo, the captain raising the contention that he had a quantity of cargo spaces still unfilled, and which could be filled without exceeding the ship's carrying capacity; and that under the charter his owners were entitled to have the vessel supplied with further beans to fill up the spaces and bring the vessel down to her marks. The captain first demanded 300 tons, but subsequently he demanded a further quantity, bringing the amount up to 360 tons. As he refused to sign the bills of lading unless he had the 360 tons put on board, or payment of the dead freight thereon, the representatives of the plaintiffs, after consulting their principals, shipped the 360 tons under protest, and thereupon the bills of lading were signed, and the vessel went to sea. On arrival in this country the shipowners exercised their lien upon the 360 tons, claiming freight upon it, the obligation to which was disputed by the charterers on the ground that they were not bound to ship it under the charter. Thereupon the amount was deposited in the joint names of the solicitors in accordance with an agreement dated the 30th June 1909. The charterers bring this action first of all to obtain a declaration that they are entitled to the return of the 427*l.* 10*s.* so deposited, and, in the alternative, for damages accrued to them for having had to buy 360 tons in order to ship it, which, assuming that they have to pay freight upon it, was sold here at a considerable loss. and further, they claim two items for damages to cargo, one for broken bags, and one for damage by sweating. The substantial defence of the shipowners is that the master was quite right, that they were entitled to have the ship filled, and as it was not they were entitled to demand the 360 tons.

The first question is on the construction of the charter-party. It is a charter negotiated and signed in Shanghai, and although instructions were received in this country, I think it is clear that at the time it was signed or afterwards the full text was never in the possession of anyone in this country. Clause 1 provides: "Steamer shall after completion of the present voyage or voyages for owner's benefit proceed to load at Dalny . . . and there . . . load from the agents of the said charterers at such customary berths as they may direct, a cargo of beans not less than 6500 tons, but not exceeding 7000 tons net intake weight of beans in bags as usual, which the said charterers bind themselves to ship not exceeding what she can reasonably stow and carry over and above her cabin bunkers, tackle, apparel, provisions, and furniture, &c." Now upon that clause the contentions raised are these: The charterers say that this in substance is the same as in the case of *Miller* v. *Dorner* (*sup.*), that it means not a full and complete cargo of beans, but something less, the omission of the well-known words "full and complete cargo" indicating an intention to make the cargo of beans in this case not a full and complete cargo, and they say that as nobody can contend that it was not a cargo, their obligation was fulfilled by loading the 76,000 bags. They say further that the words "not less than 6500 tons, but not exceeding 7000 tons" give them an option to ship a greater or lesser quantity as they will. On the other side it is said that no attention can be paid to words which parties do not put in the charter, but only to words which they do put in. They say that a cargo of beans means an entire cargo, a cargo for the ship so that it may be a laden ship, and therefore a cargo of beans would import a complete cargo. They say, further, that that contention is borne out by the charter, and provisions must be looked at as in the case of *Caffin* v. *Aldridge* (*sup.*), and that looking at the provisions by which the charterers bound themselves to ship, and the provision that the charterers have the option of underletting the whole or part of the steamer, the charterers' obligation is to ship a cargo not exceeding what she can reasonably stow and carry, once you come to the conclusion that a cargo of beans means as much as the vessel can take over and above her cabin bunkers, &c. They say, further, that it is not a cargo of beans of 6500 to 7000 tons, nor a cargo about 6500 to 7000 tons, but a cargo of beans accompanied by words of description which have the effect of warranting a certain amount of carrying capacity, and obliging the ship owner to carry that amount if it can be done. I think the construction put upon it by the defendants is right, that a cargo of beans under this contract means an entire loading of the vessel, that the words "6500 tons" are a warranty by the shipowners to the charterers that the vessel can carry that quantity, and the words "7000 tons" were a limit to their obligations or a term binding the shipowners not to ask for more 7000 tons, but entitling them to have 7000 tons. It appears to me that unless the omission of the words "full and complete cargo" distinguish the cases, as I think they do not, there are two decisions of Mathew, J. which conclude the matter. These two cases are *Potter* v. *New Zealand Shipping Company* and *Carlton Steamship Company* v. *Castle Mail Packets Company* (*sup.*). So far then it appears to me that the defendants are right.

Then attention is drawn to clause 8, an elaborate clause dealing with various matters connected with the shipment, and among other things the ventilation of the cargo. This clause contains the following words: "Cargo must on no account be loaded in the coamings of hatchways above level decks, if ventilation is interfered with thereby, nor in ballast compartments, bunkers, or cabins, unless with written consent of the charterer's agents." Now upon this it is said, first of all, that cargo—

namely, the 360 tons in dispute—was, in fact, loaded in a bunker, and there was no written consent of the charterer's agents. There is a dispute also as to whether or not the whole of the 360 tons was loaded in what is called a bunker. The captain put in a cargo plan, which must have been made at or about the time the vessel sailed. That shows 4500 bags of beans in a compartment which is described by the captain as "No. 3 small," and which, I think, I described as "No. 3 cross," and which is, or is not, a bunker according to which of the two parties is right in this case. That 4500 bags represents 360 tons. The captain says that out of that seventy-nine bags were put in the fore peak, which appears to me a trifling matter, but I think I had better go by the cargo plan rather than by the captain's statement, and it appears to me on the evidence that into the compartment in dispute the excess quantity of cargo was stowed, and, I think, it is quite manifest that it was the possession of that space, in which at the time there was a small quantity of coal, that in the first instance led the captain to demand a further quantity of cargo which ultimately amounted to 360 tons. The first question is whether small or cross No. 3 is a bunker or not within the meaning of clause 8. The owners of the vessel are not responsible for the builder's plan, and upon that this space which is divided into lower and 'tween deck spaces, is not only described as a coal bunker, but is described as having a capacity for coal, and in the summary it is included among the bunker capacity as 43 cubic feet per ton, and is not included in the cargo capacity, and one can therefore ascertain how much cargo can be put into it. It is not only described on the builder's plan, but the designer of the vessel gave evidence, and I understood at the time that he was not answering questions as to whether it was a bunker, but questions on the construction of the vessel, and he says she is much better ventilated than most cargo ships. There is a cowl which makes much better ventilation, and he therefore describes this compartment as a bunker. It is equipped so that it may be used as a bunker or for cargo. The evidence is that cargo is regularly carried in this space, and that on this voyage. as on other voyages, it carried perishable cargo with perfect satisfaction to the owners, and I am quite satisfied on the evidence that the so-called bunker is a compartment which is perfectly suitable and is constantly used for cargo. But I am also satisfied that it is used for bunker coals. The fact is that you cannot design such a vessel unless you arrange for a considerable elasticity in her capacity for carrying bunker coal. Unless she is to be perpetually sailing the seas without a safe margin or to be perpetually dodging into various ports for coal, it is inevitable that she should have a spare space for bunker coal. It appears to me, therefore, that this space, which may be and is used for other purposes, is properly described by witnesses as a bunker. Now that brings me to the other question of construction on clause 8. What ground is there for saying that if this is properly called a bunker it is not a bunker within the meaning of clause 8? Now attention is drawn to the fact that rice is carried from some parts of the East under a charter-party which is known in Shanghai, and that charter contains in terms this clause 8, and it is said to have been lifted out of that charter and inserted in the *Kish* charter, and that the evidence shows that rice is regularly brought from the East stowed in compartments of this class. Therefore it is said that one must suppose, having regard to the origin of the clause, that it is only a general clause not intended to exclude such a cross-bunker as this, because it is regularly in use in contracts under which this space is regularly filled with rice without complaint. But, of course, I have to construe this charter as an instrument prepared by the parties, although portions of it are taken from common forms, and I have to endeavour to give effect to every word. What effect is to be given to the word "bunker" here if it is to be limited so as to exclude cross-bunker No. 3? It is said that if it is necessary to exclude this cross-bunker from the meaning of the word "bunkers" it is to be found in the evidence that cross-bunkers are regularly used for the stowage of rice cargoes, and that therefore it cannot be supposed that this clause was put in for the purpose of excluding so appropriate a compartment as this. At the time this charter was made the carriage of beans was a new trade, and when the charter was negotiated the parties were either afraid that the bunker so-called was so adjacent to the engine-room as to be too hot, or there may have been some other reason, but it does not appear to me on the facts that it was terribly unreasonable to exclude the use of this cross bunker. It appears to me to be quite unreasonable to suppose that it was intended to exclude only the permanent bunkers of the vessel. Her consumption of thirty tons of coal a day would exhaust in eight days the total contents of the two regular side bunkers, and, as a matter of fact, the captain allowed the statement in the letter of complaint of the 10th June 1909 to pass unchallenged—namely, the complaint that to enable him to carry the extra cargo he was carrying on deck some 240 tons of coal necessary for the trip to his next coal port, and I think the reason why he did not challenge it was because it was necessary for the trip to have a great deal more than was contained in these side bunkers, and, as a matter of fact, he reported to his owners that he was taking 200 tons more coal. I do not think he would have taken this and stowed it at the risk of doing some damage unless he felt that it was necessary for the purposes of the voyage to have it. It appears to me, therefore, that there is no ground either of construction or fact that enables me to exclude from the word "bunkers" what I hold is a bunker—namely, the cross bunker No. 3.

The result is that, in my opinion, the space which is stipulated for in the earlier part of the charter is cut down by the express stipulation in clause 8, and the whole charter must be read together. It is said that if the captain had been alive to this question of interpretation he could have got round it, because he could have stowed all his spare coal in No. 3 cross bunker and put the 360 tons elsewhere—namely, in the alleyways or in two permanent bunkers. The answer to that is, that it is not what he did. What he did was to clear coal out of cross bunker No. 3 and stow the cargo there, and I do not think his action can be affected by considerations which can only apply to a different state of facts. The

remaining contention was that clause 8 was not an effective clause, and that therefore it has no application. I do not see how I can construe clause 8 as limited to ventilation, and the contention amounts to reading in after the words "unless with written consent of the charterers' agents," the words "unless same are well ventilated." The captain was therefore wrong in demanding the 360 tons. The remaining question is as to what is to be recovered by the plaintiffs in respect of their being compelled to ship the 360 tons. With regard to the circumstances under which the shipment took place, there are letters attached to the protest which show exactly what the captain demanded, and what the agents to the charterers resisted. The captain in his letter of the 10th June insisted, under instructions from his owners, on having a full cargo supplied or the immediate payment of dead freight in lieu of same, and brought pressure to bear by a refusal to sign the bills of lading. It appears to me that under duress and under protest to obtain their bills of lading on the rest of the cargo the charterers' agents were compelled to provide the additional cargo of 360 tons for shipment, and clearly the object with which it was demanded was to enable the shipowners to obtain a lien on the cargo and exact payment in this country. Therefore what was sought was a delivery of cargo as a security for payment of freight. The payment of dead freight at Dalny does not appear to have been contemplated as an alternative. The result was that on the arrival of the vessel there would be a right in the owners of the cargo to have it delivered freight free. I cannot infer any fresh contract to pay freight, as the loading of the cargo was not a voluntary act, and therefore I do not think I can infer a new contract to pay a *quantum meruit* measured by the amount of freight in the charter-party. They could have delivery of their own cargo at Liverpool free of freight, but to obviate this the money was deposited, and I think by the terms of that deposit it was intended to preserve the right of the owners of the cargo to have it delivered to them without payment of freight if they were wrong on the construction of the charter-party. That entitles the plaintiffs to a declaration. It is said that, assuming an implied contract to pay freight on 360 tons is to be inferred, then in the alternative the plaintiffs had to buy cargo then and there, and they did purchase it on the spot, which was sold, and, after allowance for freight, leaves 276*l.* less than they had to pay to get it to this country, the net loss being 276*l.* But I think the plaintiffs are entitled to a declaration that the sum of 427*l.* 10*s.* deposited in joint names is a sum they are entitled to receive, and there is, therefore, judgment to that effect with costs.

Solicitors for the plaintiffs, *Parker, Garrett, Holman*, and *Howden*.

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

House of Lords.

Dec. 17, 1909, *and April* 6, 1910.

(Before the LORD CHANCELLOR (Loreburn), Lords ATKINSON and SHAW.)

GLASGOW NAVIGATION COMPANY *v.* IRON ORE COMPANY. (*a*)

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

Practice—Decision upon hypothetical state of facts—Waiver of clause in contract.

The House of Lords will not give a decision upon a hypothetical state of facts, which does not represent the real contract between the parties.

Therefore where shipowners sued the charterers for demurrage under a charter-party which contained a cesser clause, and the defendants, by agreement between the solicitors of the parties, undertook not to rely upon this clause, the House of Lords declined to give a judgment in the case, and the appeal was dismissed without costs on either side.

APPEAL from a judgment of the Second Division of the Court of Session in Scotland, consisting of the Lord Justice-Clerk (Macdonald) and Lords Low, Ardwall, and Dundas, reported 46 Sc. L. Rep. 908, affirming a decision of the Sheriff Court of Glasgow.

The appellants, who were owners of the steamship *Maroon*, sued the respondents, the charterers, to recover demurrage in respect of delay in discharging the vessel.

It was not disputed that the discharge took longer than it would have done under normal conditions as to the supply of waggons, and it was agreed that in the event of the respondents being found liable for such delay, the sum payable as demurrage was 65*l.* 16*s.* 8*d.*

By charter-party, dated the 9th July 1907, the respondents chartered the appellants' steamer *Maroon* to carry from Bilbao to Ayr a cargo of iron ore to be delivered there "as customary." It was agreed that the customary mode of discharging iron ore at the port of Ayr was direct from the vessel's hold into the waggons provided by the railway company. The charter-party contained the following provisions:

Time lost by reason of all or any of the following causes shall not be computed as part of the aforesaid running days, neither shall demurrage accrue if the loading or discharging be wholly or partially prevented or delayed thereby—stoppage on river or canal; time lost by any cause of what nature or kind soever, whether of the character enumerated or not, beyond the personal control of the charterers or their agents, whereby they may be prevented or delayed in supplying, loading, or discharging.

The appellants contended that the respondents were liable for the delay in discharging the vessel on her arrival at Ayr, alleging that the cause of the delay was congestion at the works of the consignees of the cargo, and that the respondents were liable for such delay.

The respondents said that it was not proved that the cause of the delay was the fault of the consignees, and that the fault was beyond the personal control of the charterers or their agents. The sheriff-substitute found that the respondents

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

were liable to the appellants for 65*l.* 16*s.* 8*d.* Against this interlocutor the respondents appealed to the sheriff, who recalled the substitute's decision, varying his findings in fact and finding in law that the respondents were not liable to the appellants in demurrage for the detention of the vessel. The appellants appealed against this judgment to the Court of Session, and the Second Division pronounced an interlocutor containing certain new findings in fact, including a finding that the delay caused in discharging was due to a cause beyond the personal control of the respondents or their agents, and finding in law that in respect that the time lost in the discharge of the appellants' vessel was due to causes from which the respondents were exempted from liability by the terms of the charter-party, the respondents were not liable in demurrage. The respondents were accordingly assoilzied. It was stated that it had been agreed between the parties that the charterers would not rely on a "cesser" clause contained in the charter-party, and that the bill of lading should not be put in evidence.

Bailhache, K.C. and *Sandeman* (of the Scottish Bar) appeared for the appellants.

Morten, K.C., *M. P. Fraser* (of the Scottish Bar), and *Henlé* for the respondents.

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

April 6.—Their Lordships gave judgment as follows :—

The LORD CHANCELLOR (Loreburn). — My Lords: This is an action brought on a charter-party. When the charter-party is looked at, it contains a cesser clause. It appears that the parties agreed that if the action were tried in Scotland the cesser clause should not be relied upon. In other words, as the case was stated, and as the argument was founded, the bill of lading, if material, not being produced at all or put in process, the House is asked to decide, not upon the contract actually made, but upon a contract which never was made. Although the result might or might not have been the same had the real facts been brought before the House now, it is not the function of a court of law to advise parties as to what would be their rights under a hypothetical state of facts, but it is to decide what are their rights upon the real facts when the real facts are placed before the court. I do not suggest, or suppose that anyone would suggest, that there was any impropriety intended by the parties to this arrangement. What they have done is that they have placed the House in such a position that you are asked to decide without the facts being all before you upon the waiver of part of the contract, whereas if the waiver had not taken place, from all that appears on the face of the document there would have been no ground for action at all. I have no doubt from the correspondence which has been before us, and from the statement which has been made, that this was arranged between the solicitors to the two parties, and thereby that no real substance but a feigned issue has been presented to the House. Under these circumstances, I think that there is nothing to be done except to dismiss this case altogether, and I suggest to your Lordships that the following order should be made: "It appears to their Lordships that the pursuers and the defenders agree in asking for an order upon the footing that they were bound by a contract different from the contract by which they were actually bound, and the House declines to make any other order than that this appeal be dismissed, and no costs allowed to either side."

Lords ATKINSON and SHAW concurred.

Appeal dismissed. No costs allowed to either party.

Solicitors for the appellants, *Holman, Birdwood, and Co.*, for *J.* and *J. Ross*, Edinburgh.

Solicitors for the respondents, *Morten, Cutler, and Co.*, for *Macpherson* and *Mackay*, Edinburgh.

Thursday, April 21, 1910.

(Before the LORD CHANCELLOR (Loreburn), Lords JAMES OF HEREFORD, ATKINSON, SHAW, and MERSEY, with Nautical Assessors.)

GRANT *v.* OWNERS OF STEAMSHIP EGYPTIAN; THE EGYPTIAN. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Collision—Subsequent negligence by servants of plaintiff—Liability of defendant.

A man in the defendants' employment so negligently navigated their vessel that another vessel was forced into collision with the plaintiffs' vessel, causing it to leak and later to sink. The leak might easily have been discovered and stopped. The same man also acted as watchman in charge of the plaintiffs' vessel.

Held, that while the defendants were liable for the original damage caused by the collision, they were not liable for the damage caused by the subsequent sinking, as it could have been prevented by the exercise of reasonable care and diligence on the part of the servant of the plaintiffs.

Judgment of the Court of Appeal affirmed.

APPEAL from a judgment of the Court of Appeal (Lord Alverstone, C.J., Buckley and Kennedy, L.JJ.), reported 11 Asp. Mar. Law Cas. 323; 101 L. T. Rep. 704; (1910) P. 88, reversing a judgment of Deane, J.

The facts were as follows :—

A man of the name of Barron, who held a certificate from the Board of Trade as skipper of a steam fishing vessel, was employed by the appellants as watchman, and was in charge of two of their trawlers, the *Nelson* and the *Weelsby*, whilst they were lying in Grimsby Dock. On Saturday, the 7th Nov. 1908, the *Nelson* was lying in Grimsby No. 1 Fish Dock under Barron's charge, moored with her head against the quay and her stern projecting out into the dock, when sometime in the afternoon he left her and went to the Royal Dock Lock to see if the steamship *Weelsby* was coming in. While at the lock he offered his services to the respondents' manager to bring the steam trawler *Egyptian* into No. 1 Fish Dock, and he was engaged by the manager to do so. About 3 p.m., while he was in charge of the *Egyptian*, Barron so navigated her that he brought her into collision with the *Aqua*, an iron barge, which was lying with her stem

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

close under the starboard quarter of the *Nelson*. The force of the collision was such that the *Aqua's* bow was driven against a lug or bolt at the after end of the *Nelson*, doing such damage that the rivets of the lug were sheared off and the lug or bolt driven into the *Nelson*, leaving a small hole just at the water line where the bolt had been, which could have been repaired very easily. After the collision Barron moored the *Egyptian* astern of the *Nelson*, and went on to the *Aqua*. He did not look round the injured place or under the *Nelson's* counter. He then went on board the *Nelson* and looked over the side, but did not make any examination of the place where the barge had been. He went down to the cabin, but did not make any further examination of the *Nelson* nor sound the well, or take any precautions to discover if she was making water at any time. He remained in the cabin of the *Nelson* from 6.15 p.m. till 8.20 p.m., but neither saw nor heard any sign of anything being wrong. He spent the night on the *Weelsby* and visited the *Nelson* five times between 8.30 p.m. and 2.30 a.m. the next morning. On coming to the *Nelson* at 2 30 a.m. he noticed that the head of the *Nelson* was so far up above the quay that he could not board her in his usual way and had to get on board by way of the boat next to her, and then he discovered that the deck was under water at the stern to a depth of 6in. extending from the stern for some 3ft. forward. He alleged that he then went away to get assistance and did not return till between 4 and 5 a.m., when he found her sunk all but forward. The *Nelson* in fact sank at 4 a.m. It was submitted by the respondents that Barron entirely failed to discharge his duty as a watchman. Deane, J. found the *Egyptian* alone to blame for the whole of the damage, including the sinking. The Court of Appeal were of opinion that the sinking could have been avoided by reasonable care on the part of those for whom the appellants were responsible, and that both parties were to blame.

The owners of the *Nelson* appealed.

Laing, K.C. and *Balloch* appeared for the appellants, and contended that there was no evidence of negligence on the part of Barron. The accident was of a very unusual nature, and he did all that he could be reasonably expected to do.

Batten, K.C. and *Bateson*, for the respondents, were only called upon on the question of costs.

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

The LORD CHANCELLOR (Loreburn).—My Lords: In this case it is admitted that the *Egyptian* was to blame for causing damage to the *Nelson*, but the question is whether the *Egyptian* can show that the damage naturally flowing from the injury has been increased beyond what it would otherwise have been by reason of the negligence of the owners of the *Nelson* or their servants. Now I, for one, should always scrutinise closely any contention by which a wrongdoer seeks to throw upon an innocent party any portion of the consequences which flow from the wrong. An admitted fault of the *Egyptian* does not place her in a very favourable position for escaping the actual consequences of the collision which took place. But in this instance two courts—in particular the court of first instance which saw the witnesses—have found, with the concurrence of the Elder Brethren, that there was negligence by a servant of the owners of the *Nelson*, by one Barron, whose neglect increased the damage and led to the sinking of the ship. It is a circumstance of importance that both courts have found in the same way upon a question of fact; and that would naturally have very great weight with your Lordships, according to your familiar practice. But I must say that I think that it is the case also, and I concur in that view of the facts with the learned judges in both the courts below—that the watchman, knowing of the collision, did not take proper and reasonable steps for the purpose of examining the part of the ship where the impact took place. Now I agree with the Court of Appeal that this duty was owed by Barron, the watchman, to his employers, and when he was required to examine the *Nelson*, knowing that she had been struck, he was required to do so within the scope of, and by reason of, his duty to his employers, the owners of the *Nelson*, and I cannot agree with the view that Deane, J. took of the law. I cannot see how it can be said that he the less neglected his duty to the owners of the *Nelson* by reason of the fact that he had been guilty of a prior act of neglect towards them, in taking control of the *Egyptian* and bringing her into dock. Accordingly, I think that this appeal must be dismissed. But after the argument on the merits had been heard, I put to the counsel for the respondents a view, which I certainly entertain decidedly myself, that in this particular case it was extremely hard upon the owners of the *Nelson*, and that had it not been for the fact that the *Egyptian* had employed this man, while acting in service to others, to bring their vessel in to the dock, the accident presumably would not have taken place at all. I put that view to Mr. Batten with regard to the question of costs; and he has indicated on behalf of his clients that he would desire that the House should deal with that point. I have not suggested, and I do not desire to suggest, anything in the nature of moral obliquity on the part of the owners of the *Egyptian*, but I think that it is rather hard that they employed a servant of the *Nelson*, in effect, to ram the *Nelson*; and then seek to escape the consequences by saying that that same person failed also, in the subsequent hours, in his duty to the owners of the *Nelson* itself. Under all the circumstances, while your Lordships ought, I think, to dismiss this appeal, I think that there ought not to be any costs of this appeal upon either side.

Lord JAMES OF HEREFORD.—My Lords: I concur.

Lord ATKINSON.—My Lords: My view of this case is, shortly, this. It is admitted that the collision occurred through the negligence of those for the time being in charge of the *Egyptian* on behalf of her owners. It so happens that the person who was in charge, one Barron, was the plaintiffs' watchman. Some confusion has, I think, been caused in the case by reason of this double position which Barron occupied. In my view the case must be decided in point of law as if Barron had never been on board the *Egyptian*, with this qualification: that his position there fixed him with full knowledge of the fact that the collision had occurred, and

of its nature. The defendants have pleaded that the plaintiffs could, by the exercise of ordinary care, have avoided the consequence of the defendants' negligence. The question, as it appears to me, is, Have they proved that plea? In my opinion they have. Barron, as watchman of the plaintiffs' ship, with the full knowledge that he had of the collision, was bound, I think, to exercise ordinary care and to ascertain the nature of the injury done. He failed to exercise such ordinary care. Had he exercised it, he must, I think on the evidence, have ascertained this injury, what it was, and its true nature; and had he ascertained it, it is practically admitted that the mischief could have been remedied or prevented by plugging this hole. I fully concur in the announcement which the Lord Chancellor has made as regards the costs; because it is undoubted that the defendants in this action have inflicted serious injury upon the plaintiffs, and yet they escape from the consequences of that injury by reason of the negligence of the plaintiffs' servant, whom they had—I think it is not using an extreme expression to say—decoyed away from his proper business, and used for their own purposes. I am very glad that the costs of this appeal should not be given to those who have been successful under such conditions.

Lord SHAW.—My Lords: In this case a slight injury was done to the steamship *Nelson* by drawing a rivet eyehole in her starboard quarter out of its position and into the body of the ship. That was a slight injury, the responsibility for which is acknowledged by the defendants; and that has been the subject of no litigation. Following it, however, another and more serious occurrence took place—viz., the sinking of the vessel. In these cases two principles too often put separately, but really conjoined, may be stated—viz., that the defendants are liable for the damage which is the natural and direct consequence of their wrongful act. That would cover the slight injury to which I have referred. The second principle is that the defendants are not liable for any further damage which could have been avoided or minimised by the exercise of reasonable care on the part of the plaintiffs. This is really not a separable proposition from the other in the sense of being independent of it; it is only a development or corollary of the former proposition; because the latter further damage is caused, not as the natural and direct consequence of the defendants' act, but by reason of the neglect of that care which was reasonable in the circumstances on the part of the owners of the *Nelson*. That neglect is found to be established in fact. It led—and causally considered it alone led—to the sinking of the ship, and accordingly the responsibility for it cannot be placed upon the defendants. These two things have been properly distinguished by the owners of the *Egyptian* throughout. Their offer of compensation, limited to the slight injury which was the result of their negligence, has been justified by the result of this litigation; but the further damage now claimed has not been found due. In my opinion, this result is correct, as the further damage fell on the plaintiffs' ship by reason of the plaintiffs' own neglect already referred to. On the matter of costs, I agree that the attitude taken very properly by the respondents' counsel at your Lordships' Bar has enabled us to do what, underneath all these transactions, may be considered to be a substantial act of justice.

Lord MERSEY.—My Lords: I concur.

Order appealed from affirmed, and appeal dismissed without costs.

Solicitors for the appellants, *Woodhouse* and *Davidson*.

Solicitors for the respondents, *Deacon* and *Co.*, for *Grange* and *Wintringham*, Great Grimsby.

Supreme Court of Judicature.

HIGH COURT OF JUSTICE.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Monday, Feb. 28, 1910.

(Before BARGRAVE DEANE, J.)

THE ASTRAKHAN. (*a*)

Collision—Warship—Damages for detention—Damage caused by docking vessel.

A Danish warship came into collision with a British steamship. The British steamship was found alone to blame. If there had been no collision the warship would have been docked and overhauled, but would not have been commissioned again for three months. Before the three months had elapsed the collision damage was repaired and the vessel was ready to be commissioned on the date she would have been if there had been no collision. The Danish Government claimed 1500*l. for the loss of use of the vessel, and a claim was also put forward for* 55*l.* 10*s. for repairs to the bottom of the Danish vessel. This repair had been rendered necessary by one of the blocks in the dry dock being upset when she was being dry docked. The registrar disallowed both items.*

Held, reversing the decision of the registrar, that the Danish Government were entitled to recover damages for the deprivation of the use of the vessel for the period during which she could have been repaired.

Held, further, affirming the decision of the registrar, that the damage caused to the vessel by the overturning of the block in the dry dock was not a consequence of the collision, but was caused by the negligence of those engaged in docking the vessel, and that it could not be recovered.

PETITION in objection to the report of the registrar.

The petitioners were the Danish Government, the owners of the third class cruiser *Heimdal*.

The respondents were the owners of the British steamship *Astrakhan*.

The collision between the *Heimdal* and the *Astrakhan* occurred on the 19th Feb. 1909.

An action was brought by the Danish Government, the owners of the *Heimdal*, against the owners of the *Astrakhan* to recover the damage

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

they had sustained. The action was tried on the 24th and 25th June 1909, the *Astrakhan* being found alone to blame for the collision, and the damage was referred to the registrar and merchants.

The claim for damages was heard by the registrar on the 16th Dec. 1909. The Danish Government, among other items, put forward a claim for 1500*l.* for the loss of the use of the vessel, and a claim for 55*l.* 10*s.* the cost of repairing certain damage done to the *Heimdal* by her sitting on a block which had been overturned in the dry dock by the collision mat being removed from the vessel after she entered the dry dock.

The following allegations were made before the registrar by the petitioners, the owners of the *Heimdal*:—

The *Heimdal* is a steel protected twin screw cruiser of 1341 tons displacement, belonging to the King and Government of Denmark. She was built in 1894 and cost 92,900*l.* At the time of the collision on the 19th Feb. 1909 she was fully equipped as a fighting ship and manned by a crew of 150 hands, and was returning to Copenhagen from a training cruise. She was struck by the stem of the *Astrakhan* and damaged, the compartment in the way of the damage being flooded. On the 20th Feb. the *Heimdal* was put into dry dock at Copenhagen to repair the collision damage. The repairs were carried out promptly and were not completed until the 29th May, the vessel being detained for ninety-nine days. During the repairs the petitioners paid 170*l.* a month as wages to officers and men to keep the *Heimdal* in order and 20*l.* a month for oil and coal. The depreciation in the value of the vessel in three months was alleged to be 550*l.* If there had been no collision the *Heimdal* would have gone to the naval dockyard at Copenhagen and effected such small repairs as were necessary after her cruise, and would have remained afloat in the dockyard ready to be commissioned. She could have been commissioned in forty-eight hours, and would have been ready for any purpose for which she might have been required. If not required for any other purpose she would have been commissioned on the 1st June for a summer training cruise, and after the collision repairs were finished she was commissioned for that cruise.

With regard to the claim for 55*l.* 10*s.* for the repair of the damage to the bottom of the *Heimdal* the evidence showed that shortly after the collision a collision mat was placed over the damaged part of the *Heimdal*, and was secured by means of chains passed under her bottom. The collision mat was not removed until the *Heimdal* entered the dry dock. Whilst the dry dock was being pumped out it was seen by a movement of the *Heimdal* that something was wrong. The pumping was therefore stopped the dock was refilled and a diver who was sent down found that one of the blocks had been displaced by the collision mat chain. The *Heimdal's* bottom which was not damaged before she entered the dry dock was afterwards found to have been set up and damaged by the displaced block.

The respondents, the owners of the *Astrakhan*, called evidence to show that the collision mat should have been taken off before she entered the dry dock, and contended that the damage caused by the overturned block was not a consequence of the collision. They further contended that the petitioners had suffered no loss through being deprived of the use of the *Heimdal* as the repairs were finished in time for her next cruise, and no additional expense had been incurred by reason of the collision.

On the 20th Dec. 1909, the registrar reported as follows:

In this case the claimants were the Government of Denmark, the injured vessel being the third class cruiser *Heimdal*. The collision occurred in the Sound on the 19th Feb. 1909. The *Heimdal* was then just completing a long winter cruise for the purpose of training conscripts, and, in ordinary course, would have been overhauled and dry docked and not put into commission until the 1st June, and then for the purpose of training cadets. During the interval, she would have been laid up in harbour, and, it was stated, had been regarded as a stand-by ship. But as no war occurred the Danish Government have not been deprived of her use as a vessel of war. As it was, the repairs were begun on the 26th Feb., but were not completed till the 29th May, and the *Heimdal* was then on the 1st June put into commission for cadet training in the ordinary course of her work and the Government—as regards the use of the vessel—was in exactly the same position as if no collision had taken place. The plaintiffs, however, claim damages for loss of use of the *Heimdal*, and the question therefore arises as to what loss, if any, has been caused to the Government of Denmark by the collision. It is admitted by the defendants that the Danish Government has suffered loss through the cost of the necessary repairs, but it is denied that it lost the use of the *Heimdal*, because she would not, if there had been no collision, have been used before the 1st June. The fact that the *Heimdal* is a ship of war does not, I think, prevent the plaintiffs from recovering damages for the loss of her use, if in fact a loss of use can be proved. In *The Marpessa* (1907) A. C. 241) Lord Loreburn said in regard to a claim in respect of a dredger, "she earns nothing and costs a great deal, but she does indispensable service in clearing away the sand," and in the same case Lord Loreburn pointed out that *The Greta Holme* (1897) A. C. 597) showed that damages could be recovered in respect of the loss of the use of a non-commercial vessel, which, though it made no money, rendered services. As I have stated elsewhere (see Damages in Collision Cases, p. 84), actual money damages were before 1897 refused to harbour authorities and similar bodies in respect of the loss of the use of their vessels, because they could not show actual pecuniary damage. But in the cases which have corrected this view there has always been an actual loss of use of the injured vessel. In the present case I find as a fact on the evidence that there has been no loss of use of the *Heimdal*. The basis of the head of claim for damages for loss of use of the *Heimdal* therefore is not established. It is unnecessary for me to enter into hypothetical cases in regard to warships; it is sufficient to deal with the facts of the present case, the first—it may be observed—in the Admiralty Court, in which a ship of war has claimed damages for loss of time. Item four of the claim is therefore rejected. It may be desirable to say that had I arrived at a contrary opinion I should, on the principles of assessment stated by Lord Gorell in *The Marpessa* (1906) P. 14), have assessed the damages of the Danish Government at 400*l.* A small item of 55*l.* for damages to the bottom of the vessel whilst docking was also in dispute. This damage is not sufficiently contemporaneous in point of time to the collision to make it one of those circumstances which must, under the decisions, be presumed to be attributable to the collision, and it is not clear from the evidence that this claim is sufficiently proved to be held to be a reasonable consequence of the collision.

The registrar disallowed the costs of the witnesses called to prove the detention and damage.

On the 21st Dec. 1909 the Danish Government gave notice of objection to the registrar's report.

On the 31st Jan. 1910 the Danish Government filed a petition in objection to the report of the registrar, and on the 19th Feb. the owners of the *Astrakhan* filed an answer.

The petition came on for hearing before the court on the 28th Feb. 1910.

Laing, K.C., *Batten*, K.C. and *C. R. Dunlop* for the petitioners, the Danish Government.—The plaintiffs are entitled to damages for the deprivation of the use of their vessel. The vessel was detained to be repaired. The repairs were effected as quickly as possible, and they took ninety-nine days to do. If there had been no collision the vessel would have been overhauled and could have been made ready for sea in forty-eight hours. Even if an owner is not out of pocket, he is entitled to damages for the loss of the use of his vessel:

The Greta Holme, 77 L. T. Rep. 231; 8 Asp. Mar. Law Cas. 317; (1897) A. C. 596.

And he is entitled to more than nominal damages:

The Mediana, 82 L. T. Rep. 95; 9 Asp. Mar. Law Cas. 41; (1900) A. C. 113.

The fact that the vessel is a warship and cannot earn money has no effect on the owners' right to damages:

Clyde Bank Engineering and Shipbuilding Company v. *Don Jose Ramos Yzquierdo Y. Castaneda*, 91 L. T. Rep. 666; (1905) A. C. 6, at p. 12.

The principles on which the damages should be awarded in this case are laid down in

The Marpessa, 97 L. T. Rep. 1; 10 Asp. Mar. Law Cas. 464; (1907) A. C. 241.

If those principles are applied in this case the petitioners should receive 1100*l.*, not 400*l.* as suggested by the registrar. The damage to the bottom of the vessel should be allowed, for the collision mat was properly put on the vessel after the collision, and the damage was caused by its removal.

Aspinall, K.C. and *D. Stephens* for the respondents, the owners of the *Astrakhan*.—No loss was caused to the Danish Government by their being deprived of the use of this vessel. She never would have been used until the 1st June. The repairs were completed in May; no extra expense other than that allowed by the registrar was incurred. The principle to be followed is *restitutio in integrum*. If the petitioners receive more than the registrar has allowed that principle will be broken, for they will make a profit out of the wrong done them. Damages were given in *The Mediana* (*ubi sup.*) because her owners would have had to have supplied another vessel while she was being repaired. If no damage has been sustained, no money can be recovered as compensation:

The Rutland, 8 Asp. Mar. Law Cas. 497, note (*a*); (1896) P. 195, n.

Where a vessel was being worked at a loss to attract custom general damages for the deprivation of the use of the vessel were refused:

The Bodlewell, 96 L. T. Rep. 854; 10 Asp. Mar. Law Cas. 479; (1907) P. 286.

Damages for the detention of a vessel can only be recovered where there has been actual loss and reasonable proof of the amount of it:

The City of Peking 63 L. T. Rep. 722; 6 Asp. Mar. Law. Cas. 572; 15 App. Cas. 438.

Damages were given in the case of *The Mediana* because an actual loss was proved and proof of the amount of it was given. The 55*l.* 10*s.* cannot be recovered, as that damage was caused by negligence in docking with the collision mat on the vessel.

Laing, K.C. in reply.—*The Mediana* (*ubi sup.*) and *The Greta Holme* (*ubi sup.*) clearly show that general damages may be given for the loss of use of a chattel. The amount to be recovered depends on the circumstances of the case. In *The Bodlewell* (*ubi sup.*), general damages could not be given for there was no evidence as to the amount of them, but in this case the *Heimdal* was detained for ninety-nine days instead of forty-eight hours. The reason why damages for detention were not given in *The City of Peking* (*ubi sup.*) was because they had been allowed in another form: (see *The Mediana*, (1900) A. C. 113, at p. 119). *The Rutland* (*ubi sup.*), if not distinguishable, is overruled: (see *The Mediana*, (1899) P. 127, at p. 139).

BARGRAVE DEANE, J.—This case is really a new point grafted on old cases. I am not aware that there has ever been a case like this before in which, in a collision with a warship, a claim has been made for demurrage for that warship after the collision. However, I will deal with it on its own merits. Cases have been quoted of merchant ships which have made a claim for demurrage whilst under repairs, of dredgers which have been injured when working, and which have been allowed demurrage whilst under repairs, of a lightship also, and in all those cases the vessels in question were actually employed at the time they were damaged in the several services in which they were owned, and it has been a sort of rule of late years to recognise the fact, as put by Lord Halsbury in *The Mediana* (*ubi sup.*) that, if you improperly deprive an owner of the power to use a chattel you must pay him damages for that wrongful deprival of the use. But in every case you have to assess damages, and the whole question is, What is the evidence on which you can assess damages? Of course, it stands to reason that a warship may be employed on service and have to be replaced, in which case she comes in the same category as these other vessels. On the other hand, she may not be required, and we know now that a very large number of His Majesty's ships are laid up and are practically not in use at all. But in this particular case the *Heimdal*, the Danish man-of-war, had been on a cruise with conscripts, she had got within a few miles of Copenhagen, her inspection had taken place, the admiral was on board to witness the inspection, and she was on her way back to the dockyard at Copenhagen, where, in the ordinary course, she was to be laid up till the 1st June, the Danish Government having no use for her during that time. She was damaged, and there is not the least doubt that, so far as the damage is concerned, she is to be allowed the expenses of repairing the damage; but the registrar has been asked to assess a sum of money, which is put in the claim as 1500*l.*, for the loss of the use of this

vessel—I do not know from when to when—during the time when she was under repair. There is nothing before the court to show the detail of the loss of her user, but I have just asked the registrar a question which seems to me to be necessary, and that is, upon what principle he assessed the sum of 400*l.* mentioned in his report, and he tells me that he came to the conclusion that it would have taken about thirty-two days to repair this vessel, and that by that time she might have been restored into the hands of the Danish Government in case they wanted her, and he has taken one-third of the whole time alleged, and he allowed the sum claimed for demurrage at 400*l.* That seems to me to be a very reasonable way of looking at the matter, assuming he was entitled to allow anything. But I have to ask myself, in this peculiar case, did the Danish Government lose anything by this vessel being laid up for repairs? It is said that she would, in any event, have been laid up; but, the unforeseen might have happened, and I think in all these cases you should look to see what is the potential use which the Danish Government had for this vessel. Their potential use was to have her under their control to use if they wanted her; they might have wanted her for Royal purposes, to conduct Royalty about from some place to another, or to receive Royalty, or for fishing purposes, or for any unforeseen purpose which you may imagine. The Government would not have been able to make use of her if these things happened. I do not think I ought to wait, and say "I must be satisfied that it was required." If you deprive the owner of the use of a thing, it is not necessary to show that he would have used it, but if you put it out of the power of the owner to use it, then, according to Lord Halsbury's reasoning in *The Mediana*, I think you have to pay damages for that. In my opinion the registrar has come to the conclusion of fact that thirty-two days were sufficient for the repair of the vessel, and that being the case, I have got to do something different from what he has done, because, as I understand the evidence, it would have taken from a week to ten days to get this vessel into a seagoing condition before she would have been at the service of the Danish Government after her cruise, and, therefore, if I take ten days from thirty-two, that leaves twenty-two, and I shall direct the registrar to assess such an amount as he may think represents twenty-two days' deprivation of the use of the *Heimdal*, which will be something under 400*l.*

The next item is this question of 55*l.* 10*s.* The vessel having been struck on the starboard side a collision mat was put over the wound to take off the pressure from a longitudinal bulkhead, and that collision mat was put over the wound by means of a chain which passed down one side under the bottom and up the other, and by means of which the collision mat was hauled down from one side to the place where it was wanted. With that collision mat on she seems to have been placed in dry dock, but before the water was pumped out and she settled down on the blocks this collision mat was hauled up again, but the chain seems to have been left, and, whether it was by the hauling up of the collision mat or by the slack of the chain being left, before the vessel grounded on the blocks one of the blocks got moved and put up on end, the result of which was that when the vessel settled down on the blocks her keel plate got set up some 2in., and that caused an extra damage to the vessel, over and above that caused by the collision, of 55*l.* 10*s.* The registrar has said that that was not sufficiently contemporaneous in point of time to the collision. I agree it was not contemporaneous with the collision, but I do not quite think that that is the way to look at it. I think the way to look at it is, was it so much the result of the collision that you may include it in the general damage. In my opinion it was in no way the result of the collision; it was the result of carelessness in letting the water out of the dock without first seeing that the taking up of the collision mat had or had not affected the position of the block. I do not think that you can attach any blame to the wrongdoing ship in the collision for that damage which ensued in the dock. Therefore I think the registrar was right in disallowing the 55*l.* 10*s.* The other item is a sum, I do not know what the amount is, the cost of the witnesses called on behalf of the Danish Government on these various questions. I certainly think it was right to call those witnesses for the purpose of proving what was going to be done with the vessel, and what was her service, and what was her condition, and so on, but I do not think all should be allowed; I think something should be taken off, if it can be separated—I do not know whether it can—with reference to this question of the 55*l.* 10*s.* I send it back to the registrar to settle the figures, and, subject to that, I confirm his report, or vary it, on the points which I have just mentioned. I shall leave each party to pay his own costs.

Solicitors: for the petitioners, *Stokes* and *Stokes*; for the respondents, *Thomas Cooper* and *Co.*

March 11 *and* 12, 1910.

(Before BARGRAVE DEANE, J. and Elder Brethren.)

THE ABERDONIAN. (*a*)

Collision—Whistle signals—Directing a course—Collision Regulations 1897, *art.* 28.

Where shortly before a collision the engines of a steamship were reversed and three blasts sounded, and, in order to counteract the influence of her reversed engines and keep her head straight, her helm was hard-a-ported, but her whistle not sounded one short blast, it was held that she had not infringed art. 28 *of the Collision Regulations.*

DAMAGE ACTION.

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

The defendants were the owners of the steamship *Aberdonian.*

The case made by the plaintiffs was that shortly before 2.5 p.m. on the 5th Jan. 1910 the *Holmwood*, a steel screw steamship of 1327 tons gross and 850 tons net register, was in the North Sea between Aldeburgh Napes and the Shipway Channel in the course of a voyage from Dunston to London with coals, manned by a crew of

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

seventeen hands all told. The wind was about S. W., a moderate breeze, the weather hazy, and the tide flood of from one to two knots force. The *Holmwood* was on a course of S. W. ½ S. magnetic, making about seven to eight knots an hour and a good look-out was being kept on board her.

In these circumstances those on board the *Holmwood* sighted the *Aberdonian* about a mile away and right ahead. The *Aberdonian* was approaching end on to the *Holmwood* and shortly afterwards the helm of the *Holmwood* was ported and her whistle sounded one short blast. The vessels were then brought into a position to pass all clear port side to port side and the helm of the *Holmwood* was then steadied, but shortly afterwards the *Aberdonian* sounded two short blasts on her whistle and was seen to be altering under a starboard helm. The engines of the *Holmwood* were immediately stopped and reversed full speed astern, her whistle was sounded three short blasts, and her helm was put hard-a-port to keep her as straight as possible while her engines were reversing, but the *Aberdonian* still coming on under starboard helm with her stem and port bow struck the port side of the *Holmwood* just abaft the upper bridge with such force that the *Holmwood* immediately began to fill, and soon afterwards capsized and sank.

Those on the *Holmwood* charged those on the *Aberdonian* with not keeping a good look-out; with neglecting to alter her course to starboard to pass the *Holmwood* on the port side; with crossing ahead of the *Holmwood*; and with failing to slacken her speed, or stop or reverse her engines in time or at all.

The casé made by the defendants and counter-claimants was that, shortly before 2 p.m. on the 5th Jan. 1910 the *Aberdonian*, a steel screw steamship of 1647 tons gross and 747 tons net register, manned by a crew of forty hands, was in the North Sea, off Orford Ness, in the course of a voyage from London to Aberdeen, with general cargo and passengers. The wind at such time was south-westerly light, the weather slightly hazy, and the tide flood of about a knot an hour. The *Aberdonian* on a course of N E ¾ N magnetic was making about twelve knots an hour and a good look-out was being kept on board her. In these circumstances the *Holmwood* was seen about a point on the starboard bow about three quarters of a mile away, shortly afterwards the helm of the *Aberdonian* was starboarded a little, and two short blasts were given on her whistle. The *Holmwood* at once replied with two short blasts, and the helm of the *Aberdonian* was steadied, but shortly afterwards as the *Holmwood* appeared to be closing in the whistle of the *Aberdonian* was again blown two short blasts, and as the *Holmwood* was seen to be acting under port helm the engines of the *Aberdonian* were instantly rung full speed astern and her helm put hard-a-starboard three short blasts being blown on her whistle, but the *Holmwood* came on at high speed, swinging to starboard, and with her port side amidships came into collision with the stem of the *Aberdonian*, doing damage.

Those on the *Aberdonian* charged those on the *Holmwood* with not keeping a good look-out; with failing to keep her course; with failing to act in accordance with her whistle signal; with failing to ease, stop, or reverse their engines in due time; and with improperly porting.

Art. 28 of the Collision Regulations is as follows:

28. 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., one short blast to mean "I am directing my course to starboard."

Aspinall, K.C. and *A. D. Bateson* for the plaintiffs.

Laing, K.C. and *Lewis Noad* for the defendants.

BARGRAVE DEANE, J.—In this case a collision took place in the afternoon, at about two o'clock on the 5th Jan. in this year, between the steamship *Aberdonian*, bound from London to Aberdeen with cargo and passengers, and the *Holmwood*, a steamship bound from the Tyne to London with coal. Each accuses the other of being in fault for the collision. The case is one entirely of fact. There may be a question of law involved, but the main question is one of fact. The two vessels were bound on almost exactly opposite courses. The *Holmwood* was on a S.W. ½ S. course, and the *Aberdonian* was on a N.E. ¾ N. course. When sighted, according to the *Holmwood*, the *Aberdonian* was right ahead, with her mast and funnel in line, showing both bows, and according to the *Aberdonian* the *Holmwood*, when sighted, was a little on the starboard bow. The speeds of the two vessels at that time were—the *Aberdonian* twelve knots and the *Holmwood* seven to eight. That gives a joint speed of about a mile in three minutes. The distances that they were seen apart are, according to the *Holmwood* a mile, and according to the *Aberdonian* three quarters of a mile. There has been some suggestion made, chiefly on behalf of the *Aberdonian*, that the weather was misty, but I think from the whole of the evidence that it was quite clear, that the weather was such that these vessels were justified, both of them, in going at full speed as they were doing. There is a dispute as to what sound signals were given and heard. The wind was S.W., and, although a light breeze, favourable to sound signals being heard by the *Holmwood* more readily than by the *Aberdonian;* but I do not think there was anything in the wind really to interfere with the hearing of sound signals if properly given and listened for. The story of the *Holmwood* is that on sighting a vessel a mile off the officer on the watch took out his glasses from his pocket and satisfied himself that the vessel was right ahead, with her funnel and masts in line, coming straight for him. He thereupon, in accordance with art. 18, ported his helm, and, he said, blew one blast of his whistle. The *Aberdonian* never seems to have heard that one blast. She says she never heard a single blast from the *Holmwood*. Undoubtedly, according to the *Holmwood's* evidence, she blew first. Now, was that porting on the part of the *Holmwood* observed by the officer of the watch on the *Aberdonian?* His evidence is peculiar. He says: "I noticed this vessel. She was sheering slightly, sometimes to starboard, and sometimes to port,

and she was about a point on our starboard bow. I blew two blasts and starboarded for her." Why did he do that? It was contrary to art. 18. It is not that he said he heard a signal of two blasts from her. He heard nothing from her, and starboarded for a vessel very nearly ahead of him. He ought to have ported. He says he gave two blasts and the other vessel responded with a two-blast signal. Now, that is denied by the *Holmwood*. The *Holmwood's* story is that, having ported, she steadied; that she was then on the port bow of the *Aberdonian;* that then, in response to her one-blast signal, the *Aberdonian* starboarded; and that, seeing the *Aberdonian* was starboarding into her, the *Holmwood* blew three blasts and reversed, and at the same time put her helm hard-a-port—as the officer on the watch, who had been in the ship for some time, says, in order to prevent her going to starboard—not, he says, to send her to starboard, but to check the reverse action of the engines. He knew his ship, and I suppose the action of the propeller going astern varies in different ships. Still, in this case the man has told us that he did not put helm hard-a-port to send her head off to starboard, but for another reason. In spite of that, the *Aberdonian* came on, and there was a very serious collision. I believe about a minute before the collision the *Aberdonian's* engines were ordered to be put full speed astern, but in the opinion of the court that did not seriously reduce her speed, and this vessel, going at a very considerable speed, not less than about nine knots—she says only six—ran into the port side of the *Holmwood*, abaft the bridge, and sank her. Fortunately no lives were lost.

First of all, is there any blame I can attach to the *Holmwood*? She was right in porting. Did she blow a single blast? I believe she did. She then steadied, having brought the other vessel on her port bow, and she says, "We were then port to port, and if the *Aberdonian* had kept her course we should have passed port to port; but when I saw the *Aberdonian* starboarding into me there was nothing more for me to do but reverse, which I did; and I did not blow one blast when I ported my helm, because I did not intend my head to go to starboard." It is said the *Holmwood* was to blame for not blowing another blast after blowing three, because she put her helm to port. It is said she ought to have blown "3 and 1," but I think it would be very confusing if this vessel had blown three short blasts and then one short blast. That is a signal known in the Thames for a vessel turning round, but what would it have meant to a vessel in the open sea? I do not think it is a signal which, in the circumstances, would have conveyed much to the *Aberdonian*, but even if the *Holmwood* had blown a single blast, in my opinion at that time there was no possibility of the *Aberdonian* doing anything. She had been committed to her starboard helm and she put her helm hard-a-starboard at the last moment, but she did not blow the extra two blasts when she put her helm hard-a-starboard. She ought to have blown "3 and 2" if the defendants' contention is right, and that would have been very confusing to the *Holmwood*. In my opinion the *Holmwood* was not to blame for any action she took, or for the omission to blow that one blast at the last moment to indicate that she was directing her course to starboard, when in fact she was not, according to her evidence, doing anything of the sort. The *Aberdonian* says this: "I never heard one blast from the *Holmwood*. I heard two, and that was after I blew two." The fact is that the *Aberdonian* did not hear the single blast before, and when she blew two the *Holmwood* blew three, which was misheard on the *Aberdonian* and was supposed to be two. She heard nothing more except that signal. Now, I think that the *Aberdonian* was to blame, first of all for starboarding instead of porting under art. 18. But apart from the article, the evidence of the chief officer of the *Aberdonian*, who was in charge on the bridge, was this. He said: "I saw this vessel being badly steered, and I starboarded Notwithstanding that in answer to my two-blasts signal she blew two, I saw that she was directing her course, not to port, but to starboard, which indicated she was under port helm. I saw that instead of broadening on my bow she was narrowing"; and, notwithstanding that, he persisted in his course of starboarding, and he did not reverse till a time so late that it was impossible to take the speed off the vessel to any serious extent. I think the engine-room staff say the engines were actually going astern some half minute before the collision. In my opinion the conduct of the *Aberdonian* was not justified. A vessel going at great speed at the time in question should not have allowed herself to get so close and should not have starboarded in the way she did. For these reasons I am of opinion that the *Holmwood* is not to blame, and the *Aberdonian* is alone to blame.

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

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

KING'S BENCH DIVISION.

Jan. 14 *and* 17, 1910.

(Before HAMILTON, J.)

CALCUTTA STEAMSHIP COMPANY LIMITED *v.* ANDREW WEIR AND CO. (*a*)

Charter-party — Bill of lading — Exemptions from liability—"Without prejudice to this charter-party"—Charterer indorsee of bill of lading—Rights and liabilities of charterer and shipowner.

A charter-party provided that a ship should proceed to a port of loading and there load a cargo and therewith proceed to a port of discharge in the United Kingdom for a lump sum freight. It further provided that the captain was to sign bills of lading at any rate of freight without prejudice to the charter-party, but not below the charter-party rate. In the event (which, in fact, happened) of the charterers or their agents being unable to have or not have ready for signature all or any bills of lading at any port or ports by the time the ship was ready to sail, it was provided that the charter should constitute the owners' authority for the charterers' agents to sign in the captain's name all unsigned bills of lading in conformity with mate's receipts. In the event of receivers of cargo withholding payment of bill of lading

(*a*) Reported by LEONARD C. THOMAS, Esq., Barrister-at-Law.

freight, the amount so withheld was to be deemed to have been deducted from the lump sum freight and not from any portion of the freight belonging to the charterers, and the shipowners were to take any steps necessary to enforce payment by the receivers of cargo of the amount so withheld; the captain and the shipowners were to have a lien on cargo by bill of lading for freight; and the charterers' liability was to cease on shipment of cargo, provided the same was worth the lump sum freight. The bill of lading contained exceptions from liability which were different from those contained in the charter-party.

When the ship arrived at the port of loading, a shipper shipped a cargo of dates, for which he received a bill of lading signed in accordance with the terms of the charter-party by the charterers' agents at the port. While the ship was on her passage to the port of discharge, the charterers' agents made an advance to the shipper on the security of the bill of lading which was indorsed to them. The charterers presented the bill of lading at the port of discharge and received the dates, which were found to be damaged.

In a claim by the charterers to deduct from the lump sum freight a sum equal to the depreciation in value of the goods caused by the damage:

Held, that, the goods not being shipped by the charterers themselves under the charter-party, the bill of lading contained the terms of the contract of carriage; that the charter-party was therefore not prejudiced by the bill of lading; and therefore, if the goods were damaged by causes for which the bill of lading exempted the shipowners from liability, the charterers were liable to pay the lump sum freight in full.

Commercial Court.

Action tried by Hamilton, J., sitting without a jury.

The plaintiffs, owners of the steamship *Calcutta*, sued the defendants, who were the charterers of the ship, to recover 236*l.* 13*s.* 6*d.*, balance of a lump sum freight alleged to be due under the charter-party.

The following were the material clauses of the charter-party, which was dated the 23rd Oct. 1908:

1. It is mutually agreed between the Steamship Calcutta Company Limited, owners of the steamship or vessel called the *Calcutta*, now at Bombay, . . . and A. Weir and Co. that the said ship, being tight, staunch, and strong, and every way fitted for the voyage, shall . . . proceed to Busreh and there load, always afloat, as ordered, a cargo of lawful merchandise, and therewith proceed to a safe port in the United Kingdom or so near thereunto as she can safely get as ordered by charterers to discharge.

2. The steamer to discharge, always afloat, agreeably to bills of lading at any wharf, river, berth, or dock as ordered by charterers or their agents. Freight to be a lump sum of 4200*l.* . . . based on a guarantee by the owners that the steamer can load a dead weight cargo of 5600 tons over and above coals, stores, and provisions on board and be within Lloyd's rules, and that not less than 317,500 cubic feet grain space as per builders' plan will be placed at charterers' disposal for cargo, otherwise a *pro rata* reduction to be made.

3. . . . In the event of receivers of cargo withholding payment of bill of lading freight on account of short delivery or damage claims, the amount so withheld shall be deemed to have been deducted from the aforesaid lump sum freight and not from any portion of the freight belonging to charterers, and the accounts between owners and charterers shall be adjusted accordingly, and the owners shall take any steps necessary to enforce payment by the receivers of the amount so withheld.

4. . . . The captain to sign bills of lading at any rate of freight without prejudice to this charter-party, but not below charter-party rate, but should charterers or their agents be unable to have or not have ready for signature all or any bills of lading at any port or ports by the time the ship is otherwise ready to sail, it is agreed that this charter shall constitute owners' authority for charterers' agents to sign in the captain's name all unsigned bills of lading in conformity with mate's receipts, which shall be granted in due course. . . .

5. The captain and owners to have a lien on cargo by bill of lading for freight, dead freight, and demurrage. . . .

12. The ship to be addressed to charterers' agents (whom owners accept as agents of the vessel) at ports of loading and discharge. . . .

17. . . . Charterers' liability to cease on shipment of cargo provided same is worth the freight.

The *Calcutta* sailed from Bombay under this charter and arrived at Busreh, where she was put up as a general ship, and received on board 1031 boxes of dates, shipped by one Jacob Noats under a bill of lading dated at Busreh on the 25th Nov. 1908, which contained the following provisions:

Shipped apparently in good order and condition at Busreh by Jacob Noats on board the steamship *Calcutta* . . . bound for London the under-mentioned goods . . . J. N. 1031 cases dates stated as being marked and numbered as herein indicated, 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 order or to his or their assigns. Freight and primage for the said goods to be paid in cash on arrival, without deduction, at 15*s.* per ton of 20cwt. or 40 cf. at steamer's option, and to be considered earned, ships or goods lost or not lost. Average payable according to York-Antwerp Rules 1890. . . .

The bill of lading contained a number of exceptions, limitations, and conditions relieving the shipowners from liability, which were not contained in the charter-party. It provided that the mate's receipts were to be evidence of the quantity and the condition in which the goods were received by the shipowners from river steamer and craft. The bill of lading, which conformed with the mate's receipts, was signed by one Khedery, the defendants' agent at Busreh, and was signed for and on behalf of the master pursuant to the authority given by clause 4 of the charter-party to the charterers' agent to sign bills of lading in the captain's name.

On the 11th Dec., while the vessel was at sea, Khedery, on behalf of the defendants, made an advance, or agreed that an advance should be made, to Noats. The advance was in the form of a draft for 200*l.* drawn by Khedery upon the defendants in favour of Noats, which was handed to him, and he indorsed and handed to Khedery as security for the advance the bill of lading relating to the boxes of dates. The defendants therefore became pledgees of the dates. They

subsequently made a further advance of 100*l.* to Noats.

When the *Calcutta* arrived in England the bill of lading was presented by the defendants, who occupied the dual position of pledgees and also agents of Noats for the sale of the dates for him on consignment. The goods were delivered under the bill of lading, when they were found not to be in good order and condition. The plaintiffs claimed the lump sum freight under the charter-party. The defendants admitted the claim subject to a counter-claim for 236*l.* 13*s.* 6*d.*, which they claimed to deduct for damage alleged to have been done to the goods on the voyage. The plaintiffs called evidence to prove that the dates were not in fact in good order and condition when shipped, and that the damage was not sustained on the voyage, and alternatively they contended that the goods were shipped under the bill of lading, the exceptions in which exonerated them from liability for any damage sustained during the voyage. The defendants called evidence to prove that the goods were shipped in good order and condition, and that they had sustained damage on the voyage, and they contended that their rights were governed by the charter-party and not by the bill of lading, and that therefore the plaintiffs were not exempt from liability. Leave was given at the trial for the defendants to deliver a pleading which alleged that the vessel was unseaworthy in regard to the position in which the dates were stowed. It was admitted that if the plaintiffs were entitled to rely on the terms of the bill of lading, the exceptions afforded an answer to the defendants' claim for damage to the dates; and it was also admitted that if the terms of carriage were those contained in the charter-party, the exceptions therein afforded no answer to that claim.

Scrutton, K.C. and *Mackinnon* for the defendants.—If the goods were in fact shipped in good order and condition, the charter-party is the document which governs the mutual rights and liabilities of the shipowners and charterers. The effect of clause 4 of the charter-party is that a bill of lading given under its provisions constitutes a contract of carriage between the charterers and the shipper. The bill of lading, even if signed by the captain, was to the knowledge of the shipper signed by him as the agent or servant of the charterers. The bill of lading was in fact signed by the charterers' agents, although expressed to be signed for and on behalf of the captain. The charterers were the agents of the shipper for the sale of the cargo on consignment, and made an advance on the cargo. The cargo was in substance the charterers', and, if that is so, the bill of lading is merely a receipt for the cargo, and its exceptions do not protect the shipowners:

Rodocanachi v. *Milburn*, 6 Asp. Mar. Law Cas. 100 (1886); 17 Q. B. Div. 316; 18 Q. B. Div. 67;
Kruger v. *Moel Tryvan Shipping Company*, 10 Asp. Mar. Law Cas. 310, 416, 465 (1907); 97 L. T. Rep. 143; (1907) A. C. 272.

If the cargo was the shipper's, the bill of lading constituted a contract of carriage between him and the charterers, in which case the shipowners cannot rely on the exceptions, as they are not parties to the contract. If the bill of lading constituted a contract of carriage between Noats and the shipowners, the charter-party provided in clause 4 that the bills of lading were to be signed "without prejudice to this charter-party," and these words mean that, whatever terms may be contained in the bill of lading, the charter-party contract is not to be altered by them:

Hansen v. *Harrold Brothers*, 7 Asp. Mar. Law Cas. 464; 70 L. T. Rep. 475; (1894) 1 Q. B. 612;
Turner v. *Haji Goolam Mahomed Azam*, 9 Asp. Mar. Law Cas. 588; 91 L. T. Rep. 216; (1904) A. C. 826.

Consequently the shipowners are not excused from liability by any exemption not contained in the charter-party, and are therefore liable for the injury done to the goods.

Bailhache, K.C. and *Raeburn* for the plaintiffs.—Assuming that the cargo was damaged on the voyage by causes for which the bill of lading exempted the shipowners from liability, it is clear from clause 3 of the charter-party that the charter-party may be prejudiced by the bill of lading where the receivers of cargo, in this case the defendants, withhold payment of the bill of lading freight, which they are withholding to a certain extent, and in that case the shipowners may take any steps necessary to enforce payment by the receivers of the amount so withheld. The relations between the various parties must be determined upon the documents and circumstances of the case:

Samuel v. *West Hartlepool Steamship Company*, 11 Com. Cas. 115.

In the present case the inference must be that Noats was the shipper, that the cargo was his, that the bill of lading was signed for and on behalf of the captain, and that it constitutes the contract of carriage between Noats and the plaintiffs. By virtue of the Bills of Lading Act 1855 (18 & 19 Vict. c. 11), the indorsee has transferred to him all such rights of suit and is subject to the same liabilities in respect of the goods as if the contract contained in the bill of lading had been made with himself, and it makes no difference where the indorsees happen to be the charterers. The words "without prejudice to this charter-party" only mean without prejudice to the rights and liabilities of the parties with respect to acts done under the charter-party:

Gledstanes v. *Allen*, 12 C. B. 202.
Shand v. *Sanderson*, 28 L. J. 278, Ex.
Kruger v. *Moel Tryvan Shipping Company* (*sup.*).

Where the goods are shipped under a charter-party, the terms of the charter-party, and not those of the bill of lading, govern the mutual rights of the charterers and shipowners:

Hansen v. *Harrold Brothers* (*sup.*).
Turner v. *Haji Goolam Mahomed Azam* (*sup.*).

The goods in this case were not shipped under the charter-party, but under the bill of lading, and it cannot therefore be said that the bill of lading prejudices the charter-party: one instrument deals with the hire of the ship and the other with the carriage of the cargo. If the goods had been in fact shipped under the charter-party, it would then have been the governing instrument. As by the terms of the bill of lading the plaintiffs as between themselves and the shippers were not liable for the damage, and by indorsement of the bill of lading to the charterers the latter take the place of the shipper, the plaintiffs are therefore not liable for the damage to the goods.

Scrutton, K.C. in reply.

Hamilton, J.—This action, which raises a number of points of law, some of which are apparently not covered by direct authority, and also a number of questions of fact, very difficult at first sight, is brought by the owners of the steamship *Calcutta* against the charterers for a balance of freight due under the charter-party. The defendants admit the claim, subject to their counter-claim, and they claim for damage to goods on board the vessel. The counter-claim has been stated to be meant to cover, and must be taken to cover, a claim alternatively for breach of the charter-party, and a claim in tort in respect of damage to the cargo. It has been agreed that the amount of the damage on the counter-claim, if any, is the amount of the claim, 236*l.* 13*s.* 6*d.* The defence to the counter-claim, all the facts being traversed, is that the liability, if any, is one which arises under a bill of lading originally granted to Jacob Noats, and the exceptions contained in that bill of lading are a complete answer to the facts alleged, even if they are proved. Leave has been given to deliver a reply to that defence, which apparently was not thought to be of sufficient importance to be advanced until the last moment. The reply alleges that the vessel was unseaworthy in respect of the position in which the cargo was stowed in the vessel, and it was delivered on the 14th Jan. 1910. The charter-party, dated the 23rd Oct. 1908, is between the plaintiffs, as owners of the vessel, and the defendants, Messrs. Andrew Weir and Co. It contains a provision of the ordinary type for a cesser of the charterers' liability on shipment of the cargo. The cargo is to be loaded at the Busreh bar and Bushire, or other places in the Persian Gulf, and it is a general cargo to be carried to the United Kingdom. It contains a provision (clause 4) in these words: "The captain to sign bills of lading at any rate of freight without prejudice to the charter-party, but not below charter-party rate, but should charterers or their agents be unable to have or not have ready for signature all or any bills of lading at any port or ports by the time the ship is otherwise ready to sail, it is agreed that this charter shall constitute owners' authority for charterers' agents to sign in the captain's name all unsigned bills of lading in conformity with mate's receipts." The vessel having gone to Busreh, there were received on board, on the 24th Nov. 1908, 1031 boxes of dates, for which the mate signed in good order and condition. They were, in fact, dates in boxes, which were covered with gunnies, having been packed originally with reference to the Australian and not the United Kingdom market, and the mate says, as indeed the receipt would show, that they were, as far as the appearance of the cases were concerned outwardly, in good order and condition. For some reason, and I have no doubt pursuant to the authority given to them by clause 4 of the charter-party, the bill of lading when signed was signed by Khedery for and on behalf of the master, Khedery being the agent at Busreh of Andrew Weir and Co., regularly acting for them there, and the bill of lading states the shipment apparently in good order and condition by Jacob Noats, I think his name is, and it is dated the 25th Nov. 1908. The charter-party is quite the ordinary type. I think it is quite clear from the nature of the business that if the captain had been available he would have signed the bill of lading, and he would have done so at the request of Khedery as agent for the charterers, Andrew Weir and Co. No doubt it is the case that Noats shipped his cargo upon the introduction of the charterers, and very likely after some previous arrangement had been made between them as to the terms of freight and otherwise to be contained in the bill of lading, which is in Andrew Weir and Co.'s usual form. I have been invited in the first instance to say that the bill of lading constitutes a contract of carriage between Andrew Weir and Co. and Noats, and that the shipowners, the plaintiffs, are not parties to it. It is no doubt, I think, the case that although transactions by charter and sub-charter, time charter and sub-time charter, and by way of charter and bill of lading fall into a number of quite well recognised types, in each case it is necessary for the judge, in the words of Walton, J. in *Samuel* v. *West Hartlepool Steamship Company* (*sup.*), to determine for himself on the documents and circumstances of the case whether the contract for the carriage of the cargo is made with the charterers or with the owners. I am quite satisfied personally that the signature of that bill of lading by Khedery, which was expressed to be for and on behalf of the master, had the same effect as if the master had signed it, and it caused a contract to arise by way of bill of lading between the shipowners and Noats, who was in fact, as I find, the shipper of the goods. There is no fact whatever proved before me to show anything contrary to that, which I think would be the ordinary inference from the documents in the ordinary course of business. The goods having been shipped by Noats, at a date when the vessel was at sea somewhere down the Persian Gulf, as I gather—namely, on the 11th Dec.—Khedery, on behalf of Andrew Weir and Co., made an advance, or agreed that an advance should be made, to Noats on those dates, and he took the bill of lading, which was, I assume—I have not seen the original—duly indorsed by Noats, and advanced him 200*l.* as per his letter, which I suppose is his advice to his principals, and he handed to Noats a draft drawn by him on Andrew Weir and Co. in Noats' favour. Accordingly, on the 11th Dec., Andrew Weir and Co. became pledgees of the goods of which the symbol was this bill of lading. They subsequently made a further advance of, I think, another 100*l.* When the ship arrived in this country the bills of lading were presented by Andrew Weir and Co. They occupied at that time the position both of pledgees and also of agents for Noats to sell dates for him on consignment, but they presented the bill of lading, and the goods were delivered under the bill of lading. So far as I know, no question then arose as to the charter-party except this, that when the claim for freight arose it was a claim for freight, as far as these goods are concerned, to which the answer made was that Messrs. Andrew Weir and Co. were entitled to make a deduction for the damage which, by that time, it was found the goods had sustained. The claim made in the action, and the claim paid, so far as payment was made, was a claim for the lump sum freight as determined by the terms of the bill of lading. Now, it was discovered that the goods were in fact not in good order and condition. Dates are

regularly shipped to this country in very large quantities and arrive perfectly safely. Although there is doubt and controversy as to the exact condition of these goods they were undoubtedly not in good condition. The statement made on behalf of Messrs. Andrew Weir and Co. is that the cause of their damage was that they were stowed in the bridge-deck, alternatively called the 'tween deck, in a position immediately forward of the engine and boiler space, and part of the cases, at any rate, were close up against the bulkhead which separates the hold from the engine and boiler space, while others were further off or nearer the centre or forward part of the 'tween deck in question, and it is the case for the defendants that the goods were damaged by being put there, that they had been shipped in a perfectly good state, a state in which they ought to have been carried quite well to this country, and that the whole cause of the damage is due to their being in that position. Apart from the question being raised in the reply as to the unseaworthiness of the ship, it is admitted that if the shipowner is entitled to the protection of the bill of lading exceptions he would have an answer to the damage thus discovered in the dates. I need not, therefore, read the numerous exceptions in the bill of lading, because that has been common ground throughout. It is also common ground that if the terms of carriage are those contained in the charter-party, the exceptions in the charter-party would not relieve them from damage so arising. It is argued by Mr. Bailhache for the shipowners that the provisions of clause 3 of the charter-party in any event introduce into its terms the obligations of the charterers to submit to have this claim covered by the exceptions in the bill of lading, and the way it is got at is this: the charterers' case is that the captain was to sign bills of lading at any rate of freight without prejudice to this charter-party. That means that if a bill of lading is created, and if the charterer obtains a title under the bill of lading, his rights against the shipowner shall not be prejudiced thereby, but the charter-party as between himself and the shipowner shall remain unprejudiced, and therefore, in all questions as between himself and the shipowner, the charter-party, and not the bill of lading, shall be the document containing the terms by which the question is to be settled. Then the argument upon clause 3 is that even if that be the true meaning of clause 4, clause 3 so limits clause 4 that in a certain event the charterer and the terms of the charter-party may be prejudiced, and the terms of the bill of lading may be introduced against the charterer, and that event is the event of the receivers of the cargo, who are the defendants here, withholding payment of bill of lading freight on account of damage claims, in which case the charter-party provides that the owner shall take any steps necessary to enforce payment by the receivers of the amount so withheld. Now, I do not think clause 3 was intended to refer to this case. I do not think that "in the event of the receivers of cargo withholding payment of bill of lading freight on account of damage claims" is intended to cover a case where the receivers of cargo are the charterers, or where they decline to pay the charter-party freight whether in fact they were liable to pay the bill of lading freight or not. I think that is only intended to prevent the shipowner at the port of discharge allowing a third party's deductions on account of damage, in fact, deducting them himself from the portion of the freight in excess of the lump sum charter-party which would belong to the charterer, and paying himself the full lump sum freight, leaving the whole burden of the damage to fall upon the charterer. It seems to me that that is only a provision similar to the provisions about lien, compelling the owner to do his best to make the receiver pay in full, and if that endeavour does not succeed, then to apply the previous words of the clause about the adjustment of the accounts between the owners and the charterers. But it appears to me that the argument raised upon clause 4 is not well founded. The contract by way of charter-party bound the captain to sign bills of lading at any rate of freight without prejudice to this charter-party. It bound him, therefore, at the request of the charterers, to sign bills of lading which, if given to the charterer for goods shipped by him, would in his hands be only receipts for the goods and documents of title representing the goods while afloat; but which if he indorsed them away would result in the shipowner becoming liable as upon a contract to the indorsee of the bill of lading; and it provided that this should be done without prejudice to this charter-party, a prejudice which is mutual; that is to say, neither party is to be prejudiced in his relations with the other under the charter-party by its being done. But in the present case there never was any shipment by the charterer of these goods under the charter-party at all. There was from the first a contract for the carriage of these goods, which is a contract on the terms of the bill of lading given to Noats—it appears to me that then the obligation to carry the goods to their destination was governed by the terms of the bill of lading from the beginning, and that the charterer thereafter, whatever he had to do with the goods, was not to have anything to do with them under or upon the terms of this charter-party. He does not ship them under the charter-party; he does not acquire them under the charter-party, and they are in fact being carried, not under the charter-party, but under the terms of the instrument which is from the beginning an operative bill of lading in favour of Noats, the shipper. Under these circumstances, it does not appear to me that the fact that the charterer subsequently becomes interested in the goods entitles him to claim any benefit in respect of the carriage of the goods from the terms of the charter-party, as distinct from the terms of the bill of lading. Whether he acquires special property by lending money upon the bill of lading, or whether he acquires a general property by purchasing the goods, or taking the indorsement of the bill of lading, it appears to me the goods are not being carried under the charter-party, and that in enforcing the terms of the bill of lading against him the charter-party is not being prejudiced, because the charter-party is only to be observed in respect of transactions to which it is, in effect, being applied by the parties. This point, which I think is more a question of fact than of law, and which is the point advanced by Mr. Bailhache on behalf of the shipowners, appears to me to be a sound one. I think that

virtually the charter-party only applies to things that are done under it. It is the governing document, no doubt, as regards things done under it when the charter-party and the bill of lading are both granted in the first instance to the charterer, but in a case like this, where no part of the shipment or actual carriage is under the charter-party, it does not appear to me that the terms of the charter-party apply to the transaction at all.

It appears, furthermore—and reference has been made to the words of Lord Selborne in *Sewell* v. *Burdick* (5 Asp. Mar. Law Cas. 376 (1884); 52 L. T. Rep. 445; 10 A. C. 74) —that when Messrs. Andrew Weir and Co. demanded delivery of the goods under the bill of lading at the end of the voyage, they did so upon the production of the bill of lading and as parties interested by virtue of it, and thereupon, under the Bills of Lading Act, the contract expressed or evidenced by the bill of lading would become binding upon them as between themselves and the shipowner. The result of that, I think, is that the defence alleged in par. 3 of the counter-claim fails, because it states that the dates were dates whereof the defendants were owners, or, alternatively, pledgees, shipped under the charter-party, and in my opinion the obligation, shipped under the charter-party, is an essential averment in that paragraph, and it is not proved in fact, and consequently the counter-claim, as far as that paragraph is concerned, fails. But then it is said par. 4 of the counter-claim is a claim in tort. It is a claim which can be raised by the charterer, not as holder of the bill of lading at all, and it is a claim as to which, if he is not a party to the bill of lading, the bill of lading affords no answer. I had better deal with this, because although if it is true that by presenting the bill of lading in London, as was done, the charterer became a party to it, that would afford an answer to the claim in tort, because it enabled the shipowners then to set up the bill of lading exceptions. I had better deal with the point as it is raised apart from that contention, and upon the suggestion that there is a tort in the mode in which the goods were shipped originally and dealt with in the course of the voyage. Furthermore, if the reply be right that the ship was unseaworthy, then the bill of lading exceptions afford no answer at all. It therefore becomes necessary to consider in detail the facts with regard to the shipments. The first point is: Were the goods fresh dates of the season of 1908 or not? Upon the assumption that they were fresh goods of the season, in ordinary experience there would have been no difficulty in carrying them to their destination in safety, and upon the assumption that they were shipped, as alleged in par. 4 of the defence to the counter-claim, in a dry and perished condition originally, that would account for what was discovered in London. The most probable way in which dates can be shipped from Busreh in a dry and perished condition is if in fact they are dates of the previous season which have been left over for the season of 1908. In this way it becomes material to consider whether the dates were of the season of 1908 or not. The evidence as to that is, first of all, and principally, the evidence of Mr. Smith, who was called on behalf of the charterers, who has seen the dates in London and has high competence in the matter. He is supported by a gentleman acting in Messrs. Andrew Weir's firm whose name is Corkis, who also says with Mr. Smith that the dates were, he has no doubt, dates of the season 1908. The only other person who has seen the dates is Mr. Freeman, a surveyor called on behalf of the ship, who, although I make no suggestion against his fairness, obviously has not anything like the competence of those two witnesses. I think it is clear on the evidence of Mr. Smith and Mr. Corkis that the dates were dates of the season 1908. Still, discussion then arises as to what condition they were shipped in, because, although they can be carried to this country with perfect safety, accidents will happen, and it is not inevitable that, having been carried in the conditions in which they were carried, they should take harm; nor is it at all conclusive that the nature of the damage was such that it could only have arisen on board the vessel. In order to make that conclusive, it is necessary to show that they were shipped in a sound condition. The only evidence that I have with regard to their condition when shipped, apart from the mate's receipt, which I think only deals with the outside of the cases, is that of four persons who are certified by the British Consul at Busreh as merchants, and who certify that the dates were of fair average of the season of 1908, and were in perfectly sound condition when they were shipped, and this they do on the 1st May 1909. Now, in my opinion, the nationality, education, training, and so forth, of deponents has to be taken into account just as much when they sign certificates in foreign parts as when they give their evidence in the witness-box; but I do not want it to be in the least supposed that I discredit this certificate because it is signed by merchants at Busreh, who are Arabs, Persians, or what not, nor do I place any particular reliance in this case upon the fact that, although under the order they should have sworn on affidavit, they in fact signed a certificate. Strictly speaking, I do not think affidavits would have been admitted. But there is nothing whatever here to show what their means of knowledge were. They may never have seen the dates; they may have forgotten all about them, or they may have signed because Mr. Noats told them the dates were perfectly sound; there is nothing said as to where the dates came from or how they were treated between their being gathered and being shipped, where or how they were packed, or anything of the kind. I cannot speculate either one way or the other as to those circumstances. All I know is that the dates were dates of the season 1908, the shipping part of which season begins in September, and which were not shipped until late in November of that year. How they were treated and what their actual condition was I do not know, and the only information that can be got as to their actual condition is such as may be gathered from the examinations which were made here. The condition in which the dates were found is spoken to by Mr. Corkis, who saw them, and also by Mr. Saunders and Mr. Smith. Mr. Corkis, I think, did not see them all. Mr. Smith did see the whole lot after they had been opened by the Millwall Dock Company, but I understand that he did not see them on board. Mr. Saunders saw them on board without making any very close examination

on the ship, and he subsequently saw them on the 22nd Jan., when 103 cases had been opened, and these he examined. Without going in close detail into the reports and the evidence of these gentlemen, it is manifest that there is a very considerable difference of view between them. Mr. Corkis said that some boxes had in fact gone to powder; that in some they were as sound as possible, and in some they were baked to a powder; and he drew attention to the fact that, instead of the whole contents of a single box going uniformly, the baking and powdering took place irregularly at one end or at the other end, at one side or the other side, but not at both ends or both sides. Mr. Saunders, both in his report and in his evidence, took the same view. He made a report on the 22nd Jan. in which he said that "seventy-two out of the 103 boxes were heated and baked, the damage in some cases extending a few inches, in others right through, the dates being baked into powder." I think it is quite clear from his evidence and from that of Mr. Corkis that they thought the way in which the damage had been caused was by heat radiating directly from the after-bulkhead of the bridge-deck near to which the cases were stowed. Part of that bulkhead from side to side of the ship consisted of the permanent iron casting of the boiler space, and part of it consisted of a temporary wooden bulkhead erected to the wings. The case they made was that eighty to 100 cases would be in actual contact with that bulkhead, and others would be stacked near them, and those nearest to the bulkhead would get baked, and did get baked, and that the side nearest the iron bulkhead was the side that was most affected, and those that were further off were affected least, and those that were furthest off were those that escaped. On the other hand, the evidence of Mr. Smith is different. He says that he thinks the damage was due to steam and want of ventilation, and that if there had been heating he would have expected the exudation of a good deal of juice, of which he did not notice any extraordinary quantity; but that, on the other hand, if the goods get too warm and are not properly ventilated, steam is given off, and the steam then still further affects the dates, as great heat is set up by the vapour, and damp is created which eventually rots the dates, and those which are rotten enough go to powder; and he says explicitly in cross-examination that this is caused by want of ventilation, and in re-examination he says: "I do not know what the baking would do to them, but the cases nearest the bulkhead would be more baked than those further off." Here are people, Mr. Smith, probably the more experienced, and Mr. Saunders, the gentleman who had seen them on board the ship, giving different views as to how the dates came to be damaged. On the other hand, witnesses for the defendants say, particularly Captain Paton, who has great experience as a captain of vessels carrying dates, and Mr. Green, a cargo superintendent, that they have seen dates stowed in similar positions in similar ships, and carried on the same voyage without sustaining any damage at all; and Mr. Freeman, who, although inexperienced in the matter of dates, still did see the goods, does not think that so large a percentage was damaged as Mr. Saunders and Mr. Smith think were damaged. There is a sufficient amount of uncertainty arising out of the contradiction of these witnesses to make one think that the mere state of the dates, as found in London, does not of itself show that the damage must have been caused by something happening in the course of the voyage. Thereupon, one referred to the ship and her construction, and the position in which the dates were stowed. As to that, the cross-bunker below this bridge-deck has the metal bulkhead, which divides it from the engine and boiler space, sheathed with wood cleeding, and there is an air space between the wood cleeding and the watertight bulkhead. No doubt the object of that is to insulate the cross-bunker, when it has cargo in it, from the engine and boiler space. One would very naturally infer that, as that precaution is taken in the cross-bunker and not in the bridge-deck, those who had the fitting up of the ship thought or found that the cross-bunker was hotter than the bridge-deck. There are some who say that all bulkheads dividing cargo spaces from engine spaces should be so sheathed. The North of England rules have been produced, in which it is recommended that that should be done. That may be a counsel of perfection, but it is suggested that it is an imperative necessity. When you get to the space in question there is no cleeding and no air space. The place of the wooden sheathing was taken in this case by dunnage mats of an ordinary character, and, it is said by the witnesses for the ship, also by bamboos put in. One witness on the other side, Mr. Saunders, who contradicts that, had some opportunity, I do not think very great opportunity, of seeing whether there were bamboos or not. I, on the whole, think that there were bamboos as well as mats, but I do not think anyone contends that the bamboos added very much to the insulation caused by the mats. That being so, it was then said that the arrangements of the ship made the bridge-deck a hot space, which some of the witnesses described as like an oven. The iron deck of the bridge-deck crosses at its top, close up against the engine bulkhead, the air space which separates the engine iron bulkhead from the wood cleeding in the cross-bunker. It is said, if that air gets hot, as it will do, it must either escape by some means of ventilation or it will tend to heat the 2in. or 3in. of plate next to the wall of the bridge-deck, and, of course, tend further to heat the floor of the bridge-deck compartment. There is a contradiction as regards whether that space is ventilated or not. Mr. Saunders says he does not know, and he did not look. The mate says that he thinks it is not ventilated, but the captain says that it is, and that it is ventilated by a pipe at the top. On the whole, I think that the captain is more likely to know than the mate, and that it is ventilated by a pipe at the top. Then it is said that, apart from that heat, there is also the heat which comes from the engine-room, through the unsheathed plating of the engine and boiler bulkhead. As to that, the funnel carrying away the exhaust gases from the furnaces runs up something like 4ft. abaft of that plating, but it, as I understand, is cased with another casing, the object being to cause a current of air to pass round the funnel so that the funnel would radiate its heat directly into the engine space. At the top of the fidley or engine casing, some few feet I think—something like 4ft. or 5ft. above the level of the hatch of the

bridge-deck—there are the ordinary grating bars, and in this space, close against the bulkhead, runs the ladder by which the firemen emerge to the outer air, and also close to that bulkhead there run up the ventilators that are the down-takes to the engines, which are also used at times as funnels or shoots. The space, therefore, between the funnel and the bulkhead is one in which the men are constantly called upon to be, either when they are going up on deck or when they are at work. It is admitted by Mr. Mowat, one of the witnesses for the defendants, that this bridge-deck space would be all right as regards its forward part, which is well away from the bulkhead. It is proved to my satisfaction that grain cargoes have been carried in that space before and since this voyage, and no claims for damage have been made. It is proved by Captain Paton also to my satisfaction that dates are commonly carried in some such space as this, and it is proved that dates were carried in the cross-bunker on this occasion and discharged at Suez and Port Said without any claim being made, and the witnesses from the ship say, as far as they know, the bridge-deck is not hotter than the cross-bunker. Mr. Dudgeon, who has not seen the ship, but is, of course, an experienced marine architect and surveyor, thinks that the heat would be greater at the bridge-deck than at the cross-bunker. I do not think that speculation, if it is speculation, as to the relative heat at two points of a ship, which Mr. Dudgeon has not seen, can, however one may respect his opinion, outweigh the evidence of the captain and the mate, who knew their ship, and have had an opportunity of examining it, and one of whom, the captain, I understand, has been in the ship since this voyage, and has had an opportunity of directing his attention to this very point. It does not seem to me that in itself, although it has got no wooden sheathing, that compartment can be described as an improper place in which to stow even such cargo as dates.

The dates, however, if stowed in there, no doubt must be properly looked after, and then come two questions: Were they accessible so that they could be properly shifted and attended to if they got too hot? and was the compartment properly ventilated by the removal of the hatches from time to time? The latter point is very important in this case, because, if the hatch was removed from time to time in the way in which hatches are constantly removed for cargoes of this class, it appears to me that an accumulation of heat causing steam and then causing further damage to the dates, of which Mr. Smith saw traces, could not have happened on board this vessel. A compartment of this size, with a hatch 8ft. by 16ft., removed from time to time, would let out any heat that there was, and would effectually prevent, I think, the accumulation of any steam which is, in his own words, the cause of the damage he found. This depends on the evidence of the captain and the mate. Mr. Scrutton says I ought not to believe the mate, who says the hatches were constantly removed; and there were two points made against the mate: One was that in chief he described the voyage as a fine voyage, and then, when he was challenged with the log, it appeared that there were days when there was rain, and there were days when there was a gale, and there were days when the ship was shipping water. Secondly, because he did not know, one way or the other, whether the air space between the cross-bunker and the boiler space was ventilated or not. I have looked at the log, I have looked at the mate, and I have looked at the captain, and I have come to the conclusion that their evidence is the evidence which I ought to accept. They say that the captain was very particular about his ventilation, which is a good sign in a captain. The mate, who does not appear to have any interest in the matter because he is now in another ship, said that sailing with so particular a captain he was particular about taking off the hatches, and that the hatch was taken off. It is then said that if you look at the log you will see that the hatch must have been on continuously for considerable periods, and it is suggested, I think, from the time the vessel left Port Said until the time when she was at or passed Malta there was a succession of weather quite inconsistent with such a mode of dealing with the cargo. It appears, however, that sixteen hours is the longest period of continuous running recorded in the log. I have looked at the log, and passages have been read to me. I do not think that the records of gales or shipping seas are such as would compel these hatches to be kept on for long periods. I think, having regard to the sheltered position of the hatch and its great height, which is only a few feet below the level of the permanent open gratings of the engine-room fidley, it is exactly the position in which it would be practicable to take the hatches off, if they could be taken off anywhere, and, secondly, as the mate and the captain say that the hatches were constantly kept off, I think I ought to accept their evidence, and I find that they were kept off to the extent which would prevent any accumulation of heat generating steam and that sort of thing in the hold below. Then it is said that there must have been great heat, and that the engineer's log records temperatures from the 8th to the 24th Dec. which pass 80 degrees every day, and thrice pass 86 degrees, and on seven consecutive days passed 84 degrees, and that there is an average deck temperature of 77 degrees as long as observations were taken, while the sea temperature was only 72. That, no doubt, shows that they had warm weather—I should think warm weather for the time of the year, but the ship is passing through the sea, and she is making her own breeze, and the nights would, of course, be much cooler, and if the hatches were kept open, as I am told they were, it appears to me that the temperature was never likely to rise to a height at which it would produce disastrous results to dates, which, after all, are grown, gathered, packed, and eaten in hot countries; and therefore the evidence does not satisfy me that the damage to the dates which was found in this country was caused on shipboard. It leaves me in a state in which I could only speculate, and not draw a satisfactory inference of fact, as to the way in which the dates were dealt with before shipment; and where one is left without evidence on the subject, I cannot say, in face of the conflict of evidence that there is here, that the conditions on board the ship were such as must be taken to be the cause of the damage to the dates.

There remains the question as to whether it was an improper place in which to stow the

dates, in fact, and, if so, whether that impropriety made the ship unseaworthy. With regard to the latter point of my remark, no witness has used any word which suggested that he would have called the ship unseaworthy at all. On the contrary, Mr. Mowat says that part of this space, at any rate, was suitable for the carriage of dates, and the evidence for the ship is that the whole of it is a space in which dates constantly are carried. Mr. Saunders, when the point was put to him, said that the complaint he made was improper stowage. He said so in his first report. He called it bad stowage, and I think that Mr. Smith uses the expression, "owing to improper stowage," too. The case, therefore, is a case of bad stowage, and not of unfitness of the ship, and I am quite unable to see how the ship can be said to be unfit to carry dates on this voyage merely because they were put at one end of a compartment and not at the other, or at one end of the compartment and not in the middle. I therefore find that the ship was not unseaworthy, and furthermore, having regard to the ventilation which took place, and to the evidence both of Captain Paton and the cargo superintendent in this country, I cannot bring myself to the conclusion that there was any improper stowage at all. The result of that would be that there was nothing which, apart from the terms of some contract, could be described as a wrongful dealing with the dates. It therefore does not become necessary to consider what exactly would be the conditions under which the pledgees, getting their title after the goods had been placed in the vessel in the position complained of, would be entitled to sue for resulting damage, apart from any rights they might have under some contract of carriage. It appears to me that there would be very great difficulty in saying that there was any tort available to the defendants, who acquired their title after the vessel had gone to sea, having regard to the fact that the goods were in the position in which they were originally under a contract in the bill of lading; that the bill of lading had been given at the request of the defendants' own agent, and had been signed by him on behalf of the master; that the plaintiffs had no notice of the goods being carried on any other terms, and that under the terms of the bill of lading, which entirely protect him, they simply left the goods where they had been originally, and sailed the ship in the way in which it was intended that the ship should be sailed. Therefore, if the place was a proper place, and if putting them there did no harm, it does not become necessary to consider exactly under what conditions the pledgee would be able to bring an action in tort against the ship independently of the bill of lading. The result of this judgment is that the counter-claim fails, and that there is judgment for the plaintiffs for the admitted balance, with costs, and there is judgment for the plaintiffs on the counter-claim, with costs. The amount is 236*l.* 13*s.* 6*d.*

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

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

Wednesday, Oct. 27, 1909.

(Before Hamilton, J.)

Otago Farmers' Co-operative Association of New Zealand Limited *v.* Thompson. (*a*)

Marine insurance — Frozen meat — "Warranted free from particular average and loss unless caused by stranding, sinking, burning, or collision of the ship or craft — Condemnation of cargo by sanitary authorities — Total loss.

A policy provided for the insurance of a cargo of frozen meat "at and from Port Chalmers to Glasgow. Risk commencing at the freezing works, and includes a period of not exceeding sixty days after arrival of the vessel." The following clause was pasted on the face of the policy: "Warranted free from particular average and loss unless caused by the stranding, sinking, burning, or collision of the ship or craft (the collision to be of such a nature as may reasonably be supposed to have caused or led to the damage claimed for) . . . also partial loss arising from transhipment. Including all risk of craft or otherwise to and from the vessel." The meat, which was in good order and condition at the inception of the risk, was seized by the sanitary authorities on arrival at Glasgow, and condemned as being unfit for human consumption.

The deterioration of the meat happened on board the vessel, but was not caused by improper dressing or in consequence of transhipment; neither was the vessel nor any craft conveying the meat stranded, sunk, burnt, or in collision. At the trial of the action to recover for a total loss under the policy evidence was given on behalf of the defendants to the effect that the clause "Warranted free from particular average and loss, unless caused by the stranding, sinking, burning, or collision of the ship or craft," &c., had acquired a well recognised meaning — viz., that the policy was warranted free not only from particular average unless caused by stranding, &c., of ship or craft, but was also free from loss of the subject-matter, total or partial, unless caused in the same way.

Held, that the words had acquired the recognised meaning proved by the defendant's witnesses, and that as the loss in question had not occurred by stranding, sinking, burning, or collision of the ship or craft, the defendant was not liable under the policy.

Commercial Court.

Action tried by Hamilton, J., sitting without a jury.

The plaintiffs claimed to recover from the defendant, who was an underwriter at Lloyd's, a total loss under a policy of marine insurance on a cargo of frozen meat carried on board the steamship *Surrey*.

The trial of the action proceeded on the following agreed facts:

The plaintiffs were fully interested in the policy dated the 9th June 1908 upon 1489 cases of boned beef per the steamer *Surrey*. At the inception of the risk the cases were all in good order and condition. On arrival at Glasgow the whole of the contents of the cases were in such a condition that they were seized by the sanitary authorities, and condemned by a magistrate as

(*a*) Reported by Leonard C. Thomas, Esq., Barrister-at-Law.

unsound and unfit for human consumption. They were ordered to be destroyed, and sold for the purpose of being used in the manufacture of manure. The condition of the meat was not caused by improper dressing, but it arose on board the *Surrey*, and not from transhipment. The *Surrey* was not stranded, sunk, burnt, or in collision nor was any craft conveying the meat. It was agreed that the court be asked to decide whether the plaintiffs were, upon this statement of facts, and upon the terms of the policy sued upon, entitled to recover for the total loss claimed.

The policy was expressed to insure the cargo

At and from Port Chalmers to Glasgow. Risk commencing at the freezing station works, and includes a period of not exceeding sixty days after arrival of the vessel . . . beginning the adventure upon the said goods and merchandises from the loading thereof aboard the said ship at as above upon the said ship, &c., subject to institute clauses attached so far as they apply.

The following printed clause was attached to the face of the policy:

Warranted free from particular average and loss unless caused by the stranding, sinking, burning, or collision of the ship or craft (the collision to be of such a nature as may reasonably be supposed to have caused or led to the damage claimed for), but to pay landing, warehousing, forwarding, and special charges, if incurred; also partial loss arising from transhipment. Including all risk of craft or otherwise to and from the vessel, each craft or lighter to be deemed a separate insurance.

The opening words of this clause originally ran: "Warranted free from particular average, unless the ship or craft be stranded, sunk, or in collision," but these words were deleted by a line drawn through them, and the words appearing above were substituted.

The following clauses were also attached to the policy:

Frozen meat.—Conference clauses, amended Nov. 1905 (freezing works, voyage, and sixty days).—The risk commences at the freezing works at . . . includes (except as hereinafter mentioned) all risks of freezing and all risks from freezing works until on board the vessel, and, unless previously terminated, continues on board the vessel, and (or) in refrigerating stores in the United Kingdom . . . for a period not exceeding sixty days from the arrival of the vessel. Any removal of the meat from the stores previous to the expiry of the period above mentioned, or any disposal thereof other than by storage as above, terminates the insurance on such meat; and no claim for damage shall attach, unless immediately on the first discovery of any damage to or deterioration of any part of the interest hereby insured notice shall have been given to the underwriters, and the amount of depreciation agreed to by the underwriters prior to the termination of the insurance. During the period (if any) between assessment of depreciation and termination of the insurance the risks covered hereunder are those of fire and breakdown of machinery only. The insurance covers loss from defective condition of the meat from every cause (except improper dressing) which shall arise during the currency of the insurance.

Evidence was given on behalf of the defendant by a number of underwriters, who stated that the clause attached to the face of the policy had a well-recognised meaning—viz., that it meant free from particular average and free from loss, unless the loss was caused by the stranding, sinking, burning, or collision of the ship or craft.

Scrutton, K.C. and *Mackinnon* appeared for the plaintiffs.

Bankes, K.C. and *Maurice Hill* for the defendant.

HAMILTON, J.—This action is brought by the assured on frozen meat to recover a total loss measured by the full amount of the policy, 1116*l.*, upon a policy subscribed, among others, by Mr. Thompson, the defendant. There are no pleadings, but the action is tried as regards the loss upon agreed facts. The essential fact is that the cause of the loss was that the carcases arrived in such a condition that they were condemned as being unfit for human food and had to be destroyed, and that that condition arose some time during the voyage. They started in good condition. It was not caused by improper dressing before sailing. They arrived in bad condition. Under the circumstances the question is one of construction of the policy, which is in the ordinary Lloyd's form, modified in two ways by having pasted upon it a printed f.p.a. clause, which in its turn has been altered by deleting some of the words with a pen and substituting some words in typewriting, and the policy is also modified by stating that it is subject to the institute clauses attached as far as they apply, and they are attached on the leaf of the policy, and are in the form of the Frozen Meat clauses of 1905. That particular risk and cause of loss in this case is mentioned in the third paragraph of the Frozen Meat clauses, "The insurance covers loss from defective condition of the meat from every cause (except improper dressing) which shall arise during the currency of the insurance." That would be incorporated by the reference into the body of the policy unless the words "as far as they apply" would exclude it.

Under the circumstances the question is whether, having regard to the modified f.p.a. clause, "as far as they apply" prevents that clause being read into the insurance, and leaves the f.p.a. clause standing in such a form and with a meaning as to exclude any claim for the loss in question. The policy, as far as form goes, raises familiar difficulties in connection with Lloyd's policies. The unfortunate, and I think the inevitable, result of the practice of relying on an ancient form modified by the attachment of printed clauses, which in their turn are again modified in writing, always raises difficulties in construction, and the difficulties here arise upon the words "as far as the Institute clauses shall apply." The case has to be dealt with on the policy as it stands, and I think in each of these cases the exact words used and the collocation of the words must really be what guides us. There is no question of following any authority upon the particular construction of a particular instrument. The first question is upon the construction of the words in the body of the policy, and the plaintiffs say in terms that the risk commences at the freezing station works, and includes a period not exceeding sixty days after the arrival of the vessel, and that in terms the insurance is subject to the Institute clauses attached, including the ones I have mentioned. *Primâ facie* the loss is covered unless the f.p.a. warranty as modified excludes it. As a matter of construction the f.p.a warranty is very ambiguously expressed, but upon the plain construction of it

it is confined to particular average, and does not deal with the case in question, which is a case of total loss. It is said that "warranted free from particular average and loss" means warranted free from particular average and from particular loss unless caused, and so forth. It is pointed out that the clause as modified is very ambiguous because, apparently, in endeavouring to alter the printed words from a warranty free from particular average which would be deleted if the event happened of the ship or craft being stranded, sunk, on fire, or in collision, they have sought to modify into a deletion of the warranty only when the loss is caused by the stranding, sinking, or burning of the ship or craft, and when they have further in the printed clause had a different clause that there is to be a deletion if the nature of the collision is such as may reasonably be supposed to have caused or led to the damage claimed. They altered it very inartistically, and indeed confusedly, by having a co-existent provision that the deletion is to take place only if the loss is caused by the collision, and not merely that there has been a collision which might reasonably be supposed to have caused the loss. It is further pointed out that the words, "including all risk of craft," in the printed form are left in, and the words as to the inclusion of "partial loss arising from transhipment" are also left in. As a matter of construction I am invited to say that this is an exceedingly inartistic f.p.a. clause. It contains redundancies but then there are, of course, always redundancies if you have a f.p.a. clause grafted into a Lloyd's form, which makes the minimum warranty free from average at 3 per cent. It is pointed out that it might be very difficult to ascertain, in case of collision, what exactly were the circumstances under which the f.p.a. clause would be deleted; but it is said as a matter of construction that it is a particular average clause, and nothing else. On the other hand it is said: No, this can be construed quite reasonably as meaning warranted free from particular average and from loss, unless caused by the stranding, sinking, burning, or collision of the ship or craft, and that is the real meaning, and that anything else is repugnant to the words. I think at first sight one would have sought a way out of the difficulty by supposing that the word "and," between "average and loss," had got in by mistake, and that it should have run "free from particular average loss, unless caused," but in the absence of any evidence of mutual or common error or claim for rectification, I should be only reforming the contract, and not interpreting it, if I did that, and, therefore, that short cut is not open to me. It seems to me as a matter of construction that the plaintiffs' construction is right, and I think the natural grammatical construction is "warranted free from particular average and particular loss." It is quite true that "particular loss," as far as I know, is a term unheard of in insurance; but it is perfectly good English. It is true also if you warrant free from particular loss, the words "free from particular average" are surplusage. It seems to me that the words "warranted free from particular average" make the words "and loss" surplusage, and it seems to me the natural construction is to attach to the word "loss" the same adjective which qualifies "average." The alternative presents formidable difficulties, but counsel for the defendant and witnesses all agree that this is a policy against general average. But general average is only a special kind of loss, not as a rule total, caused by perils of the seas. Therefore when they say "warranted free from particular average and free from loss," *scilicet* from all loss, they are contradicting the tenor of the policy which it is admitted somehow or other gives the assured the right to recover for general average. If the object was to make this an insurance only against general average and a loss caused by the stranding, sinking, burning, or collision of the ship or craft, I think some less roundabout and less confused way of expressing it would have been chosen. As a matter of construction it appears to me that the plantiffs' contention is right. Upon the body of the policy the premium is 12*s.* 6*d.* per cent., and evidence was given, without objection, to prove that 12*s.* 6*d.* was inadequate remuneration for undertaking the risk of total loss for the cargo going bad on the voyage. I accept the evidence of how much the underwriter ought to have charged with some doubt. Whether it is 40*s.* for all risks or for risks including defective condition of the meat, but f.p.a., I think it is clear as a matter of business that if the underwriter intended to insure against the risk now sued for in this action he would have asked for more than 12*s.* 6*d.* I am not asked to rectify this policy, they have taken their chance at 12*s.* 6*d.*, and I do not think the evidence given, though I accept it, affects the construction of the policy.

Now, it is said even though as a matter of grammatical English the defendants' construction fails, that the words "warranted free from particular average and loss," &c., constitute a well-known formula used for a particular purpose and understood as affecting that purpose, and believed to express a particular meaning—at any rate, understood as expressing the meaning whether it succeeds in doing so or not. That is to say, it is not a case in which parties have used ordinary English words, possibly not expressing their meaning, but it is a case in which a particular well-known phrase having a particular well-known meaning has been inserted, and it must be understood as having that meaning. Evidence has been given upon that by Mr. Poland and four other gentlemen, whose experience, capacity, and desire to assist the court are beyond question. Their evidence is in the main in agreement, though it differs in some details. They say that this phrase which finds expression first of all in slips in the shape of "f.p.a. and loss except," or "f.p.a. and loss unless caused by," &c., of "f.p.a and loss unless caused by s s b and c"—these cabalistic expressions which had been in use among individuals ten or fifteen years ago and in the last five or six years have come into use with respect to the heavy insurance on meat cargoes in respect of breakdowns at sea and so on—they say it was intended to mean that the underwriter is not only free from average unless it is caused by those risks or stranding, sinking, burning, or collision of ship or craft, but is also free from loss of the subject matter, total or partial, unless caused in the same way. It is true that this matter does not appear to have been in controversy very much so far. Mr. Wright said specifically he had not known of a case in which

the point of total loss on board the ship, or total loss before or after the goods had quitted the ship—before they reached the ship or after they quitted the ship—was discussed. Mr. Poland said he did not personally see the policies in which the slips, which were re-insurance slips, were expressed. He settled the form, and it was for his clerks to apply it. Mr. Bolton said distinctly the form used in this policy is the regular way in which this specific formula is expressed, which I accept, though I regret to hear it, and Mr. Wright gave evidence to the same effect, and so did the other witnesses. This constitutes a considerable body of experience. Of course, I am bound to distinguish carefully between witnesses who say that the underwriters use these words with the object of excluding particular liability, and the evidence that underwriters use these words with the meaning that a particular liability is included. Very often one finds the evidence amounts only to this—that that is how they try to express themselves, and not that they understand one another as having expressed their meaning in those words. They say this is a well-recognised form expressing a well-recognised meaning, and they agree. The evidence upon the other side is that of Mr. Richards, who is experienced, no doubt, as an average adjuster, and who deals with claims after loss, and whose experience one knows must be of claims adjusted to-day under risks written eighteen months or two years ago. His experience does not bring him into contact with the use of this form to any extent comparable to that used by the defendants. No other witness was called on the other side, and they had no evidence from Lloyd's. Evidence was given by Mr. Hatchett as to the negotiations for this policy, and witnesses have been called to show where the words have been added, and that satisfies me that evidence to the contrary could not possibly have been obtained.

Therefore I think I am justified in finding upon this evidence that these words have a particular meaning, well understood, and which is the meaning that the policy is warranted free from particular average and free from loss. Now it is quite true that cases were put to these witnesses, some of which they answered illogically and some of which they could not answer at all. They say that underwriters disclaiming any knowledge of the law would make a practice of paying for fire loss in store either before or at the end of the voyage. They say with some diffidence that the same course would be pursued if a fire were on the quay during transhipment. They all say though the words means free from loss they do not treat the policy as being free from general average, and then there is the fact that the policy in terms includes partial loss arising from transhipment, and all risk of craft and otherwise to and from the vessel. I do not think it is necessary that I should discuss or decide what would be the rights of the parties if this loss had occurred before shipment or after arrival. These conundrums only go to the credibility of the witnesses.

I do not think, as a matter of fact, that the admission that general average is covered in spite of this formula, or the admission that fire would be paid for though it had not occurred by reason of the burning of the ship or craft, ought to lead me to doubt the accuracy of the witnesses in speaking uncontradictedly of the recognised meaning of the phrase. Then this does not quite conclude the matter, because, although the particular words may have in general a special meaning, I have to treat them as embodied in this policy, and it is therefore possible there may be something in the policy when construed all together which would make it impossible to attach to the words here that specific meaning which among underwriters they are understood to have. But I do not think on the construction of the policy for the purpose of this claim there is any such inconsistency. One would naturally, first of all, subordinate the conference clauses on the fly leaf of the page of the policy to the words "as far as they apply," because if the body of the policy contains an f.p.a. warranty which is inconsistent with the application of the conference clauses, the conference clauses go by the board. Secondly, as to the existence of the words left in the printed clauses which do not go with the type-written words, and which produce a confused result, although not inconsistent with the type-written words. I should attach primary importance to the words inserted by way of alteration rather than to the common form. But it appears to me that it may be read thus: "Warranted free from particular average and free from loss unless caused by the stranding, sinking, burning, or collision of the ship or craft, except that particular loss arising from that shipment will be covered, and all risk of craft or otherwise to and from the vessel will be covered notwithstanding." There is a serious ambiguity with regard to the collision, and whether that is the same as the occurrence of a collision which may reasonably be supposed to have caused the damage, but cannot be proved to have caused it—whether that will give rise to a right to recover or not I express no opinion. As in point of fact the loss occurred on the voyage it does not occur to me the difficulty touches the case, nor does it appear to me that the contention that the assured would have difficulty in knowing how far he was covered in those respects touches the case either. I dare say he would have considerable difficulty in knowing how far he was covered, whether he could sue for loss by fire occurring at the freezing station works, and if he could sue for loss for fire there to be met by the answer, that though it might be the custom it was not the law. I do not care to inquire what the rights are or how far this instrument was a disappointment to the assured, but I think on this specific instrument this policy is warranted free from not only particular average but loss, including total loss, unless caused by the events which have not happened in this case. The result, therefore, is that there is judgment for the defendant, with costs.

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

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

Supreme Court of Judicature.

COURT OF APPEAL.

Wednesday, March 9, 1910.

(Before Lord HALSBURY, FLETCHER MOULTON and FARWELL, L.JJ., and Nautical Assessors.)

THE KNIGHT ERRANT AND HOPPER BARGE W. H. No. 1. (*a*)

Collision — Tug and tow — Negligence of tug — Duty of tug to set course — Duty of tow to follow tug.

A hopper barge, which had a rudder but no motive power, when in tow of a tug came into collision with a lightship. The owners of the lightship brought an action against the owners of the tug and the owners of the tow for the damage they had sustained, alleging negligence in both tug and tow. In that action, which was tried in the Admiralty Court, both tug and tow were held to blame for the collision; the tug for not keeping more to that side of the channel which lay on her starboard side, the tow for not porting her helm sooner than she did to counteract the negligent course set by the tug.

Held, varying the order of the Admiralty Court, that those on the hopper barge were not guilty of negligence in failing to port sooner than they did, as they were entitled to assume that those on the tug who were responsible for the navigation would set such a course as would take the hopper barge safely past the lightship.

APPEAL by the owners of the hopper barge *W. H. No.* 1, defendants in the court below, from a decision of Sir J. Bigham, President, by which he held them jointly liable with the owners of the tug *Knight Errant*, also defendants below, for damage done to the lightship *Comet*, caused by a collision between the hopper barge *W. H. No.* 1 while in tow of the tug *Knight Errant*.

The respondents, plaintiffs in the court below, were the Mersey Docks and Harbour Board, the owners of the lightship *Comet*.

The defendants, the owners of the steam tug *Knight Errant*, did not appeal.

The case made by the plaintiffs was that shortly before 8.15 p.m. on the 15th Oct. 1909 the *Comet*, a lightship of 122 tons register, was lying moored on her station in Crosby Channel, river Mersey, with her head to the northward and westward. The wind was west, fresh to a strong breeze, the weather was fine and clear, and the tide flood about three knots. The *Comet's* powerful white light was flashing every ten seconds, and a proper watch was being kept on board her. In these circumstances those on board the *Comet* observed the masthead towing and red lights of the tug *Knight Errant* about a quarter of a mile away, a little on the starboard bow, and shortly afterwards the red light of her tow, the hopper barge *W. H. No.* 1. The tug and her tow were coming up channel, but were so carelessly navigated that, although the *Knight Errant* passed to the port side of the lightship, the hopper barge struck the lightship on the starboard bow such a severe blow that she soon afterwards sank.

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

Those on the *Comet* charged those on the *W. H. No.* 1 with neglecting to keep a good look-out, with failing to keep clear of the *Comet*, with failing to keep to that side of the fairway which lay on their starboard hand, and alleged that *W. H. No.* 1 was such a bad steerer, or was steered so badly, that she ran into the lightship.

Those on the *Comet* charged those on the *Knight Errant* with failing to keep a good look-out, with failing to keep the *W. H. No.* 1 clear of the *Comet*, and with failing to keep herself and the *W. H. No.* 1 sufficiently, or at all, to that side of the fairway which lay on their starboard side.

The case made by the owners of the hopper barge *W. H. No.* 1 was that they had been guilty of no negligence. They alleged that shortly before 8.10 p.m. on the 15th Oct 1909 the *W. H. No.* 1, a dumb barge used for carrying dredgings, was being towed up the Mersey Channel by the tug *Knight Errant* from the dumping ground outside the Bar Lightship. The weather was clear, the wind a moderate gale from about W.N.W., and the tide was about two hours flood. The barge was exhibiting the regulation lights for a vessel in tow, and a good look-out was being kept. The tug was in sole control of the navigation. The helm of the *W. H. No.* 1 had been kept hard a-port since passing buoy C. No. 3 some time before reaching the lightship, and no other measure was or could be taken by those on board her to avoid collision with the *Comet*.

The owners of the *Knight Errant* admitted all the allegations of negligence made in the statement of claim against the *W. H. No.* 1, but denied that she was a bad steerer. With regard to the *Knight Errant*, they alleged that shortly before 8 p.m. on the 15th Oct. she was proceeding up Crosby Channel towards Liverpool, well on the starboard side of the channel, with the *W. H. No.* 1 in tow with about fifty fathoms of the *W. H. No.* 1's rope and a wire pennant of about twenty-five fathoms. The *Knight Errant* was making six to seven knots through the water; the wind was west by north, a strong breeze, and the tide flood running about two to two and a half knots. A good look-out was being kept on board her. While so proceeding the helm of the *Knight Errant* was ported and she rounded buoy C. No. 3 and passed the buoy on her starboard side distant about 25ft.; she then continued well on the starboard side of the channel towards buoy C. No. 4, and passed clear of the *Comet* at a distance of about 100 yards, having her on the port side. The *W. H. No.* 1 negligently failed to round buoy C. No. 3 in the course of the *Knight Errant*, and instead of doing so the *W. H. No.* 1 was negligently caused or allowed by those on board her to swing out across the *Knight Errant's* stern towards mid-channel, and thereby got well out on the port quarter of the *Knight Errant*, and was observed to be heading for the *Comet*. The helm of the *Knight Errant* was thereupon ported and her engines put at full speed ahead, with the object of pulling *W. H. No.* 1 round to the southward; but the *W. H. No.* 1 failed to come round, and when a collision between the *W. H. No.* 1 and the *Comet* was seen to be inevitable the engines of the *Knight Errant* were stopped to ease the blow.

The case was heard by the President on the 14th Dec. 1909. At the hearing the contract

existing between the tug owners and the owners of the hopper barge as to the towage was proved.

The clauses as to the liability of the tug owners were in the following terms :

On the hiring of the steam tug for towage services the master and crew thereof become the servants of and identified with the ship, and are under the control of the person in charge of the ship during the performance of the contract, the steam tug owners only undertaking to provide the motive power. The steam tug owners are therefore not responsible for the acts or defaults of the master or crew of the steam tug, nor for any damage or loss that may arise to the ship or cargo, nor for any damage caused by any defect in, or accident happening to, the machinery of the steam tug, or to the towing gear or tug's hawser if in use, or from running short of coal owing to bad weather or other unforeseen circumstances, or for any loss, damage, or delay, directly or indirectly, caused by, or arising from, strikes, lockouts, labour disturbances, disputes, or anything done in contemplation or furtherance thereof, whether the owners be parties thereto or not.

The following judgment was delivered on the 14th Dec. 1909 :—

The President.—I agree with counsel for the plaintiffs when he says that this was a case of very gross bungling, and it is all the more extraordinary from the fact that while the tow is in collision with the starboard bow of the lightship the tug is on the other side of the lightship, having cleared it in safety. The question is, who are the people who are to blame for this bad navigation? It appears to me that the tug is certainly to blame. She had passed within 25ft. of buoy C. 3. She was then in a proper position, and if she had taken the most ordinary precautions to maintain that position this accident would never have occurred at all. She would then, with a rope 260ft. in length swinging between herself and her tow, have kept the tow well away from the lightship and well to the west. Instead of taking measures to do that, she apparently allowed herself to be driven by the wind to the eastward until she came into a position, according to her own account, within 100 yards of the port side of the lightship. She was then in a position of danger—that is to say, the whole adventure was in a position of danger. Instead of being where she was she ought to have been well over to the west side of this channel, which leads up the Mersey. That was, in my opinion, a fault which undoubtedly contributed to the accident. Now with reference to the tow. The tow, according to her own account, got to a position halfway between buoy C. 3 and the Crosby Lightship—the distance, I think, being 700 yards—before she did anything at all. I accept the evidence of the man who was in charge of the tow when he says that the doors were up, and I accept his evidence when he says that at the point I have mentioned he put his helm hard-a-port; but I think, and I am advised, that he might, if he had put his helm hard-a-port before he got to this position, have avoided the collision. I am advised that he ought to have put his helm hard-a port before he got to this position midway between the buoy C. 3 and the lightship. He tells us that when he did put his helm hard-a-port his vessel practically failed to answer to the helm at all. He ought, in my opinion, to have foreseen that, and if he had foreseen it he would probably—and certainly he ought to—have put his helm to hard-a-port much before he did. Those are the two causes which, in my opinion, contributed to the accident. To what extent each contributed I do not know, and I am very glad to say I have not to inquire; but both contributed to the accident, and therefore, I think, we must hold that both are to blame. Then comes a question as to what the plaintiffs are entitled to. In this case the servants of the owners of the tug have been negligent. The servants of the owners of the barge have also been negligent, and the result of the joint negligence of the two has been to damage the property of the plaintiffs. I do not think that I have anything at all to do with the contract that has been entered into between the two defendants—I mean the contract of towage. I have to decide in this case only what the rights of the plaintiffs are in the circumstances that have arisen. The defendants both of them owed a duty to the plaintiffs not to damage the plaintiffs' property. Of that duty they have both committed a breach, and therefore they are joint tortfeasors, and as such, in my opinion, they are jointly liable for the damage that has followed from their wrongdoing. Therefore there must be judgment for the plaintiffs against both defendants, with costs, but no execution is to issue for the costs until I direct. I will wait and see who pays the damages before making an order as to the costs, because I want to make it as fair as I can. I do not like the rule which says there shall be no contribution between tortfeasors.

On the 10th Jan. 1910 the owners of the hopper barge *W. H. No.* 1 delivered a notice of appeal praying for an order that the decision as to the hopper barge *W. H. No.* 1 might be reversed and that judgment might be entered for them with the costs of the action and appeal.

The appeal was heard on the 9th March 1910.

Laing, K.C. and *Dunlop* for the appellants, the owners of the hopper barge *W. H. No.* 1.—The control of the tug and tow was with the tug. Those on the tug set the course and decided what speed the vessels should travel at. The only thing that those on the tow could do was to follow in the wake of the tug. The wind and tide both tended to set the tow on to the port quarter of the tug, and those on the tug owed a duty to the tow to set such a course that, in spite of those circumstances, the tow would clear the lightship. [They were stopped by the Court.]

Aspinall, K.C. and *A. D. Bateson* for the respondents, the owners of the lightship.—Those on the tow were negligent; they should have ported their helm sooner than they did; if they had done so this collision could not have happened. That negligence, coupled with the negligence of the tug, caused the collision.

Laing, K.C.—The tow can only follow the tug; those on the tow issue no orders to the tug and can only follow her; in such circumstances those on the tug are alone responsible for the collision :

The Quickstep, 63 L. T. Rep. 713; 6 Asp. Mar. Law Cas. 603 (1890); 15 P. Div. 96.

Lord Halsbury.—I must say for my own part that I am compelled entirely to differ from the learned President. I think the appeal ought to be allowed, because, to my mind, nothing can be clearer than the fact that a man is entitled to

assume, given the present circumstances, that the person who in a certain larger sense has the control of the vessel being towed would be properly alive to the state of the wind and the fact that the vessel which is being towed is particularly liable to be affected by the wind. He is not called upon to assume at every point that the vessel towing him is going to be extremely negligent and do that which led to the collision. I am of opinion that he was under no such liability, and that he did what was right and proper; and, although he went out of his way, perhaps, to assume that there might be danger, I think he was quite right to do what he did, and I do not think it can be assumed, because he did not do it earlier, he was guilty of negligence. It appears to me that the negligence was on the part of the towing vessel, and I am of opinion that this appeal ought to be allowed.

FLETCHER MOULTON, L.J.—I am of the same opinion. This is an action against two parties for the negligent navigation of two vessels. It is beyond contest clear that the tug was negligently navigated, and I am of opinion that, for the reasons given by Lord Halsbury, there was no negligence on the part of the hopper. That is the only question raised in this case, and by allowing this appeal we decide nothing except that the charge of negligent navigation made against the crew of the hopper is not made out.

FARWELL, L.J.—I am of the same opinion, and it seems to me not only proper, but absolutely necessary that the navigator on the one ship shall be entitled, and indeed bound, to assume that those in charge of the other ship which is towing him will act with good sense and seamanship. If it were not so, the difficulties and dangers would be vastly increased. On the evidence in this case it is plain that the tug could have avoided the lightship if she had taken reasonable precautions in proper time; and that the hopper put her helm hard-a-port quite as early as it was at all reasonable for her to do so.

Solicitors for the appellants, *Hill, Dickinson, and Co.*

Solicitor for the respondents, *W. Calthrop Thorne.*

House of Lords.

April 19 *and July* 11, 1910.

(Before the LORD CHANCELLOR (Loreburn), Lords JAMES OF HEREFORD, ATKINSON, SHAW, and MERSEY.)

MARSHALL *v.* OWNERS OF THE WILD ROSE. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Employer and workman—Accident—Disappearance of seaman from ship—Inference—Death by drowning—Workmen's Compensation Act 1906 (6 *Edw.* 7, *c.* 58), *s.* 1.

A seaman, employed in a ship which was lying in a harbour, left his berth on a hot night saying that he was going on deck for some fresh air. Next morning his dead body was found in the water close to a part of the ship where there was evidence that he was in the habit of sitting on the rail. There was no evidence as to how he got into the water.

Held, that it was not a necessary inference from the facts that his death was caused by an accident arising out of his employment, and that the shipowners were not liable to pay compensation to his widow.

Judgment of the court below affirmed, the Lord Chancellor (Loreburn) and Lord James of Hereford dissenting.

APPEAL from a judgment of the Court of Appeal (Cozens-Hardy, M.R., Fletcher Moulton and Farwell, L.JJ.), reported 11 Asp. Mar. Law Cas. 251; 100 L. T. Rep. 739; 29 C. C. C. Rep. 190; (1909) 2 K. B. 46), setting aside an award of the County Court judge of Northumberland, dated the 27th Jan. 1909, in favour of the appellant, the widow of Charles William Marshall, who was the second engineer of the steam trawler *Wild Rose.*

On the 27th May 1908 the *Wild Rose,* with a cargo of fish on board, arrived at Aberdeen, and was moored in the harbour basin there. After the fish had been disposed of the *Wild Rose* remained in the harbour basin for the purpose of taking in bunker coal, but the captain gave orders that steam was to be up at midnight with a view to proceeding to North Shields. Marshall, as second engineer, would have had to be on duty for the purpose of getting up steam pursuant to orders. Marshall and Rollo, the first engineer, shortly after ten o'clock at night went below to their berths, which adjoined each other, and lay down there, Marshall taking off all his clothes except his trousers, shirt, and socks. The night was very hot. After Marshall had remained in his berth for a short time he got up and went on deck, dressed as he had been when lying down, and as he passed the berth in which Rollo was lying he said that he was going on deck for a breath of fresh air in order to cool himself. Marshall and Rollo were in the habit of going on deck to cool themselves at night in hot weather dressed as they were when lying down, and on such occasions they were in the habit of sitting on the rail on the starboard quarter of the *Wild Rose* against the fishboard. Marshall was not seen again during the night, and upon the morning of the 28th his dead body was found in the waters of the harbour basin directly below the rail on which he and Rollo were in the habit of sitting. The County Court judge held that Marshall had met his death by accident arising "out of and in the course of his employment," and awarded the appellant 300*l.* damages.

This judgment was reversed as above mentioned.

Scott-Fox, K.C. and *Lowenthal,* for the appellant, contended that this was an accident arising out of and in the course of the seaman's employment within the meaning of the section. The employment contributed to the danger. See

Reed v. *Great Western Railway Company,* 99 L. T. Rep. 781; 29 C. C. C. Rep. 57; (1909) A. C. 31;
Jackson v. *General Steam Fishing Company,* 101 L. T. Rep. 401; 29 C. C. C. Rep. 286; (1909) A. C. 523;

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

Robertson v. *Allan Brothers and Co.*, 98 L. T. Rep. 821; 28 C. C. C. Rep. 398;
Fitzgerald v. *Clarke and Son*, 99 L. T. Rep. 101; 28 C. C. C. Rep. 439; (1908) 2 K. B. 796;
Andrew v. *Failsworth Industrial Society*, 90 L. T. Rep. 611; 26 C. C. C. Rep. 339; (1905) 2 K. B. 32.

If the accident was caused by the fact that the man was in a dangerous place in which he was compelled to be by his employment, then the accident arises out of the employment. The Court of Appeal followed the decision in *Bender* v. *Owners of the Zent* (100 L. T. Rep. 639; (1909) 2 K. B. 41), but this case is distinguishable on the facts. There was evidence that the rail, below which the deceased's body was found, was a place where the men usually sat on deck.

Sir *R. Finlay*, K.C., *Atkin*, K.C., and *Mundahl* maintained that though the accident may have arisen "in the course of" the employment, there was no evidence that it arose "out of" it. It was no part of his employment to sit in this particular place, although he chose to do so for his own pleasure, and therefore a fall from that place cannot be an accident arising out of the employment. Further, there is no evidence at all as to how he got into the water. It is merely conjecture. They referred to

McDonald v. *Owners of the Steamship Banana*, 99 L. T. Rep. 671; 29 C. C. C. Rep. 60; (1908) 2 K. B. 926;
Moore v. *Manchester Liners* (*a*), 100 L. T. Rep. 164; 29 C. C. C. Rep. 120; (1909) 1 K. B. 417.

Scott-Fox, K.C. was heard in reply.

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

July 11.—Their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Loreburn). — My Lords: This has been to me an anxious case because of the view adopted by the Court of Appeal, from which I am always slow to differ, though I think that Fletcher Moulton, L.J. had some doubts. It involves two quite distinct questions. The first is, Does the evidence warrant the conclusion of fact reached by the County Court judge—that this unfortunate man fell into the water by accident? The second is whether, if that be so, the accident was one "arising out of the employment of the deceased." I wish to avoid confusion between those two separate points. In regard to the first of these questions, I observe that in none of the opinions delivered in the Court of Appeal is the conclusion of the learned County Court judge controverted, though it was assailed in argument at the Bar of this House. We know, on the evidence, that on the evening of the 27th May the *Wild Rose* was in Aberdeen Harbour. At 10.10 p.m. Marshall came on board, went below, and took off all his clothes except his trousers, shirt, and socks. It was a very hot night. He subsequently came out of his berth, saying that he thought that he would go on deck for fresh air. The crew always sat on the starboard quarter against the fishboard. Marshall went on deck with his trousers, shirt, and socks on. At midnight he was not on deck. His body was searched for next morning and found just underneath where the crew usually sat. Beyond this we know nothing. Now, in the affairs of life, where much is often obscure, men have to draw inferences of fact from slender premises. A plaintiff or claimant must prove his case. The burden is upon him. But this does not mean that he must demonstrate his case. It only means that, if there is no evidence in his favour upon which a reasonable man can act, he will fail. If the evidence, though slender, is yet sufficient to make a reasonable man conclude that in fact this man fell into the water by accident, and so was drowned, then the case is proved. I cannot possibly say that the County Court judge was wrong, because I also conclude from the slight material before us that this man fell into the water by accident (suicide was not ever suggested) and so was drowned, and I do not believe that any jury would hesitate in saying so. Whether he was sitting on the rail or not I cannot conclude, and it is wholly immaterial. But that he fell off the ship by accident I do not really doubt.

The second question is more difficult. Did this accident arise out of Marshall's employment? Let me see what his employment was. The respondents' case tells us that he was second engineer on the *Wild Rose*, a steam trawler. In that capacity he had to serve continuously. Sometimes he would be actually minding the engines. Sometimes he would be off duty, in the sense of active duty. But he was in service all the time. His employment was to discharge the duties of second engineer as and when they arose, and, among others, to be on the ship. In the opinion of Farwell, L.J. occurs a passage as follows, which brings the matter admirably to a point: "If an ordinary sailor is a member of a watch and is on duty during the night and disappears, I should think that the inference would be irresistible that he died from an accident arising out of his employment; but if, on the other hand, he was not a member of the watch, and was down below, and came up on deck when he was not required for the purpose of any duty to be performed on deck, and disappeared without our knowing anything else, it seems to me that there is absolutely nothing from which any court could draw the inference that he died from an accident arising out of the employment." Now I am not able to take that distinction. The employment being to be on board, I cannot see that an unexplained accident must arise out of the employment if it happen while he is on an active part of his occupation, and cannot so arise if he is for the time being at leisure. In either case you have, first, to ascertain if the man went overboard by accident as best you can, the difficulty of so ascertaining being equal whether he was on watch or not. And if he did fall overboard by accident it equally arose out of his employment, whether it occurred during that part of the voyage when he was actually working, or that part when he was resting from his work. The employment, by the very nature of it, exposes him to certain dangers whether at work or not, one of which is falling or being washed off his ship, and if in the course of that employment the man being on the ship accidentally perishes by one of those dangers, I think that the accident arises out of the employment. In saying this I am anxious not to give countenance to the idea that

(*a*) This case has since been reversed in the House of Lords (103 L. T. Rep. 226).

whenever an accident occurs to a person who is continuously employed it must be taken to have arisen out of the employment. If a seaman had his eye injured, for example, by a comrade striking a match to light his pipe, it could not come within the Act. But I think that it is within the Act when the danger is one of those incidental to the employment. In the present case the arbitrator has so found, and I think that he was entitled so to find.

Lord JAMES OF HEREFORD.—My Lords: I am of the same opinion. I think that it may be taken that there was a recognised habit, prompted by convenience, for the men when resting to sit on the rail, and that no objection was taken to their so doing by anyone in authority. If this be so, the argument that Marshall might be regarded as if he had been sitting on the end of the bowsprit cannot be maintained. It was not usual, or reasonable, or authorised that a man should sit on the end of the bowsprit. It is an admitted fact that the deceased man was in the employment of the defendants, and that in pursuance of that employment he was on board the ship on the night of his death. Being there he was not departing from that employment if he sought the better air of the deck rather than remain in the closer atmosphere of the cabin. Having reached the deck it was reasonable that he should sit down and not remain standing. It was also reasonable to expect that he would sit upon the rail rather than upon the bare deck. In order to carry out his employment he was resting, and when he was resting the accident happened. But it remains to be determined, Did the death of the deceased arise out of his employment? I think that it did. Now what do the words "arising out of the employment" mean? They are vague words, very different in their effect from such words as "caused by the employment." This seems to point to an indirect connection with the employment, and I think that they are fulfilled if the accident occurred during the employment and under circumstances which show that the injured person had not at the time of the injury departed from the controlling incidents of the employment. It may be that independent circumstances may show that an accident occuring during the employment did not arise out of it, but if the conditions which I have mentioned are fulfilled, the burthen of establishing such circumstances must be borne by the employer. The words of the statute, "arising out of the employment," are, as I have said, somewhat vague, but I read them as I think they ought to be read, liberally, and, doing so, it seems to me that the facts of this case establish a right to compensation, and that therefore the appeal should be allowed.

Lord ATKINSON.—My Lords: In this case the Court of Appeal have held that the applicant has not discharged the burden of proof which lay upon her by showing that her husband met his death by an accident arising out of and in the course of his employment. In my opinion they were right. The finding of the learned County Court judge, to paraphrase the language of Lord Watson in *Wakelin* v. *London and South-Western Railway Company* (55 L. T. Rep. 709; 12 App. Cas. 41), was not, I think, an inference which could be reasonably drawn, as a matter of fact, because there were no data from which such an inference could be drawn, so much as a conjecture or surmise, which there were, no doubt, ample materials to justify. There is nothing to show that Marshall did not deliberately jump or throw himself into the water, beyond the greater probability of accident as compared with suicide. No evidence whatever was adduced to show what the structure of the trawler was; whether her bulwarks were so low that he might readily have fallen over them, or so high that he could not have fallen over them. Nothing is stated as to the condition of the vessel's deck, or as to the manner in which she was moored, or whether she was in such a position that the body of the deceased must have been kept precisely in the place in which it fell into the water; but because it was found under the place where it is alleged the crew, or some of them, usually sat, it is assumed, apparently, that he was sitting in that place, and in some way or other fell in from there. Whereas, for all that appears, he might have fallen into the water from some other part of the vessel, and his body, either owing to his struggles, if he did struggle, or to some other cause, have floated to the place where it was found. The argument urged in support of this appeal appeared to me to resolve itself into something like this. A seaman lives on his ship. It is one of the duties of his employment to do so. Whether he works at his proper work, or sleeps or rests, sits or stands or moves about, the relation of master and servant continues to exist between him and his employer, and therefore he does each and all of these things in the course of his employment. If, therefore, he sustains a personal injury while on board his ship in some unexplained and unknown way, it must be assumed that the injury was caused by an accident arising out of and in the course of his employment. He may by his own carelessness or thoughtlessness or wilful misconduct have exposed himself to a new danger, not at all incidental to the doing in a reasonable way of any of the things which he is by the express or implied terms of his employment bound or privileged to do, such, for instance, as by dozing to sleep at night on the bulwarks of his vessel instead of in his bunk to prepare for work next day, yet though this new danger be the cause of the accident by which he is injured, it must still be presumed to be an accident arising not only in the course of his employment, but, in addition, out of and in the course of his employment. Sir Robert Finlay, in illustration of his argument, took the case of a female domestic servant who was obliged to live in her master's house, as the seaman is obliged to live on his ship, and assumed that she was seen to enter her bedroom some hot and sultry night, and next morning the window of her room was found open and her lifeless body found on the pavement beneath. She might have thrown herself out, or dozed asleep and fallen out, or overbalanced herself while awake and fallen out. On the principle for which the appellant contends it should be presumed she was killed by an accident arising out of and in the course of her employment, because in the course of her employment she was undoubtedly entitled to rest and to breathe fresh air; but it does not appear to me to be either a reasonable, ordinary, or proper way of resting or taking fresh air to lean out of a window at night at a time when sleep may readily overtake

her. It could not be assumed that she or her master ever contemplated such a risk as attendant upon her service when she entered upon it. The peril to her was, I think, a new peril arising out of her own careless and reckless act, and not a peril incident to, or connected with, the performance of the duties of her employment, or the enjoyment, in a reasonable and proper way, of those rights and privileges to which she might be entitled as preparations for her active work. The accident caused by that new peril could not, in such a case, I think, be held to arise out of her employment. The only difference between that case and the present lies in the fact that this seat was said to be an accustomed seat; but does that make any real difference? A workman may be bound or entitled to frequent a certain place, or do a certain thing, under certain conditions, and if an accident happened to him while frequenting that place or doing that thing, under these conditions, it might well be held that that accident arose out of his employment, but it by no means follows that the same result would be arrived at if the conditions were entirely changed before he did the particular thing or frequented the particular place. The alteration in the conditions may have made that perilous which was theretofore safe, so perilous, indeed, that in the absence of actual proof it could not be presumed that the employer or workman ever contracted or contemplated that the peril should or might be encountered as one of the risks connected with the employment. Even, therefore, if this seat on the bulwarks, near the fishboard, was one which the crew, with the express or implied permission of the master of the ship, used in their waking moments, so as to cause an accident arising from its use at such times to be rightly held to have arisen out of the employment, it by no means follows that the use of the same seat for sleeping on at night was ever contemplated by the parties as a risk incident to the employment. Even, therefore, if it had been proved, which it was not, that the deceased when he left his bunk sat upon this seat, then, having regard to the time at, and circumstances under, which he did it, and the great probability that he would drop asleep, it does not, in my opinion, at all follow that the risk of falling into the water was a risk incidental to or connected with his employment, while his ship was in port, and at such a time and under such circumstances, or his drowning an accident arising out of his employment, though it may well be that the risk of being blown or swept overboard or of falling overboard while his ship was at sea was such a risk. One cannot help feeling sympathy for the applicant, but if any force is to be given to the words of the statute, she must, in my opinion, be held to have failed to discharge the burden of proof resting upon her.

Lord SHAW.—My Lords: In this case the known facts are few and simple. A sailor, partially dressed, left his sleeping berth in a ship lying in a tidal basin, and proceeded to the deck, having remarked to his companion that he was going up to cool himself. This happened at 10.10 on the night of the 27th May 1908. Next day his dead body was found in the harbour, just under the fishboard, which was at a part of the gunwale where the members of the crew sometimes sat down. From these, which are the only facts proved, the County Court judge inferred that the deceased met his death by accident arising out of and in the course of his employment, and he found the shipowners liable in compensation under the Act of 1906. The learned judges of the Court of Appeal have found that it is not established that the death occured by accident arising out of and in the course of his employment. They appear to concede, or are willing to take it for granted, that the death occurred by accident, and that the accident may be looked upon as having occurred in the course of the employment, but recognising that they are bound also, before liability can emerge under the Act, to hold that the accident arose out of the employment, they cannot do so, and they decide accordingly. I feel constrained to agree with their conclusion. It has been reached after great concessions or assumptions in favour of the appellant, and on those, in my opinion, it has been properly reached. But, for my own part, I do not conceal that I should have some difficulty in making those concessions or assumptions. The facts in every case may leave here and there a hiatus which only inference can fill. But in the present case the name of inference may be apt to be given to what is pure conjecture. What did the sailor Marshall do when he left his berth and went on deck? Nobody knows. All is conjecture. Did he jump overboard, walk overboard, or fall overboard? One can infer nothing; all is conjecture. Was there an accident at all, or how and why did the deceased unhappily meet his fate? No doubt the occurrence took place during the period of his engagement, but did it take place in the course of his employment, or, as was justly argued, in the course of some occupation grafted on to his employment but in no way part of it, necessary to it, or usual in it? There can be, in my view, nothing dignified with the name of an inference on this subject, but again only conjecture. Finally, if mere conjecture be legitimate, how can it reach the point that an accident causing the death by drowning of this man occurred not merely in the course of his employment but arose out of that employment? The answer to this is, that he was a sailor on his ship and the ship was surrounded by water. Had the ship been at sea one could have understood the answer better, because the sailor might have been pitched overboard by the rolling of the vessel or blown overboard by the wind. These would have been the perils surrounding the seaman's life and duty, and injuries or accidents through them might well enough be held to fall within the category of things arising out of and in the course of the employment. But in the present case such a question does not arise, for the ship was lying quietly in port. The deceased man left his sleeping berth and went on deck; and the nearest conjecture to an inference that was placed before this House was that he had seated himself on the side of the ship and fallen asleep and overboard. No one would attribute misconduct to him in selecting that place, or even the rigging to rest upon during the night rather than in his berth, and of course it is argued that since he was under engagement and doing no wrong the accident to him arose in the course of his employment. But how it can be said to have arisen out of it I do not understand. It arose

out of some voluntary act of the deceased, in no way springing from his employment, necessary to his employment, or usual in his employment. This being so, how is the Act of Parliament to be construed? To keep to the case of death alone. The statute provides that, "if in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall . . . be liable to pay compensation" in respect of the workman's death. I do not see my way to hold that this is equivalent to saying that the employer is liable to pay compensation in respect of the death of any workman should the death occur during the period, and at the place, of his service. To do so would, in my opinion, be to interpret language setting up definite conditions and canons of liability as if it were really a life insurance. It is settled law that a claimant, in invoking the statute, must establish that the conditions and canons of liability which it sets up have been satisfied. But the interpretation argued for by the appellant would wipe those conditions and canons out. I desire, however, specifically to guard my opinion as being any precedent in what I may call the ordinary case of a sailor, whose life is sacrificed in circumstances of mystery—say, of loneliness during a night watch or confusion during a storm. The performance of duty in such circumstances would raise presumptions of a kind consistent with the seaman's case completely satisfying the conditions laid down by the Act. I think that the view expressed on that subject in the latter part of the judgment of Farwell, L J. is both humane and sound. The present case, however, I hold, for the reasons above expressed, to be of a totally different character. I agree with the opinion that the appeal should be dismissed.

Lord MERSEY.—My Lords: For the purpose of dealing with this appeal I accept the statement of facts in the appellant's case. It is not necessary to recapitulate them. The only question to be determined is whether these facts afford any evidence upon which the County Court judge could reasonably find that the death of Marshall was caused by accident arising out of his employment. The Court of Appeal were of opinion that they afforded no such evidence, and I think that their decision was right. It is said that the accident was due to the man's sitting on the rail of the ship and falling from it. I think that this is probably true, although I fail to find any legal evidence in support of the statement. But I do not see how it can reasonably be said that to sit on the rail of the ship was in any sense connected with the man's employment. I agree with Sir Robert Finlay that it would be as reasonable to say that to sit on the end of the bowsprit would be an act connected with his employment, and if sitting on the rail was no part of his employment, falling from it cannot be an accident arising out of his employment. I do not overlook the statement in the case that the engineers were in the habit of sitting on this rail. I can well believe it to be true. But that the men were in the habit of doing a thing which was not an incident of their employment cannot, in my view, bring any resulting accident within the meaning of the Act. I do not regard this case as laying down any general principle. It turns entirely on its particular facts; and taking the view that I do of those facts, I think that the appeal fails.

Judgment appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellant, *Maples, Teesdale, and Co.*, for *G. W. Chapman*, North Shields.

Solicitors for the respondents, *Williamson, Hill, and Co.*, for *R.* and *R. F. Kidd*, North Shields.

Supreme Court of Judicature.

COURT OF APPEAL.

Monday, July 4, 1910.

(Before COZENS-HARDY, M.R., FARWELL and KENNEDY, L JJ.)

WIENER AND CO. *v.* WILSONS AND FURNESS-LEYLAND LINE LIMITED. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Bill of lading — Craft transit — "Vessel" — Exceptions — Unseaworthiness — Ambiguity — Merchant Shipping Act 1894 (57 *&* 58 *Vict. c.* 6), *s.* 742.

A through bill of lading contained a clause of exceptions, including damage, loss, or injury arising from rain, &c., and also from unseaworthiness or unfitness of the vessel at commencement of or before or at any time during the voyage. It further contained the following clause: "All the above exceptions and conditions shall apply from the time when the goods come into the possession or custody of the carriers or their agents, in warehouse, on wharf, in craft, in course of land or water transit, or in any other situation."

The shippers claimed damages for injury to the goods from rain occasioned by the unseaworthiness or unfitness of the barge in which the goods were conveyed to the carrying steamer.

Held, that the shipowners were not liable; that the exceptions and conditions in the bill of lading applied to the barge, so far as in the nature of the case they were applicable, just as much as they did to the vessel; and that there was no ambiguity in the clauses in question.

Decision of Hamilton, J. affirmed.

THIS was an appeal by plaintiffs from a decision of Hamilton, J.

The plaintiffs' claim was for damages for breach of duty or contract in and about the carriage of sheepskins by the defendants.

By their points of claim they alleged that the defendants were common carriers, or, alternatively, undertook the liability of common carriers; or, in the further alternative, undertook to lighter the goods with due care and skill.

They further alleged that in breach of their duty as common carriers, or in breach of their contract, the defendants allowed the goods to become damaged by rain while on board their lighter; and, further, that the lighter was unseaworthy.

By their defence the defendants denied that they were common carriers or undertook to

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

lighter the goods with due care and skill; and, further, that they were protected by the exceptions in the bill of lading.

The material provisions of the bill of lading, dated in London, the 25th March 1909, were as follows:—

Received from J. Wiener and Co. for shipment in and upon the steamship called the *Anglian* sailing from the port of London (or the following steamer) ninety-seven bales raw dry sheepskins . . . to be delivered from the ship's deck (where the shipowners' responsibility shall cease) in the like good order and well conditioned (subject to the liberties, exceptions, and restrictions under-mentioned) at the port of Boston, or so near thereto as she can safely get, always afloat, unto . . . at Boston for transportation in bond unto order of their assigns. . . . Goods to be forwarded to Gloversville at ship's expense and shipper's risk. . . . The act of God . . . breakage, pilferage, wastage, rain, spray . . . lighterages, transhipment, jettison, explosion, heat, fire afloat or on shore, damage or loss from boilers, tanks, pipes, and steam machinery (including consequence of defect therein or damage thereto) . . . unseaworthiness or unfitness of the vessel at commencement of or before or at any time during the voyage, perils of the seas, rivers, navigation, or land transit of whatsoever nature or kind, and all damage, loss, or injury arising from the perils or things above mentioned, or from the negligence, act, default . . . of the owners, &c. . . . or other persons in the service of the shipowner or not, and whether on board the vessel carrying the goods, or any other vessel owned by the company, and whether occurring previously or subsequently to sailing, always excepted. . . . If the owner shall have exercised due diligence to make the steamer in all respects seaworthy and to have her properly manned, equipped, and supplied. it is hereby agreed that in case of danger, damage, or disaster resulting from faults or errors in navigation, or in the management of the steamer, or from any latent defect in the steamer, her machinery or appurtenances, or from unseaworthiness, whether existing at the time of shipment or at the beginning of the voyage (provided the latent defect or unseaworthiness was not discoverable by the exercise of due diligence), the consignees or owners of the cargo shall nevertheless pay salvage and any special charges incurred in respect of the cargo, and shall contribute with the shipowner in general average to the payment of any securities, losses, or expenses of a general average nature that may be made or incurred for the common benefit . . . and to the same extent as if such danger, damage, or disaster had not resulted from or been occasioned by faults or errors in navigation, or in the management of the vessel, or any latent defect or unseaworthiness. . . . The carrier is not to be liable for any loss or damage capable of being covered by insurance, nor for any claim, notice of which is not given before the removal of the goods. . . . In case of any loss or damage to the goods for which the carrier may be liable, he shall have the benefit of any insurance upon the said merchandise, and on payment of such loss or damage he shall be subrogated to all the rights of the assured. . . . Claims on the carriers or their agents, or servants, for loss, damage, or any other cause, shall be settled direct with the agents of the line in London. . . . All the above exceptions and conditions shall apply from the time when the goods come into the possession or custody of the carriers or their agents, in warehouse, on wharf, in craft, in course of land or water transit, or in any other situation, and in accepting this bill of lading the shipper, consignee, and (or) indorsee agree to all its stipulations and conditions whether written or printed. . . .

The cargo was received by the defendants through the medium of a lighterman, and conveyed by the lighter from a wharf to the defendants' steamer.

It was admitted that the defendants were liable for the acts of the lighterman and the condition of the lighter; and that the contract contained in the bill of lading was applicable to that portion of the transit.

On the 19th April 1910 the action came on for trial before Hamilton, J., sitting without a jury, when his Lordship gave the following judgment:—

HAMILTON, J.—This is an action brought by the shippers of ninety-seven bales of raw dry sheep-skins for breach of a through bill of lading against the defendants, who granted them that bill of lading and received the sheep-skins for carriage. The skins were in fact handed to a lighterman, and put into a barge of which he was in charge, by the plaintiffs at St. Olave's Wharf, in London, and it is admitted that not only for that lighter and lighterman were the defendants responsible, but that the contract contained in the through bill of lading is applicable to that part of the transit by lighter from St. Olave's Wharf to the carrying vessel belonging to the defendants. It is alleged by the plaintiffs that the barge, the *Amy*, was not seaworthy or reasonably fit for the reception or carriage of the skins in question by reason of her not having a supply of tarpaulins with which to protect these skins which, it is alleged, were goods liable to take damage by getting wet by rain. It is alleged that in consequence of their getting wet by rain for want of the requisite tarpaulins they arrived at the terminus of the through bill of lading transit—namely, Gloversville, in, I think, the State of New York—externally in good condition, but, in fact, so damp in the interior that sixty-four out of the ninety-seven bales were damaged to the extent of 50 per cent. of their value, whereby, after a realisation, the plaintiffs have lost 412*l.* 7*s.* 6*d.* The defendants contest the unseaworthiness or unfitness of the barge, allege that she was supplied with tarpaulins at the material time, and, although they offer no proof to the contrary, point out that it is incumbent upon the plaintiffs to prove that the damage claimed for was a consequence of the unseaworthiness, if any; but the defendants also entrench themselves, they say, impregnably in the clauses of an extremely voluminous bill of lading.

I think the first question to be considered is, What is the effect of the bill of lading? Now, it is admitted frankly that the bill of lading applies to the craft portion of the transit — that is to say, the loading of the skins in the *Amy* and the carriage by her of the skins from St. Olave's Wharf to the ship. I do not propose to read this bill of lading through, but there are two clauses which it is necessary to consider together upon the contention of the defendants that they are not, under this bill of lading, liable for unseaworthiness at all, but that it is excepted, even when the unseaworthiness happens in the barge and is the cause of the damage. The bill of lading is a through bill of lading, which commences "Received from J. Wiener and Co. [namely, the plaintiffs], for shipment in and upon a steamship called the *Anglian*," and contains in the earlier part of it, after the statement of the terminus *ad quem*, a

clause of exceptions beginning as usual with the act of God and the King's enemies. That clause of exceptions contains a number of matters which are causes of damage at all times and at all places—like rain, frost, decay, pilferage and wastage, and so forth. It contains some which are clearly inapplicable, at any rate to a dumb barge like the *Amy*—namely, an exception of damage or loss from boilers, tanks, pipes, and steam machinery, and it contains some which, according to the defendants, are perfectly applicable to the craft, and, according to the plaintiffs, are not applicable to the craft, of which the principal are the words referred to, "Unseaworthiness, submerging or sinking of ship or admission of water into the vessel, straining, unseaworthiness or unfitness of the vessel at commencement of or before or at any time during the voyage, perils of the seas, rivers, navigation, or land transit of whatever nature or kind, and all damage, loss, or injury arising from the perils or things above mentioned." At the end of the bill of lading, in the last clause, are the words, "All the above exceptions and conditions shall apply from the time when the goods come into the possession or custody of the carrier or their agents in warehouse on wharf in course of land or water transit or in any other situation." The defendants say those last clauses plainly and abundantly apply the exceptions in the earlier part of the bill of lading to the craft transit, and most particularly of all they plainly and clearly apply unseaworthiness to the case of transit in a barge. To this there were two answers made. One, as I understand it, is that the words in the long clause of exceptions are not capable of application to a craft, just as the exception of damage or loss from boilers can have no reference to the loss in the barge, or unseaworthiness or unfitness of the vessel can have no reference to the barge, because by the word "vessel" is, as a matter of construction, plainly meant the ocean steamer, the *Anglian*, or the substituted vessel which, in fact, took the goods. This seems to me to be a question of construction in the sense in which that word is understood by lawyers, and is independent of the plaintiffs' second point that even if there are words in the long clause of exceptions relating to unseaworthiness and possibly applicable to the craft risk, nevertheless the whole thing is so involved and so ambiguous that the clause ought not to be applied so as to protect the shipowner.

Now, as a matter of construction it appears to me that the words "unseaworthiness or unfitness of the vessel" are abundantly capable of being applied to the barge *Amy* as well as to the ship, the *Anglian*, or her successor. The construction of the bill of lading involves the construction of all its different provisions. First of all, it is pointed out, and justly pointed out, that the word "steamer" or the word "ship" is constantly used throughout this bill of lading in connection with the actual steamer and in connection with the ocean risk. Secondly, it is pointed out that in the very dozen words which relate to unseaworthiness, "ship" or "vessel" are used as distinct terms, and the defendants say as separate terms. The plaintiffs say: "No, this is only tautology; this is only a variety of language. That which is described as the ship is also described as the vessel. Both words refer to the ocean steamer." But if one looks in the bill of lading at large one finds a good many passages in which "vessel" is used as a term capable of a wider interpretation than the word "steamer" or the word "ship." For example (and I think this is the strongest evidence of it), "In case of quarantine the goods may be discharged at the merchant's risk into quarantine depot, hulk, or other vessel as required for the ship's dispatch," a clause which clearly places the vessel into which the goods may be discharged in antithesis with the dispatch of the ocean steamer which is to go away, and which annexes the words "every vessel, depot, or hulk," in such a way as to show that "vessel" in that passage includes something stationary or movable in harbours as distinguished from going to the open sea. As a matter of construction I think that any court ought to read the words in question in this bill of lading as capable of application to the case of a craft, and "unseaworthiness or unfitness of the vessel" seem to me to be words as applicable to craft as the words "rain, spray, rust, frost, or decay."

Now comes the other question, whether they are applied to the craft by the omnibus clause at the end, and whether that has been done so unambiguously as to entitle the shipowner to rely upon that exception so introduced. Mr. Bailhache has brilliantly argued that this is not so. He says first of all the rule is laid down in the closing sentences of Lord Macnaghten in *Elderslie* v. *Borthwick* (*sup.*) that that which is ambiguous is no protection, and if the shipowner is protecting himself against liability, and, above all, against liability for unseaworthiness, he must use language which is quite plain, and quite plain not merely on careful consideration, but such that a business man of ordinary intelligence would be able to make up his mind about it. Of course, I accept the test thus laid down in *Elderslie* v. *Borthwick*, but the real crux comes in the application of it. Mr. Bailhache says "all the above exceptions and conditions shall apply" cannot be true, because as soon as you commence to read the above exceptions you see that there are some that cannot apply to a craft, and he points out as the most salient instance loss from boilers. The next step is that that being so "all the above exceptions" must be read distributively, and must be read as "all the above exceptions as may be applicable," or "all the above exceptions, in so far as they affect warehouse, wharf, or craft, are to be applied," and when you have got thus far he says, "How is a plain man to understand whether the unseaworthiness of the vessel is or is not an exception applicable to the case of loss in craft?" Of course, in dealing with this matter one first of all asks for authority, and no authority has been cited where the courts have held words similar to these, or constructions of a bill of lading similar to these, to be too ambiguous to affect their purpose. Where in one and the same instrument, as in *Elderslie* v. *Borthwick* (*sup.*), a shipowner says in one part "I will not be liable for unseaworthiness at all," and in another part "I will be liable for unseaworthiness if I have failed to take reasonable care to make the ship seaworthy," of course there is no very great practical difficulty in applying the principle and in saying that a shipowner who says one thing on one page and the opposite on another has hardly conveyed his meaning unam-

biguously to a plain man of business, but I think I get no guidance from the cases as to whether, in a construction like this, the rule about ambiguity really applies or not. It appears to me clear, first of all, that the mere trouble and complexity of the thing does not make it ambiguous. In this case no one could look at these two things together without reading the whole, and then, on getting to the tail-end of it, going back to the beginning, and with some pains putting the two together; but that is a mechanical difficulty similar to printing the bill of lading in illegible small type. Then it seems to me to be clear that the mere fact that trained minds can present, and plausibly present, very opposite constructions of these clauses read in combination again is anything but conclusive upon the point. The third thing is that, of course, from the point of view of a judge, the test is a somewhat fictional test, because half a lifetime of training in the law scarcely qualifies one for exactly appreciating how a plain man of business would be impressed by reading this document if, which again is a violent hypothesis, he ever were to read it.

Doing all I can to put myself at the correct point of view, I think the first thing that would occur to anyone reading this bill of lading at the end is: Here is a risk being tacked on antecedent to the carriage by sea. I am getting the right to have my goods carried under this bill of lading not only in the ship but from the warehouse to the ship, and I see at the end that the shipowner claims to be as free from liability in warehouse, on wharf, or in craft, as he has claimed to be in the earlier part of the bill of lading. I do not think the merchant would then begin to construe these two sentences like a grammarian, or that he would be at very much pains to adjust his business operations upon the assumption that he was considering with anxiety the syntax of the one sentence or the other. It appears to me that he would say: "There may be some doubt about some of these things, because they do not apply to a barge, although, as to that, there can be no real difficulty, because what does not apply to a barge does not apply to the case and may be struck out, but I understand this to mean that he intends that anything that can apply to a barge from which he is protected in the ship he intends to be protected against in the barge.. Those are the terms on which the goods are being carried. If those terms are satisfactory to my underwriters they will suit me. I am not in any doubt about the matter, and I am quite content to have my goods carried on those terms." If that is so, it appears to me that as a matter of construction the last clause applies to the barge the provision about unseaworthiness, and does so in a manner, which is sufficiently within the cases, to protect the shipowner in the present case. That relieves me from any necessity of expressing any opinion about the other questions of law that have been raised except one, and only leaves it incumbent upon me to find the facts briefly.

The one question of law that has to be briefly considered arises in connection with what is a question of fact—namely, whether the facts bring the case within the clause, "The carrier is not to be liable for any loss or damage capable of being covered by insurance, nor for any claim notice of which is not given before the removal of the goods." It was conceded by the defendants that this was a through bill of lading to Gloversville, in the United States. The removal of the goods meant removal from the depot of the railway company at Gloversville, and it was contended that under the circumstances that clause would have afforded them a defence. As a matter of fact, the goods were removed on the 24th April 1909 and complaint was first made by the recipients to the plaintiffs on, I think, the 29th, and, when the news had been cabled to the plaintiffs, was by them communicated in the form of a notice of claim to the shipowners in this country in the early days of May, in any case not before the removal of the goods, but after they had been taken away to, and examined at, the plaintiffs' agent's warehouse in Gloversville. Two cases were cited, *Tattersall* v. *National Steamship Company* (*sup.*) and *Morris* v. *Oceanic Steam Navigation Company* (*sup.*), a decision of Mathew, J. in 1900. In the first case a clause, which, as it seems to me, is in principle indistinguishable from the present one, because it is a clause limiting liability in amount, and not with regard to time of claim, but still involving liability, was held to be no defence to a shipowner whose bill of lading made him liable to make a ship seaworthy, who was sued for damage due to the proved unseaworthiness of the vessel. In that case the Divisional Court held that the clause was referable to the contract to carry with care, and so forth, in a seaworthy ship, and was not referable to the antecedent obligation to make the ship seaworthy. If that case is right, of course, and if it is made out that the ship was unseaworthy here, and the damage flowed from the unseaworthiness, then *Tattersall's* case would prevent the defendants having any answer under this clause. On the other hand, Mathew, J. held that a clause of a similar character, intended to limit the liability of the defendants again in amount, was available for their protection, although the ship had not been seaworthy at the time of sailing. Now, it is argued by Mr. Dawson Miller that the real gist of Mathew, J.'s decision is that the bill of lading there provided that unseaworthiness should not be a liability of the shipowner, provided he had taken due care to make the vessel seaworthy, but if that event failed, and he did not take such due care, then the full obligation as to unseaworthiness attached, and therefore the shipowner was in the same position as the shipowner in *Tattersall's* case, and, that being so, Mathew, J. had held that even under those circumstances a clause of this character protected the shipowner. If that is so, the two cases cannot stand together; one is in conflict with the other, though I do not see from the report that Mathew, J. had *Tattersall's* case cited to him in argument. My duty, of course, is not to hold that either case can be wrong if it is reasonably possible to reconcile them. If one case or the other must be disregarded, my duty is to follow *Tattersall's* case, the decision of the Divisional Court; but I think on the argument advanced by the plaintiffs they are really to be reconciled in the way suggested, namely, that where the bill of lading, as in *Tattersall's* case, leaves the obligation to make the ship seaworthy unreduced, the exception in question, or the exception in this case, would only be an exception out of the liability to carry the

goods properly on the voyage, assuming that the ship has been previously made seaworthy. On the other hand, if the case were one in which the common law obligation of seaworthiness had been replaced by a contractual one which substituted an endeavour to make a ship seaworthy for an absolute success in making a ship seaworthy, then an exceptional liability of this character would relieve the shipowner from liability for the acts of his servants, and would also relieve him; but if the law were such as to establish the defendants' point in this matter, then I have to say how I find the facts upon this question. I may refer to *Moore* v. *Harris* (3 Asp. Mar. Law Cas. 173 (1876); 34 L. T. Rep. 519; L. Rep. 1 A. C. 318) in the Privy Council. Although the language of the judgment upon a clause which I think is indistinguishable from the present in principle was in favour of construing it quite literally, and of saying that if notice is not given, whether there is an opportunity of giving it or not before the removal of the goods, that would be an answer to the shipowner, the actual decision, as is plain from p. 330 of L. Rep. 1 A. C., was that the limitation was applicable, at any rate, where the damage was such as on an examination of the packages, conducted with proper care and skill at the place of removal, could have been discovered. The evidence before me as to this is that there are no conveniences for examining skins at the depot at Gloversville, and anyone wanting to examine skins would have to examine them, as I understand, on the platform or up in the sidings, and that it is not the practice to examine bales of skins there, but in this case the shippers knew before the vessel had reached Boston that the goods were wet with rain, and that they might have been damaged. I think they knew more than that; I think they knew that the goods had taken damage, because the witness Chambers—who, I think, is accurate here—says that he had at the time of loading telephoned to Messrs. Wiener that their skins were actually getting damaged by wet. Nevertheless, they took no steps whatever, as I think they reasonably ought to have done, to advise their correspondents in Gloversville who were going to receive the goods that they had got wet by the fault of the shipowner, or those for whom he was responsible, and might therefore, in the ordinary course, have expected to find damage on arrival. Had they done that, in spite of the evidence of Mr. Hegarty about the depot at Gloversville, I see no reason at all why two or three or half-a-dozen bales of skins could not have been opened actually at the station sufficiently to see whether there was extensive damage or not; and then, if damage was so discovered, they could have given the shipowners the benefit of that notice which they had stipulated for, and given them the opportunity before the goods were removed of seeing what the extent of the damage was, what the cause of it was, and what course they ought to take with regard to their liability; and therefore I think, upon the facts, that there was such an opportunity of giving notice of this damage before the removal of the goods from the railway station at Gloversville as within the decision in *Moore* v. *Harris* would have made this clause apply. But there are other considerations which, in my opinion, bind me to say that the clause does not afford an answer to the defendants, the shipowners.

Now, with regard to the facts, I think it is clear that before this barge could be fit to receive and carry these skins she ought to have been provided with tarpaulins. The conduct of the parties, as well as the evidence in the case, satisfies me of that. Was the *Amy* supplied with tarpaulins? The owner of the barge says he had arranged that she should be supplied. The people with whom he arranged, Smith and Co., say that they took some steps to supply the tarpaulins required, but whether the tarpaulins reached St. Olave's Wharf, and when, seems to me to depend almost entirely upon a comparison between the evidence of Chambers, the foreman who superintended the loading of the barge, and the younger man, Horner, who was the lighterman of the *Amy*. They contradict one another; they contradict one another as to times, and they contradict one another as to whether there were tarpaulins or not. I think it is clear, on Horner's own admissions, that when the rain came on he was taken by surprise. If he had got his tarpaulins they were not, at any rate, anywhere where they could be promptly put upon the goods to protect them from the sudden fall of rain. On his own admission also I think it is evident that the tarpaulins were not there by any means when he expected them; otherwise, he would never have gone to the telephone to try and hurry them up. I have come to the conclusion that I ought to accept the evidence of Chambers, that when the goods were being loaded, and when the rain fell, the tarpaulins were not there. I have the clear fact of the foreman promptly telephoning to Messrs. Wiener that the skins were getting damaged by wet, and setting them in motion, with the result that Messrs. Wiener's clerk telephoned to the shipowners, and they, I think, telephoned to the barge-owner, and I do not think that all that telephoning would have taken place if it was not for the fact that Mr. Chambers saw before his eyes heavy rain falling upon these bales in the barge. Mr. Balchin tries to fix the time of these telephone messages at a time antecedent to the fall of rain, but although I quite believe he is doing his best with the evidence, it appears to me I cannot rely on his recollection, in the teeth of what was done at the time, and the precise evidence of Chambers, the foreman. The remaining question is whether the rain that fell caused the damage? There is a great deal of doubt about this, and if the defendants had been able to offer me any evidence to suggest some other mode in which the skins got wet, I think that I should have to hold that the plaintiffs have not made out their case. In the first instance, the letters that came from Gloversville speak of sea-water damage, an expression, of course, which may be explained by the skins being dry-salted, but, at any rate, they suggest that they were not thinking of damage in the particular way in which it is said to have occurred. It is clear that the plaintiffs, on getting that report, could not believe that so much damage could be due to what they thought such a trifle as this shower of rain, as to which, as their letter of the 1st May shows, they had not even at that time got an accurate account of the facts before them, and even when I look at the affidavits from America they are somewhat vague.

One witness is not able to say whether the damage was by salt or fresh water; the other says his impression is it was from fresh water. One witness cannot say the time, except it is not of recent origin, that it occurred, and the other says three or four weeks from the date of the examination. There are discrepancies between the account given in the correspondence of what those experts had reported and what the experts say in their affidavits, but still, though I think there is considerable difficulty in putting this evidence together to make out the plaintiffs' case if there was anything to set against it, as there is nothing to set against it I accept their evidence. I am satisfied that the goods, when packed in the warehouse for export, were in perfectly good condition. The foreman, who superintends that, says so, and I believe him, and as the defendants might have given evidence of any opportunity for the goods to get wet at any time after they had reached the ship's side, and have failed to do so, it seems to me the natural conclusion is to trace the damage to the rain, it being of a character which rain might, in this class of goods, perfectly well cause. As to the amount of damage, there seems to be no question that a prudent course was taken in realising the goods, and that the loss actually is what is alleged, 412*l.* 7*s.* 6*d.* I think that disposes of the questions of fact, because although it was contended by the defendants that the plaintiffs could not rely on unseaworthiness, seeing that the plaintiffs' own servants had gone on stowing bales in a barge on the top of bales that were already wet, and therefore exposing them to damage, and knowing that there were no tarpaulins for their protection, I think it is sufficiently clear upon the evidence that it was the bales that were already in the barge that were wet, and that took damage, and that as they had been already handed over bale by bale to the lighterman the responsibility of the shippers had ceased and the responsibility of the shipowner had commenced, and after that it was for the shipowner to protect them, or to pay damages. In the result, there is judgment for the defendants with costs.

From that decision the plaintiffs now appealed.

Bailhache, K.C. and *Leck*, for the appellants, contended that the bill of lading was ambiguous, and that therefore the defendants were not protected by its provisions. They relied on

Elderslie Steamship Company v. *Borthwick*, 10 Asp. Mar. Law Cas. 24 (1905); 92 L. T. Rep. 274; (1905) A. C. 93.

Atkin, K.C. and *Dawson Miller*, for the respondents, were not called upon to argue.

Cozens-Hardy, M.R.—I must say that I think that this is a reasonably plain case. I think that this bill of lading is rather less like the Chinese puzzle, which has been referred to, than many others. I assume, without deciding in favour of Mr. Bailhache's argument, that the first—the main part—of the bill of lading was addressed to the ocean-going vessel, and the ocean-going vessel only. But on the face of it it is a through bill of lading. It is made a through bill of lading by the clause at the end of the bill of lading itself, or, at least, that clause makes the matter quite clear. It says: "All the above exceptions and conditions shall apply from the time when the goods come into the possession or custody of the carriers or their agents, in warehouse, on wharf, in craft, in course of land or water transit, or in any other situation." Here it was found that the barge which conveyed the goods from the wharf or warehouse to the ocean-going steamer was not seaworthy, and the only question for us is this: Whether the exception and condition relating to seaworthiness in the main body of the bill of lading applies to the barge. I must say that it seems to me reasonably plain that it does. I think that it cannot be put better than it was put by Hamilton, J. in a passage of his judgment which I will now read. He says, using for the moment the language of any business man, "the man in the street," this (at p. 719 of 102 L. T. Rep.): "Here is a risk being tacked on antecedent to the carriage by sea. I am getting the right to have my goods carried under this bill of lading, not only in the ship, but from the warehouse to the ship, and I see at the end that the shipowner claims to be as free from liability in warehouse, on wharf, or in craft, as he has claimed to be in the earlier part of the bill of lading. I do not think the merchant would then begin to construe these two sentences like a grammarian, or that he would be at very much pains to adjust his business operations upon the assumption that he was considering with anxiety the syntax of the one sentence or the other. It appears to me that he would say, 'There may be some doubt about some of these things, because they do not apply to a barge, although, as to that, there can be no real difficulty, because what does not apply to a barge does not apply to the case and may be struck out, but I understand this to mean that he intends that anything than can apply to a barge from which he is protected against in the ship he intends to be protected against in the barge.'" That seems to me to be reasonably plain. The exceptions and conditions are to apply to the barge, so far as from the nature of the case they are applicable. It cannot be doubted that unseaworthiness applies to a barge just as much as it does to a vessel. With great respect to Mr. Bailhache's argument—his arguments are always clear—I fail to appreciate the distinction which he seeks to draw between general exceptions only and an express exception like that of seaworthiness. We are dealing here with a clause at the end of the bill of lading which does not seem to me to be inconsistent with anything in the earlier part. It does not seem to me to have any such ambiguity as would render the shipowner liable for not having protected himself clearly; and I think that the view taken by Hamilton, J. was perfectly right, and that this appeal must be dismissed with costs.

Farwell, L.J.—I am of the same opinion. The last clause of the bill of lading adds to the contractual liabilities under the bill of lading a fresh liability which would not otherwise exist under that document. And it gives co-relative freedom from liability so as to make it a liability co-extensive with that imposed by the bill of lading in respect of the vessel. I am wholly unable to see any ambiguity even for the "business man" who has been spoken of. I would suggest that it is easily tested by striking out the word "vessel" and writing in the word "barge." If you find that the words used apply as well to a barge as to a vessel, and if you find that the

liability is imposed in respect of the barge, it seems to follow, in my opinion, that the restrictions on and exceptions from that liability which apply to the vessel apply also to the barge. I think that Hamilton, J. was quite right.

KENNEDY, L.J.—I also think that the decision of Hamilton, J. is perfectly right. I have nothing to add to his judgment, which sets out his reasons, or to the judgments which have already been pronounced by this court.

Appeal dismissed.

Solicitors for the appellants, *Ballantyne, McNair,* and *Clifford.*

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

April 18 *and* 19, 1910.

(Before VAUGHAN WILLIAMS, FLETCHER MOULTON, and FARWELL, L.JJ.)

THE CRAIGHALL. (*a*)

Practice—Collision—Damage action—Preliminary acts—"Vessel"—Landing stage—Rules of the Supreme Court—Order XIX., r. 28*—Order LXXII., r.* 2*—Rules of the Supreme Court* 1883*, Appendix O.*

A steamship ran into a landing stage in the Mersey. The Mersey Docks and Harbour Board, the owners of the landing stage, brought an action against the owners of the steamship to recover the damage they had sustained.

The registrar made an order that the parties to the action should make and file preliminary acts. Bargrave Deane, J. affirmed the order of the registrar.

On appeal:

Held (reversing the order of Bargrave Deane, J.), that the owners of the steamship were not bound to file a preliminary act, as a collision between a steamship and a landing stage was not a collision between vessels within the meaning of Order XIX., r. 28*; that any previous practice which had existed under the Admiralty Rules of* 1859 *as to the filing of preliminary acts had been repealed by the inclusion of the Admiralty Court Rules of* 1859 *in the list of repealed rules in Appendix O of the Rules of the Supreme Court* 1883*, and that in consequence of their express repeal they were not kept in force by the provisions of Order LXXII., r.* 2.

Re Busfield, (1886) 32 *Ch. Div.* 123) *approved.*

APPEAL from a decision of Bargrave Deane, J. confirming an order of the district registrar at Liverpool.

The appellants were the owners of the steamship *Craighall;* the respondents were the Mersey Docks and Harbour Board, the owners of a landing stage in the river Mersey.

On the 15th Feb. 1910 the steamship *Craighall* collided with the Woodside landing stage and damaged it.

The Woodside landing stage is a structure moored to the Cheshire side of the Mersey, and is 795ft. long and 80ft. broad. It consists of a cattle stage, a luggage stage, and a passenger stage. It rises and falls with the tide, and moves slightly in a northerly and southerly direction.

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

The Mersey Docks and Harbour Board issued a writ against the owners of the steamship *Craighall* seeking to recover the damage they had sustained by reason of the collision, and applied to the district registrar for an order that both parties should file preliminary acts.

On the 14th March 1910 the district registrar made an order that preliminary acts were to be filed.

The owners of the *Craighall* appealed to the judge in chambers, who affirmed the order of the registrar.

From his decision the owners of the *Craighall* appealed to the Court of Appeal.

The following orders and rules were referred to during the hearing of the appeal.

Order XIX., r. 28. In actions in any division for damage by collision between vessels, unless the court or judge shall otherwise order, the solicitor for the plaintiff shall, within seven days after the commencement of the action, and the solicitor for the defendant shall, within seven days after appearance, and before any pleading is delivered, file with the registrar, master, or other proper officer, as the case may be, a document to be called a preliminary act, which shall be sealed up, and shall not be opened until ordered by the court or a judge, and which shall contain a statement of the following particulars: (*a*) The names of the vessels which came into collision and the names of their masters; (*b*) the time of the collision; (*c*) the place of the collision; (*d*) the direction and force of the wind; (*e*) the state of the weather; (*f*) the state and force of the tide; (*g*) the course and speed of the vessel when the other was first seen; (*h*) the lights (if any) carried by her; (*i*) the distance and bearing of the other vessel when first seen; (*k*) the lights (if any) of the other vessel which were first seen; (*l*) whether any lights of the other vessel, other than those first seen, came into view before the collision; (*m*) what measures were taken, and when, to avoid the collision; (*n*) the parts of each vessel which first came into contact; (*o*) what sound signals (if any) and when were given; (*p*) what sound signals (if any) and when were heard from the other vessel. The court or a judge may order the preliminary act to be opened and the evidence taken thereon without its being necessary to deliver any pleadings; but in such case, if either party intends to rely on the defence of compulsory pilotage, he may do so, and shall give notice thereof in writing to the other party, within two days from the opening of the preliminary act.

Order LXXII., r. 2. Where no other provision is made by the Acts or these rules, the present procedure and practice remains in force.

Appendix O. Repeals . . . (22) The Rules, Orders, and Regulations for the High Court of Admiralty of England 1859 and 1871.

C. R. Dunlop for the appellants (defendants), the owners of the *Craighall.*—The landing stage is not a vessel within the meaning of Order XIX., r. 28, and the district registrar should not have made this order. The particulars which have to be inserted in the preliminary act have no bearing upon a collision between a steamship and a landing stage. There can be no use in making the parties answer questions which have no material bearing upon the case. When a ship was sued by owners of cargo on the ship for damage done to the cargo by collision with another ship, preliminary acts were not ordered, for they were not in point:

The John Boyne, 36 L. T. Rep. 29; 3 Asp. Mar. Law Cas. 341 (1877).

Even if the old practice under the Admiralty Court Rules required preliminary acts to be filed in cases of damage, that wider practice has not been preserved by Order LXXII., r. 2, as the rules of 1859 are repealed by Appendix O. (22) of the Rules of the Supreme Court 1883. The statement in note (*i*) in Williams and Bruce's Admiralty Practice, 3rd edit., p. 368, is wrong if it is intended to convey that the wider practice still exists. Preliminary acts were first used in 1856 (*The Inflexible*, Swa. 32), and at that time the Admiralty Court had no jurisdiction to try this class of case.

A. D. Bateson for the respondents, the Mersey Docks and Harbour Board.—The real object of the preliminary act is to get a statement from the party filing it of the circumstances while the facts are fresh in his memory, and it prevents the party filing it from shaping his case to meet that of his adversary:

The Vortigern, 1 L. T. Rep. 307; Swa. 518.

There is nothing in the point that from the nature of the case all the particulars cannot be given, for the court only requires the best answers that can be given. A floating landing stage is a vessel within the meaning of rule 28 of Order XIX. A "vessel" is defined in Johnson's Dictionary as "any vehicle in which men or goods are carried on the water"; in the Century Dictionary it is defined as "a ship; a craft of any kind, usually a larger craft than a boat; but in law often construed to mean any floating structure." The landing stage falls within each of these definitions, and the case therefore is within Order XIX., r. 28, and the order of the district registrar was right. [Farwell, L.J.—Every floating structure is not a vessel, *The Gas Float Whitton* (76 L. T. Rep. 663; 8 Asp. Mar. Law Cas. 110; (1897) A. C. 337.] No, because a buoy does not carry men or goods on the water, and the article salved in that case was a gas buoy. Apart from the rule, but following the practice as it existed when the Admiralty Court Rules 1859 were in force, the order may be made, for the provisions of the rule have left the wider practice under the former rules untouched:

Williams and Bruce's Admiralty Practice, 3rd edit., p. 368, note (*i*).

In one of the cases quoted in the note the damage sued for was caused by a ship's anchor fouling a telegraph cable; in that action a preliminary act was filed:

The Clara Killam, 23 L. T. Rep. 27 (1870); L. Rep. 3 A. & E. 161.

A case of collision with a pierhead has been held to be a cause which the Admiralty Court had jurisdiction to try:

The Zeta, 69 L. T. Rep. 630; 7 Asp. Mar. Law Cas. 369; (1893) A. C. 468.

Under the old rules proctors would have filed preliminary acts. The purpose of a preliminary act is stated in

Secretary of State for India v. *Hewitt*, 60 L. T. Rep. 334; 6 Asp. Mar. Law Cas. 384 (1888).

If preliminary acts are not ordered in this case, the plaintiffs are entitled to get the information contained in them by means of interrogatories framed on the same lines. By filing preliminary acts the same result is arrived at by a quicker way. Interrogatories were ordered in *The Isle of Cyprus* (63 L. T. Rep. 352; 6 Asp. Mar. Law Cas. 534 (1890); 15 P. Div. 134).

Vaughan Williams, L.J.—I think that this is a clear case and that the appeal succeeds. It is admitted that the rules, orders, and regulations of the High Court of Admiralty 1859 are included in the matters referred to in the "repeal" appendix to the Rules of the Supreme Court 1883, and in the face of that it is very difficult to see how it can be said that, notwithstanding the passing of rule 28 of Order XIX., the old rule, or the old practice corresponding with the rule, has been preserved or saved from repeal; that is, assuming that the rules of 1859, and the alleged practice thereunder, with regard to the filing of preliminary acts in "causes of damage" went beyond the case of collisions "between vessels," which, in my opinion, they did not. Rule 28 of Order XIX. says: "In actions in any division for damage by collision between vessels, unless the court or a judge shall otherwise order, the solicitor for the plaintiff shall, within seven days after the commencement of the action, and the solicitor for the defendant shall, within seven days after appearance, and before any pleading is delivered, file with the registrar, master, or other proper officer, as the case may be, a document to be called a preliminary act." It is said that notwithstanding that rule, which is to govern for the future the practice as to preliminary acts, a preliminary act may be ordered in a case in which there has been no collision between vessels and only a collision between a vessel and a fixed pier or stage, which, despite the argument of counsel for the respondents, I am of opinion is not a vessel within the meaning of the words of this rule. It is attempted to be said that the application of this rule is limited because it uses the words "in actions in any division." Counsel for the respondents has tried to argue from the words "in any division" that this rule was not intended to apply to actions in the Admiralty Division. The Act says that the several rules, orders, and regulations contained in the schedule are repealed, and I find that Appendix O of the Rules of the Supreme Court 1883 includes the "rules, orders and regulations for the High Court of Admiralty of England 1859 and 1871," which are therefore repealed. I have heard the view Cotton, L.J. took in the case of *Re Busfield* (32 Ch. Div. 123) as to the effect of the inclusion in this repeal order of rules relating to the practice which had previously existed, and he points out that the saving clause as to practice can have no application whatsoever to a rule or order which is specifically repealed. Under these circumstances I need not prolong my judgment, but will only say that this appeal must be allowed, because it is perfectly clear that in this respect the old practice of the Admiralty Court has not been preserved or saved. I should like to add that I am confirmed as to this both by the questions which we put to counsel for the respondents and by his answers, in which he really failed to give us any instance to show that, in fact, the old practice of the Admiralty Court has been preserved. As he was unable to give us any examples establishing any such proposition, it was my duty to ask the learned registrar of the Admiralty Division, and his answer entirely con-

firms the conclusion that I have come to—namely, that so far from it being possible to show there is any rule or practice in the Admiralty Court which has been preserved, which in fact has made the preliminary act applicable outside the cases defined by Order XIX., r. 28, no trace of it can be found in the Admiralty Registry. In these circumstances the appeal must be allowed, with costs.

FLETCHER MOULTON, L.J.—I am of the same opinion. The rule in force with regard to preliminary acts is rule 28 of Order XIX., and that only applies to damage by collision between two vessels. To my mind it is clear beyond all question that this landing stage is not a vessel. It is a huge floating structure intended to be a permanent structure and stationary except in one respect—namely, that it has a power to float, and of rising and falling with the water. Otherwise it is absolutely fixed. It has none of the characteristics of a vessel, and, quite apart from any authority, I am of opinion that it could not possibly be included within the term "vessel." If authority were needed there is the case of *The Gas Float Whitton No. 2*, in which the House of Lords treated with scorn the suggestion that a gas buoy, which was at least as much a vessel as this landing stage, could be regarded as a ship or vessel. Counsel for respondents has contended that preliminary acts may still be directed in cases which do not come within Order XXIX., r. 28. He says that under the rules of the Admiralty Court 1859 preliminary acts were directed in all cases of damage—that is to say, in all cases of damage within the cognisance of that court. I do not think that the language of these rules supports his contention, but I will assume that it does so. He then refers to Order LXXII., r. 2, which says that "Where no other provision is made by the Acts or these rules, the present procedure and practice remain in force"; and he says that in cases of damage other than cases of damage by collision between vessels there is no rule about preliminary acts, and therefore the old procedure and practice remain in force—that is to say, that the Court of Admiralty can still direct preliminary acts in those cases. In my opinion that is not the effect of Order LXXII., r. 2. I have not only my own opinion for this, but also the authority of the decision of this court, which is binding upon us, and with which I thoroughly agree. In the case of *Re Busfield* (32 Ch. Div. 123) this court considered the effect of Order LXXII., r. 2, and Cotton, L.J. laid down the principle that it would be wrong to say that this rule saves any practice which depends solely upon an Act of Parliament which has been repealed, or upon a rule which has been abrogated. There is no question that this earlier practice to which counsel for the respondents appeals depended solely upon the rules, orders, and regulations of the High Court of Admiralty of England 1859, and those are specifically repealed by being inserted in Appendix O to the Rules of the Supreme Court 1883. Therefore the decision of this court is that a rule so repealed cannot be relied upon to keep in force a practice depending upon it. The argument of counsel for the respondents depended solely upon that, and, as it cannot be relied upon, therefore it follows that this appeal must be allowed, with costs.

FARWELL, L.J.—I agree. As regards Order XIX., r. 28, I think the construction is apparent. There must be two vessels in collision, and to say that a pier of this nature is a vessel appears to me to be straining words too much. The other point taken is that the old Admiralty practice remains. Now, there might have been an Admiralty practice antecedent to the rules of 1859, in which case different considerations might arise; but in fact the whole of this practice with regard to preliminary acts depends upon the Admiralty Rules of 1855 and 1859—the rules of 1859 repealing and re-enacting those of 1855. Those rules of 1859 have been in terms repealed, and Order LXXII., r. 2, which is founded on sect. 21 of the Judicature Act 1875, says that "Where no other provision is made by the Acts or these rules, the present procedure and practice remain in force." The question of the effect of that rule has arisen two or three times. There is the case of *Re Busfield*, to which Fletcher Moulton, L.J. has referred. The question also came before Kay, J. in *Magnus* v. *National Bank of Scotland* (36 W. R. 602), where the learned judge cites Lord Redesdale to show the law as it stood long before the Consolidated Orders 1860, and then goes on to point out that the practice had been modified by the Consolidated Orders 1860, that the Consolidated Orders had been thereafter repealed, and that this left the old practice unaffected except so far as "other provision is made by the Acts or these rules." He, therefore, acted upon the old practice. That would have been the case here if counsel for respondents had been able to show that there was an Admiralty practice distinct from, and not dependent upon, the orders repealed. In the case of *Tannenbaum* v. *Heath* (1908) 1 K. B. 1032) the court held that the old practice with regard to the discovery of ship's papers in cases of marine insurance was continued, and continues to the present day, but the court refused to extend it to any other form of insurance. It follows, in my opinion, that this particular form of Admiralty practice, depending entirely upon rules which have since been repealed, no longer exists, and, therefore, the appeal must be allowed.

Solicitors for the appellants, *Thomas Cooper* and *Co.*, for *Hill, Dickinson*, and *Co.*, Liverpool.

Solicitor for the respondents, *W. Calthrop Thorne.*

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

May 3, 4, 5, 6, *and* 27, 1910.

(Before WALTON, J.)

KISH *v.* TAYLOR. (*a*)

Charter-party — Bill of lading — Unseaworthiness—Putting into port of refuge—Deviation — Effect of, on contract of carriage — Dead freight—Lien for — Short loading — Unliquidated damages.

The terms of a charter-party conferred upon the plaintiffs a lien for dead freight, and by the bills of lading the cargo was made deliverable to the shippers' order or their assigns, "all other conditions as per charter-party."

(*a*) Reported by LEONARD C. THOMAS, Esq., Barrister-at-Law.

The charterers failed to load a complete cargo, and the plaintiffs loaded other cargo at a lower rate of freight than that provided by the charter-party in order to minimise the loss.

At the time of sailing the ship was in fact unseaworthy by reason of an excessive quantity of cargo having been piled on deck, and, in consequence of such unseaworthiness, she was obliged to put into a port of refuge for repairs, after which she completed her voyage.

In a claim against the bill of lading holders for a lien on the cargo for loss sustained in consequence of the charterers' failure to load a complete cargo as they were bound to do by the terms of the charter-party:

Held, (1) *that the deviation to a port of refuge for the purpose of repairs was justifiable, and the fact that it was occasioned by the unseaworthiness of the ship did not put an end to the contract of carriage and relieve the defendants from their obligation to pay dead freight; (2) that "dead freight" included a claim for unliquidated damages for short loading, and the plaintiffs were entitled to the lien claimed.*

McLean *v.* Fleming (1 *Asp. Mar. Law Cas.* 160 (1871); 25 *L. T. Rep.* 317; *L. Rep.* 2 *H. L.* (*Sc.*) 128) *followed.*

Gray *v.* Carr (1 *Asp. Mar. Law Cas.* 115 (1871); 25 *L. T. Rep.* 215; *L. Rep.* 6 *Q. B.* 522) *not followed.*

COMMERCIAL COURT.

Action tried by Walton, J., sitting without a jury.

The plaintiffs, who were the owners of the steamship *Wearside*, claimed as against the defendants, who were the holders of a bill of lading dated the 23rd Jan. 1908 for goods loaded in the *Wearside* for carriage to Liverpool, a declaration that they were entitled to a lien upon the cargo carried under the bill of lading and a charter-party dated the 18th Dec. 1907 for dead freight of the steamer, and for payment of dead freight.

The material clauses of the charter-party, which was in the "Pitch Pine" form and made between the plaintiffs and the Mississippi Transportation Company, were as follows:

1. That the said steamship . . . shall with all convenient speed . . . sail and proceed to Mobile, Ala. Charterers also have the option of loading vessel at Pensacola, Pascagoula, or Gulfport, as per margin . . . and there load, always afloat, from the said charterers or their agents, a full and complete cargo of pitch pine sawn timber and (or) deals and (or) battens and (or) boards and (or) scantlings at charterers' option. Deck load (if required by the master) to be supplied by the charterers at their risk and at full freight, to consist of hewn and (or) sawn pitch pine timber and (or) deals and (or) battens and (or) boards and (or) scantlings at the shippers' option. . . . Charterers agree to furnish only such under-deck cargo as will go through the steamer's hatches. Charterers have option of shipping 750 loads hewn under deck at 5*s.* extra per standard, not exceeding what she may reasonably stow and carry over and above her tackle, apparel, provisions, and furniture, and being so loaded shall therewith proceed to a direct port on Continent between Bordeaux and Hamburg, both inclusive, Rouen excepted. Charterers have also option of ordering vessel to discharge at two or three places as per reverse hereof or so near thereunto as she can safely get and deliver the same always afloat at any usual discharging place for such cargo, provided that if the charterers or their agents shall on the steamer's arrival at the port of discharge direct her to proceed to any ready available berth, wharf, dock, or place, where she can lie always afloat she shall proceed thereto and deliver cargo there. Freight shall be paid as follows: . . . 4*l.* 2*s.* 6*d.* per St. Petersburg standard hundred of 165 cubic feet. 6. 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 not accountable for splits or shakes unless caused by careless or improper handling, freight and all conditions, clauses, and exceptions as per this charter. 7. The Act of God, the King's enemies, restraints of princes and rulers, perils of the seas, jettison, fire, barratry of the master and crew, pirates, collisions, strandings, accidents, faults or errors in navigation or in the management of the said steamer, accidents to hull and (or) machinery and (or) boilers or latent defects therein although existing at the time of shipment and although occasioned by the faults or errors in judgment of the pilot, master, mariners, or other persons in navigation or in the management of the steamer, not resulting in any case from want of due diligence by the owner of the steamer, always mutually excepted. The steamer has liberty to call at any ports, in any order, including Newport News, Norfolk, and Sydney, Cape Breton, to coal or for loading or discharging cargo . . . and to tow and to assist vessels in distress, and to deviate for the purpose of saving life and property. 13. The master or owner to have an absolute lien upon the cargo for all freight, dead freight, demurrage, and should the receiver require the cargo to be delivered overside or at a place where the owners cannot exercise their lien then the approximate freight, &c., to be paid during delivery. 14. The vessel to be consigned to charterers or their agents at the port of loading paying them 2½ per cent. commission on the estimated amount of freight. 15. Charterers or their agents to provide and pay a stevedore to do the stowing of the cargo under the supervision of the master, to supply dogs and chains (at their risk), pay wharfage, custom house, tonnage, quarantine dues (but not fumigating expenses or other special charges consequent on sickness of the crew) and consular fees for entrance and clearance, harbour-master's fees, and pilotage in and out at the port of loading at four dollars fifty cents (4.50 dollars) per St. Petersburg standard of 165 cubic feet on the entire cargo on board at port of loading. 20. Charterers' responsibility under this charter shall cease as soon as the cargo is shipped and bills of lading signed, provided all the conditions called for in this charter have been fulfilled or provided for by bills of lading. 22. Any difference between charter-party and bills of lading freight to be settled at port of loading before vessel sails. If in vessel's favour to be paid in cash at current rates of exchange less insurance. If in charterers' favour by captain's bill payable ten days after arrival at port of discharge.

The *Wearside* proceeded to Mobile, Ala., and gave notice of readiness to load on the 16th Jan. 1908, and there loaded a part of her cargo. The cargo in respect of which a lien was claimed in the present case was shipped at Mobile under a bill of lading dated the 23rd Jan. 1908, which provided as follows:

Shipped in good order and condition by N. G. G. Donald, of Mobile, in and upon the good steamship called *Wearside* . . . now lying at Mobile and bound for Liverpool *viâ* Rotterdam and Dunkirk *viâ* other loading ports as per charter dated the 18th Dec. 1907 148 pieces hewn oak timber containing 9946 cubic feet. The rate of freight on the above to be 26*s.* per load of fifty cubic feet. . . . The steamer has liberty to call at any ports, including Newport News, Norfolk, and Sydney, Cape Breton, to coal or for loading or discharging cargo . . . and to tow vessels in distress

and to deviate for the purpose of saving life and property . . . unto shippers' order or their assigns, he or they paying freight for the same as above, all other conditions as per charter-party dated the 18th Dec. 1907, all the terms, provisions, and exceptions contained in which charter are herewith incorporated and form part hereof. . . .

The charterers did not in fact load cargo themselves, but procured cargo to be loaded.

The *Wearside* duly left Mobile and arrived at Pensacola about the 28th Jan. 1908.

On the 16th Feb., after 801 standards had been loaded on the *Wearside*, the charterers, having got into financial difficulties, gave notice to the plaintiffs that they were unable to load any more cargo.

A full and complete cargo would have amounted to about 1463 standards, and the plaintiffs, in order to minimise the damages, obtained 661 more standards, some of which were carried at a freight of 50*s.* and some at 55*s.* per standard.

A portion of the cargo was stowed on deck to the height of 16ft., and the crew complained that the ship was consequently unseaworthy. She was subsequently surveyed by Lloyd's surveyor, who certified that the ship was seaworthy.

Some of the crew still refused to go to sea, and substitutes were obtained.

The *Wearside* left Pensacola at the end of February, and proceeded to Newport News, Norfolk, to bunker, when further trouble occurred owing to members of the crew complaining that the ship was unseaworthy, and more substitutes had to be obtained.

The *Wearside* left Norfolk on the 11th March, and on the 14th March she got into difficulties. A violent change in the wind, accompanied by two big waves, caused the ship to heel over to an angle of 20 degrees, and before she could right herself the lashings of the deck cargo gave way and the cargo shifted, so that it hung over the side of the ship and held her down. The bulwarks of the ship were cracked, and she made water.

The ship was righted by cutting the wire lashings and filling the starboard tanks so as to counteract the list to port. It was found also that the wire lashings had fouled the propeller.

The *Wearside* then proceeded to Halifax to repair the damage.

Three hundred and eighty-two standards were either lost or jettisoned.

The ship then proceeded on her voyage to Liverpool *viâ* Rotterdam.

The plaintiffs claimed to recover from the holders of the bills of lading on the cargo as dead freight 1387*l.*, being the difference between the freight of 50*s.* and 55*s.* per standard on the 661 standards obtained in order to fill the ship and the charter-party freight of 82*s.* 6*d.* per standard.

The defendants by their defence did not admit that the bill of lading incorporated all the terms, provisions, and conditions of the charter-party. They pleaded that by the terms of the bill of lading under which the 801 standards were shipped, the plaintiffs were not entitled to claim any lien upon the 801 standards or any part thereof for dead freight due under the charter-party; that they were entitled to the benefit of 1508*l.* due to the charterers under clauses 14 and 15 of the charter-party; that when the *Wearside* sailed from Pensacola she carried an excessive deckload and was in consequence unseaworthy, in consequence of which it became necessary for her to deviate from her chartered voyage and proceed to Halifax; that by reason thereof the plaintiffs failed to perform the contract contained in the charter-party and (or) bill of lading, and were not entitled to the benefit of any of the provisions contained therein; and that the plaintiffs were not in any event entitled to claim dead freight in respect of the excessive deckload.

Atkin, K.C. and *Holman Gregory* for the defendants.—There cannot be a lien for unliquidated damages:

Gray v. *Carr* (*sup.*).

This proposition seems to conflict with the decision of the House of Lords in *McLean* v. *Fleming* (*sup.*), where, although there was a claim for a liquidated sum, it was apparently decided that there can be a lien for unliquidated damages. *Gray* v. *Carr* (*sup.*) is a case decided in England and binding on an English court, whereas *McLean* v. *Fleming* (*sup.*) is a Scotch case. The vessel deviated because she went off her voyage to Halifax and stayed there some substantial time. The question arising on this point is whether the shipowner is excused a deviation, although for the purpose of saving life and property, where such deviation is occasioned by unseaworthiness:

Carver's Carriage by Sea, sect. 402.

Bailhache, K.C. and *Maurice Hill* for the plaintiffs.—In *Gray* v. *Carr* (*sup.*) the court decided (1) that under the charter-party, which reserved a lien for dead freight, that lien did not cover damages for failing to load a full and complete cargo; and (2) that a lien for dead freight, where the bill of lading incorporates the provisions of the charter-party, is preserved as against the holder of the bill of lading. In *McLean* v. *Fleming* (*sup.*) it was held that under the circumstances the charter-party did in fact give a lien for dead freight. In that case the charterer and the bill of lading owner were one and the same person. The only difference in principle between the two cases is that in *Gray* v. *Carr* the class of cargo which was to be loaded depended on the choice of the charterer, while in *McLean* v. *Fleming* the cargo was homogeneous, and the rate of freight fixed. The present case is on all fours with *McLean* v. *Fleming*. If the two cases are inconsistent with each other, the case in the House of Lords should be followed. The only difference between these two cases is that there is a fixed rate of freight in the one and not in the other. The present case, in common with *McLean* v. *Fleming*, has a fixed rate of freight. In ascertaining what is covered by a lien for dead freight, the whole question is: What would have been the difference between the cargo loaded and the capacity of the vessel? and, having ascertained that, it becomes necessary to see what the charter-party freight was, and what would have been the cost of loading it. The amount for which the lien for dead freight is available can then be arrived at. There was no such deviation as would put an end to the contract of carriage. The master had to consider

the interests of the cargo owners as well as those of the shipowners:

Phelps, James, and Co. v. *Hill and Co.*, 7 Asp. Mar. Law Cas. 42; (1891) 1 Q. B. 605.

Cur. adv. vult.

WALTON, J.—In this case the plaintiffs are the owners of a steamship called the *Wearside*, and the steamer was chartered by charter-party under which she was to load a complete cargo of wood at Mobile and Pensacola; the defendants are the holders of bills of lading of part of the timber that was loaded under that charter-party. The question which arises is this: whether the plaintiffs, the shipowners, are entitled to a lien upon the defendants' cargo in respect of the loss which the plaintiffs suffered in consequence of the charterer not loading a full and complete cargo, as he was bound to do by the terms of his charter-party. By the charter-party there was a lien provided for in these terms: "The master or owners to have an absolute lien upon the cargo for all freight, dead freight, demurrage, and average." By the terms of the defendants' bill of lading the consignees were to pay freight for the cargo delivered under the bill of lading "as above." The freight is actually named in the bill of lading, and then it goes on, "All other conditions as per charter." It is not disputed that those words do import into the bill of lading the term of the charter-party by which the master and owners are to have an absolute lien upon the cargo for, amongst other things, dead freight. The question, as I have said, which arises in this case is whether the plaintiffs, by virtue of that clause so imported into the bill of lading, are, under the circumstances of this case, entitled to a lien upon the defendants' goods for the loss which I have mentioned, which, the plaintiffs say, is dead freight within the meaning of the charter-party, and therefore within the meaning of the bill of lading. The vessel loaded timber at Mobile and Pensacola, but did not load a full cargo. Only 801 standards were loaded, and, admittedly, that fell a good deal short of a full cargo. The shipowners, in consequence of the failure of the charterers and to lessen the loss, did their best to fill the ship with other cargo. They succeeded, and, after making allowance for the lower freights which they received, they incurred a net loss of 1387*l.* For that sum they claim the lien upon the defendants' goods. They say that the vessel could have loaded 1463 standards, the freight upon which would be 6167*l.* The freight on 801 standards actually shipped was only 3040*l.*, some shillings and pence, the difference being 3126*l.* 11*s.* 11*d.*

Several points are taken by the defendants in their defence, and I will deal with them in the order in which they are pleaded. By the 11th paragraph of the points of defence it is alleged that at the time when the *Wearside* sailed from Pensacola she carried an excessive deckload, and, in consequence thereof, was unseaworthy. I heard a good deal of evidence as to facts, and a good deal of expert evidence. It is not necessary for me to refer to that evidence in further detail. The conclusion at which I have arrived from the evidence of the experts, and from the evidence of what took place according to the facts, is that that allegation in par. 11 is made out; that when the *Wearside* sailed from Pensacola she did carry an excessive deckload, and in consequence thereof she was unseaworthy. Then by par. 11*a* of the points of defence it is alleged that, "On or about the 14th day of March 1908 the said steamship, in consequence of her said unseaworthy condition, fell over on her port side, and it became necessary to deviate her, and she deviated from her voyage and proceeded to Halifax." There is no doubt that the vessel did fall over on to her port side, and I think there is no doubt that that was in consequence of the deckload (at least I find as a fact it was) being excessive, and the vessel in that respect being unseaworthy. There is also, I think, no doubt that when that happened the master did what he was justified in doing, and I think was bound to do; that is to say, he put into Halifax as a port of refuge in order to repair and make the ship fit to proceed on her voyage, and that was done. Therefore, so far as the facts are concerned, par. 11*a* is made out. Whether that is a deviation or not is a question which I have to consider. In my opinion, as I have said, it became necessary for the master, under the circumstances which actually happened on the 14th March, to do what he did, namely, to put into Halifax in order to repair, and it was his duty to do so. But the defendants say that that was a deviation; that it was a departure from the voyage, and that in consequence of that the defendants are not bound by the terms of the bill of lading, and the lien cannot be enforced as against them; that the ship abandoned the voyage which she had to make under the charter-party and under the bills of lading, and made a different voyage, to which the bills of lading do not apply. No doubt, if it was a deviation in the strict sense—that is to say an improper deviation—the consequences which I have mentioned would follow, and the defendants would not be subject to any lien under the bills of lading for the dead freight. But, ordinarily, if a vessel in the course of her voyage puts into a port of refuge necessarily for the safety of the ship and cargo, that is not a deviation, and the effect of it is not in any way to interfere with the contractual rights of the parties under the bill of lading. But it is said here by the defendants that in this case the deviation was improper because it became necessary in consequence of the vessel being unseaworthy, and that is the first question of law which I have to decide. I have held that the vessel was unseaworthy. She did put into Halifax in consequence of her unseaworthiness. Was putting into Halifax a deviation which had the effect of discharging the defendants from the obligations and the liabilities created by the bills of lading? I think the effect of unseaworthiness upon a contract of carriage is now reasonably well settled. I need not refer to one or two recent cases. There was some suggestion made that the question was still open, and that the obligation to have the ship seaworthy at the commencement of the voyage was a condition of the contract in this sense, that unless the condition is fulfilled, and unless the vessel is seaworthy when she commences her voyage, the contract cannot be enforced. I think that is not so. If a vessel commences a voyage in a condition such that in some respects she is not seaworthy, and if she completes her voyage without any loss or damage, the consignees under the bills of

lading (the shippers) cannot set up that the voyage was not a voyage under the charter-party because the vessel was not seaworthy when the voyage was commenced. They must take their cargo and pay for it according to the terms of the charter-party, or the contract of carriage, or whatever it is. If in the course of the voyage there is some loss or damage which is occasioned by the unseaworthiness of the vessel, or contributed to by the unseaworthiness of the vessel, then, no doubt, the shipowner is liable for that loss, even though it is a loss within the perils excepted by the terms of the bill of lading. In other words, if the loss is occasioned by the unseaworthiness of the vessel the shipowner cannot rely upon the exceptions in the bill of lading. If there is a loss which is in no way caused or contributed to by the unseaworthiness, and if it is within the excepted perils and within the exceptions in the bill of lading, then the shipowner is not liable for that loss, and can rely upon the terms of the bill of lading which exempted him from such liability. Now that seems quite clearly established. Applying that to the present case, I may say the result is this: That when the vessel left Pensacola, and when she was sailing on the 14th March, before the disaster happened which obliged her to put into Halifax, she was upon the chartered voyage. The voyage was the chartered voyage. That being so, a disaster happens, and it is the duty of the master, as I have said, under the circumstances which did happen in this case, to put into the port of refuge, and he did so. Is that an improper deviation? I have come to the conclusion that it is not. I have not looked carefully into the terms of the bills of lading, or the terms of the charter-party, for this purpose, but, if they are in the ordinary terms, the owners of the cargo cannot be charged with any part of the port of refuge expenses, because those expenses are occasioned by the unseaworthiness of the ship. That is so, no doubt, but it is going a great deal further to say that putting into Halifax when it was necessary to put into Halifax in the course of the chartered voyage is an improper deviation, because but for the unseaworthiness of the ship it would not have been necessary to do so. I do not think that that is a sound contention. I think, therefore, that there was no such deviation as interfered with the obligations of the parties under the bill of lading except to the extent which I have indicated, and that the owners of the cargo cannot be liable for any costs, charges, and expenses occasioned by the vessel putting into Halifax in that way. That disposes of the second part of par. 11*a* of the defence in which it is stated that, "by reason of the said facts," that is, putting into Halifax in the way I have described, "the plaintiffs failed to perform the contract (if any) contained in the said charter-party and (or) bills of lading, and are not entitled to the benefit of any of the provisions contained therein respectively." I decide against the defendants on that point. The deviation does not prevent the shipowner from relying upon the lien given to him by the charter-party and by the bills of lading.

The next question which arises appears to me to present rather more difficulty, and it is a rather broader question. It is said that the claim here of the plaintiffs is a claim for unliquidated damages, and that is true. There is no sum fixed per ton or per standard in the charter-party which is to be paid under the named dead freight as liquidated damages. That is perfectly true. The claim is for unliquidated damages, and it is said a lien for dead freight cannot include a lien for a claim which is for unliquidated damages. The authority relied upon in support of that contention is the well-known case of *Gray* v. *Carr* (*sup.*). There, by the terms of the charter-party, the owners are to have an absolute lien on the cargo for all freight, dead freight, demurrage, and average, and by the terms of the bill of lading the consignees were to pay freight, and all other conditions, as per charter-party. Therefore, so far as the charter-party and the bill of lading are concerned for the purpose of this case, the terms are practically the same. This very question, no doubt, did arise in *Gray* v. *Carr*. Under such a charter-party and such a bill of lading, had the shipowner a lien for the loss which he suffered by reason of the full cargo not being shipped? The court were divided. It was held by Kelly, C.B., Wills and Brett, JJ., and Channell, B. that there was no lien given for damages for short loading under the term "dead freight" in the charter-party, but the lien could only be for liquidated damages, and could not be good for unliquidated damages. That, no doubt, is the decision in *Gray* v. *Carr*, and, if I am bound by that, there is an end of the case, and the plaintiffs are not entitled to the lien which they claim. But there is another case which is in the House of Lords, and that is the case of *McLean* v. *Fleming*, in which the same question arose. There there was a lien given by the charter-party for dead freight. There is this difference—the consignee who received the cargo, and as against whom the question arose, was not nominally the charterer, but was practically the charterer because the charter-party had been effected with him, and, therefore, he was bound directly by the charter-party, and not merely by the bill of lading importing the lien from the charter-party into the bill of lading as against the consignee. I cannot see that that makes any difference, because if the charter-party lien is imported into the bill of lading, then, whether there is a lien or not apart from other clauses in the charter-party (and there are no others affecting this case so far as I know), the question must be exactly the same, as to what is the extent of that lien. Whether dead freight means unliquidated damages as well as liquidated damages, it must be the same upon the same clause whether it arises under the charter-party or under the bill of lading. It was held in the House of Lords in this case of *McLean* v. *Fleming* according to the headnote, "what is called dead freight is defined to be simply an unliquidated compensation recoverable by the shipowner from the freighter for deficiency of cargo." Undoubtedly it was held in *McLean* v. *Fleming* by the House of Lords that the lien for dead freight did give a lien for unliquidated damages, being the damages suffered by the shipowner by reason of a full cargo not being shipped. We know liquidated damages were provided for and were stipulated for in the charter-party or the bill of lading. *Gray* v. *Carr* was argued in Nov. 1870 and in Feb. 1871, and the judgment of the Exchequer Chamber was given on the 15th June

1871. The judgment in the House of Lords (I think the argument was on the same day) was delivered on the 3rd April. Therefore, between the argument and the judgment in *Gray* v. *Carr* *McLean* v. *Fleming* had been decided. It had not been reported, although the judgment had been given in April, in any of the reports at the time the judgment was delivered by the Exchequer Chamber in *Gray* v. *Carr*. *McLean* v. *Fleming* was a Scotch case. It had not been referred to, I think, in the course of the arguments, but when the judges came to deliver their considered judgments in *Gray* v. *Carr*, *McLean* v. *Fleming* was referred to and distinguished. I have now to consider whether I am bound by the judgment in *Gray* v. *Carr*, distinguishing *McLean* v. *Fleming*. If *McLean* v. *Fleming* stood alone, it seems to me perfectly plain that it is not distinguishable from the present case and I should be bound to follow it and to say that dead freight includes a loss such as that which the plaintiffs suffered in this case, and includes a claim for unliquidated damages. That is quite clear. But then in *Gray* v. *Carr* the Court of Exchequer Chamber, after they knew of the decision in *McLean* v. *Fleming*, and dealing with a case very like the present case, said, "Oh, but *McLean* v. *Fleming* does not apply to such a case: it is distinguishable." It is very difficult to know precisely what is the right thing to do, but I have looked carefully into the judgments in *Gray* v. *Carr*, and into the reason why the learned judges in that case thought that *McLean* v. *Fleming* did not in any way conflict with the decision they gave in *Gray* v. *Carr*. The reason appears to me plainly to be this, and I think it is quite clear. It is stated by Brett, J. in his judgment at p. 541. Having referred to *McLean* v. *Fleming*, he says: "Now, under those circumstances, it was pointed out by some if not all of the learned lords who took part in the judgment that the damages for not loading a full cargo were, in point of fact, ascertained, because they would be the specified amount per ton upon the quantity that was really ascertained; and if that were so that would properly be dead freight within the ordinary meaning of the term, and the lien being given in terms for dead freight, that case would be within the recognised rule." Now that means that Brett, J. thought that in *McLean* v. *Fleming* the claim that was made was really a claim in fact for liquidated damages; that although the expression "liquidated damages" did not occur in the charter-party or the bill of lading, in fact it was a claim for an ascertained fixed sum. As soon as you know what the ship would carry and how much she did carry, then all the rest follows as a matter of course, and the damages were, in that way, just as much ascertained and fixed as if the charter-party had provided that in case a full cargo was not shipped so much per ton should be paid upon what was short. That was the view which Brett, J. took in *Gray* v. *Carr*, and, so far I can understand it, the other judges who agreed with Brett, J. in deciding that dead freight did not include unliquidated damages took the same view of *McLean* v. *Fleming*, and therefore thought they were not bound by that decision in a case like *Gray* v. *Carr*. They did not say they were not bound by that decision because it was a Scotch case. That was a point which was raised before me. All the judges in *Gray* v. *Carr* treated *McLean* v. *Fleming* as binding upon them if it could not be distinguished, and they thought it was distinguishable, because in *McLean* v. *Fleming* the claim in truth was a claim for liquidated damages. As I have said, *McLean* v. *Fleming* had not then been reported. What note of the case had been seen by Brett, J. and the other judges I do not know, and there is nothing to show. Apparently Brett, J. had seen some note of the case and had seen some note of the judgments. That appears from the passage which I have read, but I cannot think that the judges in *Gray* v. *Carr* had seen a full and complete report or note of what was said in *McLean* v. *Fleming*. It is impossible to read *McLean* v. *Fleming*, which is reported in 2 Scotch and Divorce Appeal Cases, at p. 128, as reported there, or as more fully reported in some respects in a note at the end of *Gray* v. *Carr*, at p. 558 of Law Reports, 6 Queen's Bench, without seeing that the House of Lords dealt with the question whether dead freight did mean, amongst other things, a claim for unliquidated damages for a breach of contract in not shipping a complete cargo. They dealt with it expressly. It is true that in *McLean* v. *Fleming* Lord Chelmsford said something to which I think Brett, J. was referring in the passage which I read, which is: "This case can hardly be considered to be one of unliquidated damages, because, the master not having brought home any other goods than those of the appellants, the proper measure of the shipowner's claim appears to be the amount of the agreed freight which he would have earned upon the deficient quantity of 210 tons of bones." That, at any rate, only means that as the facts turned out in that case it was very easy to estimate the damages. There was no deduction to be made in respect of any cargo which the shipowner had found to fill up the empty space. I do not think that that would make the damages any the less unliquidated, but it might make the ascertainment of them extremely simple. Then Lord Chelmsford goes on: "But whether the amount of his damages is to be regarded as ascertained or not, I am of opinion that the charter-party gives him a lien for his claim on account of the deficient cargo." Therefore, Lord Chelmsford plainly holds that, whether it is liquidated or unliquidated damages, it is included in the expression "dead freight." Lord Westbury's judgment is absolutely explicit. He says, "What is the meaning of the term 'dead freight' in respect of the remedy which it gives the shipowner? Does it entitle him to say that the deficient quantity should be paid for at the rate assigned per ton in the charter-party? I think that that would be a very unreasonable interpretation, for if the full freight had been furnished to the captain, the charge for loading and the other outlays attendant upon the additional 210 tons which were wanting would have occasioned some expenditure to the shipowner. The result, therefore, is that in a charter-party giving no specific sum as the amount to be recovered by way of compensation for dead freight, the shipowner becomes entitled only to a reasonable sum—which is another phrase for unliquidated damages." Lord Westbury held the lien for dead freight includes such unliquidated damages, and Lord Colonsay, the other judge, is of the same opinion. Therefore it seems to

me that I ought not to overlook the fact (because it seems to be quite plainly the fact) that the Court of Exchequer Chamber in saying that *McLean* v. *Fleming* was distinguishable had not really before them the full facts or the full judgments in that case. If they had I do not think they could have said what they did say. Therefore I do not think a distinction as to what the facts were upon which the House of Lords decided *McLean* v. *Fleming*, and what appears to be plainly a mistaken distinction, can be binding upon me. *McLean* v. *Fleming* is undoubtedly an authority which I must follow, and if there is a conflict between *McLean* v. *Fleming* and *Gray* v. *Carr*, as there undoubtedly is, I think I am bound by *McLean* v. *Fleming*, and, looking at the facts in this case, it seems to me quite impossible to distinguish the facts upon which the judgment really proceeded in *McLean* v. *Fleming* from the facts in the present case. Therefore I think that *McLean* v. *Fleming* binds me, and I must hold that the lien given by the charter-party in this case and imported into the bill of lading covered a claim such as is made by the plaintiffs, which is, no doubt, a claim for unliquidated damages. I think it has been really recognised amongst lawyers and amongst men of business since *McLean* v. *Fleming* that that is the true view. This is not altogether the reason for my decision, but I think it worth mentioning. After all, the question here, no doubt, is a question for the court, because it is a question of construction, but the question is, What do the words "dead freight" mean as understood amongst shipowners and charterers and people interested in the shipping business? That is the real question. What do they mean? The House of Lords have said in *McLean* v. *Fleming* what they thought they meant, and I find, looking back in the text-books, that in the late Judge Carver's book, in the first edition of 1885, it is stated that a lien for dead freight, since the decision in *McLean* v. *Fleming*, covers a claim for unliquidated damages, and that has appeared, I think, in every edition since 1885 in Judge Carver's book. I find in Scrutton, J.'s book, the first edition of which appeared in 1886, that he points to the difficulty of reconciling *Gray* v. *Carr* and *McLean* v. *Fleming*, and, after discussing that difficulty, comes to the same conclusion as Judge Carver. Therefore, dealing with the books which I think I may say are in the hands of people interested in shipping, whether they are men of business or lawyers, *McLean* v. *Fleming* has been treated as conclusive upon this point. However that may be, for the reasons I have already stated, I think I must follow *McLean* v. *Fleming*, and hold the lien given in this case included such a claim as that which the plaintiffs are now making. That disposes of the broad question, but there are two other questions which I have to decide, and the first is: For what total amount had the plaintiffs a lien? In order to decide that, I must first find how many standards of wood the ship could have carried properly. The quantity she did carry was excessive, I think, and I have not found anything in my note very explicit with regard to that, but Mr. Bailhache said there was no dispute about it, and he accepted Mr. Atkin's figure. Mr. Bailhache said he would raise no question about it. Subject to that, I think the proper way of ascertaining the amount of the plaintiffs' claim is to take the number of standards which the vessel could carry and then deduct the 801 standards which the charterers shipped, and then get a balance. The figure taken during the case was 662 standards as the amount short, but that is arrived at by taking the full number of standards which the vessel in fact loaded. The figure must be a less figure than that, but, having arrived at that figure, then the charges which I think ought to be taken at 4.50 dollars, and 2½ per cent. commission, must be deducted, and then from the figure so arrived at in the same way the substituted freight must be allowed. I think I shall ask counsel to work out the figures, the basis being that which Mr. Bailhache put before me, but they must begin with the figure which I have no doubt they will agree as being the number of standards which the vessel could carry. Subject to this there will be judgment for the plaintiffs with costs.

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

Solicitors for the defendants, *Trinder, Capron*, and *Co.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

April 25, 26, *and* 27, 1910.

(Before Sir S. EVANS, President, sitting with Elder Brethren).

THE RIEVAULX ABBEY. (*a*)

Practice—Preliminary act—Pleadings.

In collision cases the magnetic or true course is the course which should be pleaded, and not the compass course.

DAMAGE ACTION.

The plaintiffs were the owners of the steam trawler *Kennet*; the defendants and counter-claimants were the owners of the steamship *Rievaulx Abbey*.

The case made by the plaintiffs was that shortly before 7.30 p.m. on the 27th Dec. 1909 the *Kennet*, a steel screw steam trawler of 167 tons gross and 56 tons net register, manned by a crew of nine hands, was in the river Humber, approaching No. 7 (Holme Ridge) gas buoy, in the course of a voyage from the North Sea fishing grounds to Hull with a cargo of fish. The weather was slightly hazy, the wind was about south-east, light, and the tide was first quarter ebb of the force of about four knots. The *Kennet*, which was proceeding up the river well on the starboard side of the channel, was heading about N.W. ½ N. by compass, and was making about four 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 *Kennet* observed distant about one mile and bearing about two points on the port bow the two white masthead lights of the steamship *Rievaulx Abbey*, and shortly afterwards the green light came into view on about the same bearing. The *Kennet* kept her course and speed, and the lights of the *Rievaulx Abbey* were

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

carefully watched. The *Rievaulx Abbey*, instead of keeping out of the way of the *Kennet* as she could and ought to have done, continued to come on, keeping her masthead and green light open on the port bow of the *Kennet*. When the vessels were so close that collision could not be avoided by the action of the *Rievaulx Abbey* alone, the helm of the *Kennet* was put hard-a-port as the best means of averting collision or minimising the damage, but the *Rievaulx Abbey*, continuing on at high speed, with her stem struck the port bow of the *Kennet* a violent blow, cutting into her and doing her serious damage.

Those on the *Kennet* charged those on the *Rievaulx Abbey* with not keeping a good look-out; with failing to keep out of the way of the *Kennet*; with not easing, stopping, or reversing their engines; with improperly attempting to pass ahead of the *Kennet*; with failing to keep to that side of the channel which lay on their starboard hand; with improperly starboarding and failing to port their helm; and with failing to indicate their course by whistle signals.

The case made by the defendants was that shortly before 7.21 a.m. on the 27th Dec. 1909 the *Rievaulx Abbey*, a steel screw steamship of 1162 tons gross and 507 tons net register, manned by a crew of twenty-six hands all told and carrying six passengers, was going down the river Humber, on a voyage from Hull to Rotterdam, laden with a general cargo. The wind was S.S.E., a fresh breeze, the weather overcast and clear, and the tide ebb about one knot. The *Rievaulx Abbey* was on a down-channel course of S.E. ½ E. magnetic, making about ten or eleven knots; 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 the *Rievaulx Abbey* saw about a mile off and about two points on the starboard bow the masthead and then the green light of the *Kennet*. Seeing that the *Kennet* was coming up on her wrong side, the helm of the *Rievaulx Abbey* was starboarded a little and steadied, two short blasts being sounded on her whistle. The *Kennet*, however, did not reply, so the engines of the *Rievaulx Abbey* were stopped, and about the same time the green light of the *Kennet* disappeared, leaving the masthead light only visible. Shortly afterwards the *Kennet* showed her red light (not a good light) close to on the starboard bow, whereupon the helm of the *Rievaulx Abbey* was hard-a-starboarded, her engines were given a touch ahead to help the helm, and then reversed full speed, but the *Kennet* came on, and with her port bow struck the starboard side of the stem of the *Rievaulx Abbey*, doing damage.

Those on the *Rievaulx Abbey* charged those on the *Kennet* with not keeping a good look-out; with failing to keep clear; with failing to slacken their speed or stop or reverse; with failing to keep to their starboard-hand side of the channel; and with failing to indicate their course by whistle signals.

Aspinall, K.C. and *H. C. S. Dumas* appeared for the plaintiffs.

Laing, K.C. and *A. D. Bateson* appeared for the defendants.

THE PRESIDENT.—The collision in this case took place within a short distance of No. 7 (Holme Ridge) buoy in the river Humber, about 7.20 p.m the 27th Dec. 1909. The colliding vessels were the steamship *Rievaulx Abbey*, proceeding down river, and the steam trawler *Kennet*, steaming up. Their descriptions are set out in the pleadings. It is agreed that at this place the channel was a narrow channel. The vessels sighted each other about a mile before the collision. At the speeds at which they approached each other, this distance would take about three and a half minutes to traverse. The time was therefore short. Some little time before the weather had been foggy, but the fog had cleared, and it is common ground that the vessels could sight each other at a mile off, and that each thought herself entitled to go at full speed through the water—the account given by the master of the *Rievaulx Abbey* at Rotterdam is admittedly inaccurate—it does not deal with the real facts one way or the other. There are three main questions of fact to be decided: (1) What course was each vessel on at the time of sighting? (2) What was the position of each vessel at that time? (3) What courses they took or what manœuvres they performed afterwards. The trawler *Kennet* pleaded her compass course. In my view it is important that in the preliminary act and pleadings in cases like this the course should be stated by reference to the magnetic, or to the "true," and not by reference to the ship's compass. The evidence shows that the deviation of the compass of the *Kennet* was not accurately recorded on the deviation card. It is left in doubt what the deviation really was. The *Kennet*, going up the river, wanted the Killingholme lights as leading lights. The master and the look-out man were very shortly before the collision on the look out for these lights. From the No. 7 buoy these lights are about three miles distant. The master and the man at the wheel gave different accounts of the courses. The look-out man saw the two masthead lights of the *Rievaulx Abbey* and reported them. He thought they were the Killingholme lights, although the two masthead lights were only a mile off. The master said that although he was on the look-out for the Killingholme lights, he did not mistake the lights of the *Rievaulx Abbey*, but he said that "the two white lights which he saw appeared to be much on a level, so that he could not say which of the masthead lights was to the right and which was to the left of the other." There was in fact a vertical difference of 20ft. between the two lights. I have come to the conclusion on the evidence that when the vessels sighted each other the *Kennet* was off her proper course, and was on the wrong side of the channel, and was therefore not obeying art. 25 of the Regulations for Preventing Collisions; that the captain ported his helm in order to alter her course, in all probability at first to get into line with the two lights, under the impression that they were the Killingholme lights; and that he went still further off on his port helm when he ascertained that the lights were those of a steamship, in order to try to get his vessel to the other side, so as to pass port to port. In altering her course to port no signals were given from the *Kennet* in accordance with art. 28. As to the *Rievaulx Abbey*, she had for captain a man most familiar with the navigation of the Humber, and

a man who was qualified as a Humber pilot. I think his evidence is more accurate and reliable than that of the captain of the *Kennet* and of his witnesses. His evidence is strongly corroborated by the engineer, who produced his book of orders given to the engines, which is obviously a genuine document made at the time. The captain saw the Killingholme lights astern, and kept the vessel's proper course down the channel until he saw the green light of the *Kennet* about one and a half points on his starboard bow. He thought the *Kennet* was on her wrong side, and that the best way was that the vessels should pass green to green; so he gave a signal of two short blasts to indicate that he was directing his course to port, and then starboarded a little for that purpose. I believe this signal was given. Those on board the *Kennet* said they did not hear it. If there was a proper look-out they ought to have heard it. At any rate, no answer was given. At no time, either in answer or otherwise, did the *Kennet* give any signal of change of course. No answer having been received from the *Kennet*, and the green light of the *Kennet* disappearing, the master of the *Rievaulx Abbey* stopped his engines a short time, and then a little later, having seen the red light of the *Kennet*, he gave orders to give a touch ahead with the engines, and further starboarded, in order to lessen the force of the collision, which was then inevitable. This accounted for the *Rievaulx Abbey* being on the side of the channel nearer to the buoy when the collision took place. The master of the *Kennet* wanted to get, and appeared to be obsessed with the idea that he must get, into a position to pass the *Rievaulx Abbey* port to port, and he made for this course. I believe, notwithstanding the contradictory evidence of her master and his witnesses, that after sighting the *Rievaulx Abbey* the *Kennet* ported her helm in order to try to get in a position to pass port to port, and that before the collision an order to hard-a-port was given. Signals ought to have been given, and could have been given, of these manœuvres. None were given. In these circumstances I think that the *Kennet* did not keep on her proper side—on her starboard side—of the narrow channel, and that the collision took place by reason of her being on the wrong side and attempting to get on to her proper side. By so doing I do not think she could make the *Rievaulx Abbey* a crossing vessel, or that she is entitled in the circumstances to say that the *Rievaulx Abbey* was a crossing vessel within the meaning of art. 19. She could have passed green to green after the signals given by the *Rievaulx Abbey*; and having regard to the respective positions when they first sighted each other, and shortly afterwards, she ought to have passed green to green. The *Rievaulx Abbey* kept her proper course down stream until the collision was actually impending. In doing this I have said that in my opinion she was not in the circumstances a crossing vessel, and by her manœuvres just before the collision she attempted to avoid the collision, or to minimise its effect. She was not guilty of bad seamanship in making these attempts, and at that time she could not by any act of hers alone have avoided the collision. The result is that the *Kennet* is responsible for the collision. Accordingly the plaintiffs' claim is dismissed, and upon the counter-claim there will be judgment in favour of the defendants with costs, and with a reference as to damage.

Solicitors for the plaintiffs, *Botterell* and *Roche*, agents for *A. M. Jackson* and *Co.*, Hull.

Solicitors for the defendants, *Pritchard* and *Sons*, agents for *J.* and *T. W. Hearfield* and *Lambert*, Hull.

April 28, 29, *and May* 6, 1910.

(Before Sir SAMUEL EVANS, President, sitting with Elder Brethren).

THE PITGAVENEY. (*a*)

Collision — Sailing drift-net vessel sailing—Steam drift-net vessel shooting nets—Lights for steam drift-net vessel — Duty of sailing drift-net vessel to keep out of the way—Steam vessel under sail—Steam vessel under way—Engaged in fishing—Steam vessel proceeding—Special circumstances rendering departure from rules necessary—Breach of rules which could not by any possibility have contributed to the collision—Not standing by—Presumption of fault—Rebuttal of presumption—Collision Regulations 1897, *arts. preliminary, s.* 2, 9 (*b*), 20, 21, 22, 23, 26, 27, 28, 29—*Merchant Shipping Act* 1894 (57 & 58 *Vict. c.* 60), *ss.* 419, 422.

A sailing drift-net vessel making about four knots, exhibiting the lights for a sailing vessel under way, while sailing on a course of S.W. came into collision with a steam drift-net vessel, which was making about a knot and heading E.S.E., while those on board her were shooting their nets. The steam drift-net vessel was exhibiting the two white lights prescribed by art. 9 (*b*) *of the Collision Regulations* 1897, *but the lower light was away from the direction of the nets instead of being in their direction as it ought to have been.*

Held, that the sailing drift-net vessel was alone to blame for the collision for keeping a bad look-out, and that she ought to have given way to the steam drift-net vessel engaged in fishing.

Held, that the steam drift-net vessel was a steam vessel under steam and not a sailing vessel, and was under way and engaged in fishing within art. 9 (*b*) *of the Collision Regulations* 1897, *and therefore was not bound to carry the lights prescribed by art.* 2, *but was bound to carry the lights prescribed by art.* 9 (*b*).

Held, also, that, though the steam drift-net vessel was a steamer, and was therefore bound prima facie *to keep out of the way of a sailing ship, yet she was an encumbered steamship, and under the circumstances was excused from keeping out of the way, as she was either not proceeding within art.* 20 *or there were special circumstances within art.* 27 *which rendered it necessary to depart from the rules.*

Held, further, that, though she had committed a breach of art. 9 (*b*) *in carrying proper lights wrongly placed, the non-compliance with that article could not by any possibility have contributed to the collision, as they were the lights of a steam vessel encumbered with fishing gear, and the sailing drift-net vessel should have kept clear of her.*

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

Held, further, that, as the steam drift-net vessel in her endeavours to avoid collision had fouled her propeller with her nets and thus rendered herself incapable of steaming, and as the sea was too rough to lower a boat, the steam drift net vessel had rebutted the presumption that she was to blame raised by sect. 422 of the Merchant Shipping Act 1894.

DAMAGE ACTION.

The plaintiffs were the owners of the sailing drifter *Zaandam*.

The defendants were the owners of the steam drifter *Pitgaveney*.

The case made by the plaintiffs was that shortly before 4.50 a.m. on the 25th Oct. 1909 the *Zaandam*, a Dutch drift-net fishing vessel belonging to Scheveningen of about 69 tons gross and 67 tons net register, manned by a crew of twelve hands all told, whilst bound on a fishing voyage was in the North Sea about thirty-two miles N. by W. of Smith's Knoll Lightship.

The weather at the time was fine, with an overcast sky; the wind was W. by N., blowing a strong breeze. The *Zaandam* was not fishing, but had a large quantity of herrings on board in barrels, and under storm canvas was making about two knots through the water, heading south-west, waiting until the weather moderated before shooting her nets. Her regulation side lights and 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 *Zaandam* sighted the *Pitgaveney*, exhibiting two white lights in a diagonal form and also a small bright light, which was taken to be and in fact was exhibited on her mizzen mast, bearing about right ahead and distant about one and a half miles. The lights on the *Pitgaveney* were taken to be those of a fishing vessel fast to and behind her drift nets. In a short time the helm of the *Zaandam* was starboarded and she was kept full, steering about south, in order to pass under the *Pitgaveney's* stern.

Soon after the *Zaandam* had been got on to a southerly heading the *Pitgaveney* was observed to have altered her heading, and, with the same lights exhibited, was bearing just before the beam on the starboard side, distant three to four cables, and approaching to cross the course of the *Zaandam*, which vessel kept her course, as it could then be seen that the *Pitgaveney* was a steamship, and, coming on at a high rate of speed, the *Pitgaveney* with her stem struck the starboard side of the *Zaandam* just forward of her midships and did her a great deal of damage, cutting her down below the water. The plaintiffs were unable to continue fishing and were not able to use their vessel again in the season's herring fishing and suffered damage thereby. Immediately after the collision both red and white flares were burned as a signal to the *Pitgaveney* that the *Zaandam* needed assistance, but no notice was taken of such signals, and she steamed away without rendering or offering to render any assistance or giving her name. The plaintiffs by shifting weights on board their ship to keep the hole out of the water were enabled to stuff up the hole in their starboard side with canvas and eventually made Scheveningen.

Those on the *Zaandam* charged those on the *Pitgaveney* with not keeping a good look-out; with not keeping out of the way of the *Zaandam*; with exhibiting improper and misleading lights, and neglecting to exhibit proper lights for a steamship under way; with neglecting to give helm signals; with neglecting to ease, stop, or reverse their engines; and with improperly attempting to pass ahead of the *Zaandam*. They further alleged that those on the *Pitgaveney* failed to stand by after the collision, and thereby committed a breach of sect. 422 of the Merchant Shipping Act 1894.

The case made by the defendants and counter-claimants, the owners of the *Pitgaveney* was that shortly before 4.30 a.m. on the 25th Oct. 1909 the *Pitgaveney*, a steel screw steam drifter belonging to Inverness of 89 tons gross and 29 tons net register, manned by a crew of nine hands all told, was in the North Sea, about thirty-one miles east of Lowestoft, in the course of a fishing voyage. The wind was W.N.W., a stiff breeze; the weather was dark but clear, and the tide was the first of the flood of little or no force. The *Pitgaveney*, which was engaged in the operation of shooting her nets, was heading about E.S.E. and with her engines stopped was just moving through the water under the influence of the wind on a small part of the mizzen sail, which was set close down. Her two regulation white lights for a vessel engaged in fishing with drift nets 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 *Pitgaveney* observed about a mile to a mile and a half off and bearing broad on the port bow a number of lights, amongst which it was believed was the starboard light of the *Zaandam*. The *Pitgaveney* continued the operation of shooting her nets, maintaining her heading, and after a time the green light of the *Zaandam* was noticed separate from the other lights. The *Zaandam* approached, drawing dangerously near to the *Pitgaveney*, and apparently taking no steps to keep out of the way. The *Zaandam* was thereupon loudly hailed, but, as she continued to come on heading for the *Pitgaveney*, which vessel had always maintained the same heading, the engines of the *Pitgaveney* were put full speed astern, but, notwithstanding these manœuvres, the *Zaandam*, coming on at speed, with her starboard bow struck the stem of the *Pitgaveney*, doing herself the damage complained of, and doing some damage to the *Pitgaveney*. Immediately the engines of the *Pitgaveney* were put astern her propeller became foul of the fishing gear, which was wound up in it, bringing the engines to a stop and completely disabling her for several hours until her propeller could be cleared. In consequence of the said collision the defendants sustained damage to their vessel and fishing gear, and lost a night's fishing. After the collision the *Zaandam* continued on until she was several ships' lengths away from the *Pitgaveney*, when flares were burnt on her, and there was some hailing, but the *Pitgaveney* was then quite helpless.

Those on the *Pitgaveney* charged those on the *Zaandam* with not keeping a good look-out; with failing to keep out of the way of the *Pitgaveney*; and, alternatively, with failing to keep her course.

The following Collision Regulations were referred to during the course of the case:

Preliminary.—In the following rules every steam vessel which is under sail and not under steam is to be considered a sailing vessel, and every vessel under steam, whether under sail or not, is to be considered a steam vessel. . . . 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.

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 ahead to two points abaft the beam 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 as 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.

9. Fishing vessels and fishing boats, when under way and when not required by this article to carry or show the lights hereinafter specified, shall carry or show the lights prescribed for vessels of their tonnage under way. (*b*) Vessels and boats, except open boats as defined in subdivision (*a*), when fishing with drift nets, shall, so long as the nets are wholly or partly in the water, carry two white lights where they can best be seen. Such lights shall be placed so that the vertical distance between them shall be not less than 6ft. and not more than 15ft., and so that the horizontal distance between them, measured in a line with the keel, shall be not less than 5ft. and not more than 10ft. The lower of these two lights shall be in the direction of the nets, and both of them shall be of such a character as to show all round the horizon, and to be visible at a distance of not less than three miles.

20. When a steam vessel and a sailing vessel are proceeding in such direction as to involve risk of collision, the steam vessel shall keep out of the way of the sailing vessel.

21. Where by any of these rules one of the 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 a 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.

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.

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.

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.

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. 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.: One short blast to mean "I am directing my course to starboard."

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.

The material parts of sect. 422 of the Merchant Shipping Act 1894 are 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, and also (*b*) To give to the master or person in charge of the other vessel the name of his own vessel and of the port to which she belongs, and also the names of the ports from which she comes and to which she is bound. (2) If the master or person in charge of a vessel fails to comply with this section, and no reasonable cause for such failure is shown, the collision shall, in the absence of proof to the contrary, be deemed to have been caused by his wrongful act, neglect, or default.

The following cases were cited during the arguments and in the judgment:

The Tweedsdale, 61 L. T. Rep. 371; 6 Asp. Mar. Law Cas. 430 (1889); 14 P. Div. 164;
The Gladys, 101 L. T. Rep. 720; 11 Asp. Mar. Law Cas 352; (1910) P. 13;
The Jennie S. Barker, 33 L. T. Rep. 318; 3 Asp. Mar. Law Cas. 42 (1875);
The Englishman, 37 L. T. Rep. 412; 3 Asp. Mar. Law Cas. 506 (1877); 3 P. Div. 18;
The Argo, 82 L. T. Rep. 602; 9 Asp. Mar. Law Cas. 74 (1900);
The Gannet, 82 L. T. Rep. 329; 9 Asp. Mar. Law. Cas. 43; (1899) P. 230;
The Fanny M. Carvill, 32 L. T. Rep. 646; 2 Asp. Mar. Law Cas. 565 (1875); 13 App. Cas. 455;
The Duke of Buccleuch, 65 L. T. Rep. 422; 7 Asp. Mar. Law Cas. 68; (1891) A. C. 310;
The Corinthian, 100 L. T. Rep. 411; 11 Asp. Mar. Law Cas. 264; (1909) P. 274;
The Cockatrice, 98 L. T. Rep. 728; 11 Asp. Mar. Law Cas. 50; (1908) P. 182;
The Upton Castle, 93 L. T. Rep. 814; 10 Asp. Mar. Law Cas. 153; (1906) P. 147;
The King's County, 20 Times L. Rep. 202.

The arguments of counsel are summarised in the judgment.

L. Batten, K.C. and *A. E. Nelson* for the plaintiffs.

Aspinall, K.C. and *H. C. S. Dumas* for the defendants.

THE PRESIDENT.—This case is of some general importance, and I have thought it right to reserve

my judgment. On all questions affecting navigation or manœuvres the Elder Brethren are in entire accord with me. The question to be decided is whether the sailing drifter *Zaandam* or the steam drifter *Pitgaveney* is, or whether both are, to blame for a collision which occurred between them in the North Sea on the early morning (about 4.40 a.m.) of the 25th Oct. 1909. The facts were much in dispute. It is not necessary or desirable to state at length the version of the facts given by the witnesses on either side. It is sufficient to state the material facts as I find them after the necessary process of sifting and boiling them down. Speaking generally, I accept the version given on behalf of the *Pitgaveney* in preference to that given on behalf of the *Zaandam*. The material facts, as I find them upon the evidence, are as follows: The *Zaandam* was a Dutch sailing drift-net fishing vessel of 69 tons gross and 67 tons net register manned with a crew of twelve hands all told. The *Pitgaveney* was a Scotch screw steam drift-net fishing vessel of 89 tons gross and 29 tons net register and manned with a crew of nine hands all told. On the morning of the collision the *Zaandam* had not begun to fish or to shoot her nets. She was under way going towards her fishing ground and carried the proper under-way lights for a sailing vessel. The *Pitgaveney* for about half an hour or more before the collision had been shooting her nets, and was continuing to shoot them at the time of, or immediately before, the collision. Up to the time of the collision she had shot twenty-four nets out of sixty which she intended to shoot in all. Each net was from thirty-two to thirty-four yards long. She headed east-south-east and was travelling before the wind (which was a west by north strong or stiff breeze) with a little mizzen sail. Her engines had been stopped about half an hour or more before the collision happened, but she had her steam on and her engines ready, so that just immediately before the collision an order which was given to put the engines full speed astern could be and was at once obeyed. She shot her nets over the starboard bow, and after they were shot they fell and trailed astern and to windward of the steamer so that her stem pointed away from her nets. She carried the two white lights prescribed by art 9 (*b*) of the Regulations for Preventing Collisions (April 4, 1906) for vessels fishing with drift nets, with a working light. The lights, however, at the time of the collision were not carried in the direction prescribed by that article; that is to say, the lower of the two lights was away from and not in the direction of the nets.

The two vessels sighted each other when a mile or one and a half miles distant; the *Zaandam* was then sailing on a south-westerly course and the *Pitgaveney* was making an east-south-east course. I find that from this time until the collision happened the speed of the *Zaandam* was about four knots and that of the *Pitgaveney* about one knot. The accounts of the speed and of the operations of the *Pitgaveney* can be seen to coincide in a remarkable way, none the less significant because this was not pointed out by the witnesses. The engines were stopped about 4 a.m. The shooting of the nets then began and proceeded till just before the collision happened —say about 4.40. (This is the time midway between those stated by the two vessels.) The twenty-four nets at thirty-four yards each would make 816 yards—close on half a mile. It is almost certain, therefore, that the speed of the *Pitgaveney* was rather less than one knot. The evidence for the *Zaandam* that the *Pitgaveney* steamed towards her a good three knots is quite unreliable. The *Zaandam* was steered by an A.B. He stated that he changed her course from south-west to south just after the *Pitgaveney* was sighted, on the ground that he thought the *Pitgaveney* was a fishing vessel, but I think the *Zaandam's* course, which was not recorded or very accurately observed, was nearer to the south-west until the very time of the collision. She carried a working mainsail with one reef, a foresail with one reef, a mizzen with two reefs, and a small jib. For some time before the collision she kept her course and speed, as the helmsman said he thought she was bound to do. In the collision the starboard side of the *Zaandam*, about amidships, and the stem of the *Pitgaveney* came into violent contact. The damage was chiefly caused to the *Zaandam*, and was serious. She was a wooden vessel built about 1882. The damage caused was consistent with the description of the casualty which was given on behalf of the *Pitgaveney*. Immediately before the collision happened the master of the *Pitgaveney* in order to avoid it, seeing that the *Zaandam* was keeping her course, ordered his engines full speed astern, but after a few revolutions the propeller became fouled with the warp of the nets and was absolutely stopped. The warp parted, and the part which had been entangled in the propeller was produced in court. The result was that the twenty-four nets which had up to that time been shot were cut off, and for the time being were lost. The propeller was not freed for several hours afterwards. About 10 a.m. the other thirty-six nets were shot and buoyed, the vessel then went off in search of the twenty-four nets which had been lost, and after some little time they were recovered. After the collision the *Zaandam* proceeded on her course and kept her speed, and she reached the port of Maasluis, some fifty-five miles away, in due course. Seeing she was damaged those on board of her shortly after the collision burnt flares. The *Pitgaveney* did not stand by or give any answer to the *Zaandam's* flares. Many points were raised on either side and relied upon as showing blame on the part of the respective vessels. It was contended by counsel for the *Zaandam* that the *Pitgaveney*, although when first sighted was heading W. with her lower light to the westward as if she were fishing with her nets to windward, turned right round and steamed in an E.S.E. course at some speed up to the collision. As indicated above I could not accept the accuracy of this version. It was admitted on behalf of the *Zaandam* that if the *Pitgaveney* was shooting her nets (as I find she was) this manœuvre of turning round would have been impossible. Upon the account thus put forward by the *Zaandam* that the *Pitgaveney* turned round and steamed towards her it was contended that the *Pitgaveney* was a "steam vessel under way" within the meaning of the Preliminary Note to the Regulations for Preventing Collisions, and that she should have carried the under-way lights for a steam vessel in accordance with art. 2. It was also contended that she was carrying the wrong lights, inasmuch

as she was not stationary. It was further contended that she was not entitled to carry the lights prescribed by art. 9 (*b*); and that in any event she was carrying such lights in the wrong direction, and in breach of the provisions of the article. It was moreover contended that she was a steam vessel, and that as such she ought to keep out of the way of a sailing vessel under art. 20, and by inference under art. 26; and that the *Zaandam* was entitled to, and was indeed bound to, keep her course and speed by reason of art. 21; and that in any event the *Pitgaveney* did not act in a seamanlike manner because she did not put her engines full speed astern in time. It was finally argued that the *Pitgaveney* refused to stand by when the flares were shown from the *Zaandam*, and was therefore acting in contravention of sect. 422 of the Merchant Shipping Act 1894, and that accordingly she must be presumed to be to blame for the collision. Counsel on behalf of the *Pitgaveney*, on the other hand, contended that there was no proper look-out on the *Zaandam*; that the *Pitgaveney* was to be considered and treated as a "sailing vessel" and not as a "steam vessel," within the meaning of the Preliminary Note to the Regulations, because, although "under steam," she could not in the circumstances work her propeller by steam; that she was therefore a "sailing vessel" under art. 26, and that as she was fishing with nets the *Zaandam* ought to have kept out of her way under that article. Alternatively it was contended that if the *Pitgaveney* was to be considered as a "steam vessel" she was not a "steamer proceeding" under art. 20, in the first place because she was not in fact proceeding under steam, or by means of her steam propelling power; and in the second place because she was not "proceeding" by reason of "special circumstances" within the meaning of art. 27 and the decisions in *The Tweedsdale* (*sup.*) and *The Gladys* (*sup.*). Finally, it was contended that the *Pitgaveney* was not "fishing" under art. 9 (*b*); that there was no provision for her lights when shooting her drift nets, this being a *casus omissus* not dealt with by the article; and that accordingly she was entitled to carry the white lights she did, and in the direction in which she carried them, in accordance with the practice of drifting net fishing vessels; and alternatively that if she was within art. 9 (*b*) she carried the proper lights, and although the direction of the two lights was reversed and might be wrong and constitute a breach of the article, the breach did not, and could not by any possibility, cause or contribute to the collision. The points thus raised are of considerable importance, especially to those engaged in the business of fishing with drift nets, and, therefore, also to all those who may navigate in waters where such fishing takes place.

The construction and application of the various rules are not easy. Giving the best consideration I can to the rules and to the various decisions upon them, the conclusions at which I have arrived upon the various points raised are as follows: The *Pitgaveney* was a "steam vessel," and not a "sailing vessel," fishing with nets within the meaning of art. 26. She was a "steam vessel under steam," notwithstanding that she might not, without fouling it, work her propeller by steam. If she was "proceeding" under art. 20, she would have been a "steam vessel proceeding," although she did not in fact proceed by means of her steam power. She was a "steam vessel under way" within the preliminary note to the regulations, and would have had to carry the "under-way lights" if art. 9 did not apply to her case. She was a vessel fishing with drift nets, having her nets partly in the water within the meaning of art. 9 (*b*), although she was only shooting her nets preparatory to fishing in the ordinary sense of the term, and, therefore, she was excused by art. 9 from carrying "under-way lights," and was entitled to and bound to carry the lights prescribed by art. 9 (*b*): (*vide The Cockatrice, sup.*). She was unable, while shooting her nets, to use her steam either to go forward or astern without the risk amounting almost to the certainty of immediately fouling her propeller. She was, therefore, an "incumbered" vessel; and although she was a steamer and, therefore, *primâ facie* bound to give way to a sailing vessel, yet as an encumbered vessel, even though she was making a speed, under wind with a small sail, of about one knot, she was either not a vessel "proceeding" under art. 20, or, if she was, she was relieved from the obligation, and put outside the operation of art. 20 by reason of art. 27: (*vide The Tweedsdale, sup.*; *The King's County, sup.*; *The Upton Castle, sup.*; *The Gladys, sup.*). She should have carried, as I have said, the fishing lights described in art. 9 (*b*). She did carry these lights, but at the time of the collision the two lights were not in the direction prescribed by that article—her lower light, instead of being in the direction of the nets, was in the opposite direction. She, therefore, failed to observe in this respect the provisions of the article, and was in this sense guilty of a breach of the rules and came within the operation of sect. 419 of the Merchant Shipping Act 1894. It was given in evidence that steam drift-net vessels, while shooting, head away from the nets, and shoot them over the side to trail towards the stern, and that after the operation of shooting the nets is over, turn round, head to the nets and then drift. In these circumstances I think that the light should be so placed that the lower light should always be in the direction of the nets—*i.e.*, in the circumstances above stated, the lower light should have been towards the stern while the shooting took place, and when that operation was over and the vessel was turned head to the nets, the light should have been changed so that the lower light should be towards the stem, and in the direction of the nets. I therefore am of opinion that the *Pitgaveney* did not comply with the provisions of art. 9 (*b*) with reference to the direction of the lights. If, by reason of this non-compliance, damage was caused by any vessel passing on the wrong side of her and fouling her nets, she would be to blame.

It remains in the present case to be considered, however, whether her non-compliance with art. 9 (*b*) could by any possibility have caused or contributed to the collision. It clearly did not in fact cause or contribute to the collision, but this is not the material question, and indeed upon such a question proof would not be admissible (*The Fanny M. Carvill*, (*sup.*); *The Duke of Buccleuch*, (*sup.*), although it is very difficult to distinguish

between evidence directed to the question whether a breach in fact caused or contributed to the collision and evidence directed to the proper question of whether a breach could by any possibility have caused or contributed to the collision in the circumstances of the case: (see the judgment of Vaughan Williams, L.J. in *The Corinthian*, (1909) P., at p. 274). I am satisfied by the evidence and the arguments for the *Pitgaveney* that the non-compliance with the regulations as to the direction of the lights could not by any possibility have caused or contributed to the collision. The lights she carried were those of a vessel fishing with drift nets. They were so regarded by those responsible for the *Zaandam* when the *Pitgaveney* was first sighted. She therefore ought to have been regarded as an encumbered fishing vessel, whether the lower light pointed one way or the other. The *Zaandam*, however, regarded her as a vessel steaming towards the *Zaandam*, although she was not in fact steaming; and the *Zaandam* proceeded on her course on the ground that she regarded the *Pitgaveney* as a steamer steaming under way, although, as I have said, she was not steaming, and did not carry the "under way" lights. This, in my opinion, was due to the fact that the *Zaandam* kept no look-out or a very bad look-out: (*cf. The Englishman, sup.*; *The Argo, sup.*; *The Gannet, sup.*). As to the alleged breach by the *Pitgaveney* of sect. 422 of the Merchant Shipping Act 1894, I find that in her attempt to avoid the collision when she saw the *Zaandam* determinedly keeping her course, the *Pitgaveney* put her engines full speed astern and fouled her propeller, as was inevitable. The fact that she risked this shows her anxiety to do what she could to prevent the accident. This rendered her unable to give assistance by steaming, and I find also on the evidence, and am advised by the Elder Brethren, that in the circumstances and in the sea that was making it would have been dangerous for her to lower her boats, even if the *Zaandam* had not gone away on her speed, and accordingly I am of opinion that the *Pitgaveney* has rebutted the presumption raised by sect. 422 of the Merchant Shipping Act. In the result, therefore, I hold that as the *Pitgaveney* could not manœuvre under steam either forward or astern, by reason of her nets, without fouling her propeller, she was not bound by art. 20 to keep out of the way; that there were "special circumstances" within art. 27 which authorised a departure from art. 20, supposing art. 20 otherwise applied; that she was a vessel fishing with drift nets with the nets partly in the water; that she carried the lights of a fishing vessel, although the direction did not properly indicate the line of the nets; that the lights being those appropriate for a fishing vessel, the mistake in the direction could not by any possibility have caused or contributed to the collision; that the *Zaandam* did not keep a proper look out; that she wrongly kept her course; that she could without difficulty with the steerage way upon her have put her helm hard up shortly before the collision and eased off so as to keep away from the *Pitgaveney*; that she ought to have done so; and that she is solely to blame for the collision. I therefore give judgment in favour of the defendants upon the claim and counter-claim, with costs, and order the usual reference to ascertain the damage under the counter-claim.

Solicitors for the plaintiffs, *Stanton* and *Hudson*, agents for *A. M. Jackson* and *Co.*, Hull.

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

House of Lords.

June 13 *and* 14, 1910.

(Before the LORD CHANCELLOR (Loreburn), Lords MACNAGHTEN, JAMES OF HEREFORD, and COLLINS.)

RED R. STEAMSHIP COMPANY *v.* ALLATINI BROTHERS AND OTHERS. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Charter-party — Bill of lading — Freight — Construction of charter party and bill of lading.

Oats and barley were shipped under bills of lading which provided: "To be delivered unto order, he or they paying freight for the said goods, and performing all other conditions and exceptions as per charter-party . . . at the rate of freight as per charter-party per ton of 2240lb. gross weight delivered in full."

The charter-party provided that the ship should load a full and complete cargo of wheat, maize, linseed, or rapeseed, and contained the following provisions: "(6) Freight, 12s. 6d. per ton; (13) 6d. per ton less if ordered to a direct port; (14) for linseed and rapeseed the rate to be 7 per cent. per ton more than for wheat or maize; (15) all per ton of 2240lb. English gross weight delivered; (16) charterers to have the option of shipping other lawful merchandise, in which case freight to be paid on steamer's dead weight capacity for wheat or maize in bags at the rates above agreed on for heavy grain, but the steamer not to earn more freight than she would if loaded with a full cargo of wheat or maize in bags; (31) the master to sign bills of lading at any rate of freight that the charterers may require, but any difference in amount between the bill of lading freight and the total gross chartered freight as above to be settled at port of loading before the steamer sails. Vessel to have a lien on cargo for all such bill of lading freight, dead freight, demurrage, and all other charges."

Only oats and barley were loaded, and the vessel sailed for a direct port only about half loaded, the charterers being unable to provide a full cargo.

Held, that the holders of the bills of lading were liable to pay freight at the rate of 12s. a ton gross weight delivered, and that no dead freight was payable by them.

Judgment of the Court of Appeal affirmed.

APPEAL from a judgment of the Court of Appeal (Fletcher Moulton and Buckley, L.JJ., Vaughan Williams, L.J. dissenting), reported 11 Asp. Mar. Law Cas. 317 and 101 L. T. Rep. 510, affirming a judgment of Bray, J., reported 11 Asp. Mar. Law Cas. 192 and 100 L. T. Rep. 268, at the trial before him in the Commercial Court without a jury, in favour of the defendants.

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

The appellants, the plaintiffs, were the owners of the steamship *Ryall*. The respondents were the indorsees and holders of bills of lading relating to oats and barley carried on the *Ryall*.

The action was brought by the appellants for a declaration that they were entitled to recover from the respondents Dewar and Webb 1411*l*. 0*s*. 8*d*.; from Allatini Brothers, 591*l*. 2*s*. 8*d*.; and from the Banco Espanol del Rio de la Plata, 78*l*. 15*s*. 8*d*.; making in all 1727*l*. 1*s*., deposited by the respondents with the Surrey Commercial Docks Company to secure delivery. The appellants claimed those sums as freight and dead freight. The appellants' claim turned on the construction to be placed on the terms of the charter-party and bills of lading, and was based upon a contention that the freight to be paid was to be calculated on the dead weight capacity of the ship for wheat and (or) maize in bags, and that if oats and barley were carried and delivered the same amount of freight should be paid, though the rate of freight per ton weight of the light cargo carried and delivered would increase.

The respondents contended that the freight due was 12*s*. per ton of 2240lb. of gross weight delivered, which they paid.

The material provisions of the charter-party are set out in the headnote above and in the report in the court below.

Bailhache, K.C. and *D. Stephens*, for the appellants, contended that clause 16 of the charter-party was intended to fix a standard for finding out the freight payable for any given cargo as compared with a cargo of wheat or maize. The freight in that case must be calculated by finding out how much wheat is excluded by the cargo which has been shipped, and the freight calculated upon that. The contention of the respondents is that the freight payable is a lump sum freight. We say that this is not so, but the charter-party provides a method of arriving at the true freight, at the rate of 12*s*. per ton. Dead freight is payable under clause 31. The authorities are not uniform. In *Brightman* v. *Miller* (*Shipping Gazette*, June 6, 1908) a charter-party in this form was considered, and the learned judge did not take the view which Bray, J. took in this case. In *McLean* v. *Fleming* (25 L. T. Rep. 317; L. Rep. 2 H. L. Sc. 128) and *Gray* v. *Carr* (1 Asp. Mar. Law Cas. 115 (1871); 25 L. T. Rep. 215; L. Rep. 6 Q. B. 522), two cases which were heard about the same time, the House of Lords, in a Scotch appeal, and the Exchequer Chamber took different views. The former view should be preferred, and the ship have a lien for dead freight. Wheat is made the standard for all other cargo. To hold that clause 16 imposes a lump sum freight makes clauses 15 and 31 nugatory. Freight calculated by the dead weight capacity of the ship is not the same as a lump sum freight. See

Steamship Rotherfield Company v. *Tweedy*, 2 Com. Cas. 84;

Steamship Heathfield Company v. *Rodenacher*, 2 Com. Cas. 55.

See also as to calculating freight by a standard:

Russian Steam Navigation Company v. *Silva*, 13 C. B. N. S. 610;

Southampton Steam Colliery Company v. *Clarke*, L. Rep. 6 Ex. 53.

If we are wrong on the construction of clause 16, the question of dead freight does not arise, but it does not follow that there is no lien for dead freight because it is to be settled at the port of loading. *Gardner* v. *Trechmann* (5 Asp. Mar. Law Cas. 558 (1884); 53 L. T. Rep. 518; 15 Q. B. Div. 154), cited by Buckley, L.J., does not apply.

Atkin, K.C. and *D. C. Leck* for the respondents. The charter-party was intended to provide the same freight as for a cargo of heavy grain. It is a lump sum freight, not a rate per ton. The calculation for which the appellants contend is not necessary, and involves reading in the words "at the rate of." If our view of clause 16 is right, the question of dead freight does not arise.

D. Stephens was heard in reply.

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

The Lord Chancellor (Loreburn).—My Lords: I do not know how this form of charter-party has been understood or applied in the trade, but I can only give the best opinion that I can form with regard to the effect of the language of the bill of lading which incorporates the language of the charter, obscure as possibly may be the construction of it in this case, as it not infrequently is in other cases. The main question is whether the freight on oats and barley is to be according to the rate fixed by this charter-party for wheat—namely, 12*s*.—or whether it is to be according to a calculation, which, with all respect, seems to me an abstruse calculation, made under the 16th clause of this charter-party. Now, that depends upon the meaning of the bill of lading, and of the charter-party to which it refers. Both these documents, no doubt, admit of difficulties in either construction, and so far as words go the documents are not as clearly expressed as they might be. I agree, however, with the Court of Appeal and Bray, J., but as there was not unanimity in the Court of Appeal I will state in a very few words the reason for my opinion. In a matter of business I should not accept readily such a construction as is put forward by the appellants, which would involve calculations in some cases of a very difficult kind, if any equally probable construction not surrounded by those difficulties were possible. Now I think that another construction—namely, that contended for by the respondents—is not only equally probable, but is in itself more probable even apart from the consequences which would follow from the appellants' contention. I think that it is in itself a preferable construction. It seems to me that clause 16 of the charter-party provides for a lump sum freight; it is an affair between the shipowners and the charterers, and the calculation between them is easy and simple enough. The bill of lading requires freight to be paid "at the rate of freight as per charter-party per ton of 2240lb." The bill of lading refers to a "rate of freight." The only "rate of freight" provided by the charter is the rate of 12*s*. or 12*s*. 6*d*., as the case may be, although it is true that this rate is only stated for wheat and maize—for certain specified kinds of goods. There is another rate of freight, indeed, mentioned for linseed, but that is referable to the 12*s*. rate for wheat. If this be not the proper construction of the bill of lading, then it seems to me that no effect will be given to the words "at the rate of," which are found in the bill of lading. I will not enter into the question what would be the effect

in a case where those words were omitted from the bill of lading. I cannot, as at present advised, think that it was intended that the rate on a particular parcel was to be ascertained in such a cumbrous way as the appellants suggest, even if the words "at the rate of" were excluded from the bill of lading; but I do not wish to express any final opinion upon that subject. In plain language, it seems to me that the business view, and the proper view, is that the owners and charterers agree, in the event of goods other than those specified being shipped, for a lump sum freight; that as to the bill of lading the charterers might fix whatever rate they pleased, but they have fixed it with reference to the rate mentioned in the charter-party—namely, 12s. If this view be correct, then we need not discuss the question of dead freight, because admittedly the lien for dead freight would not arise. Accordingly I move your Lordships to affirm the decision of the Court of Appeal.

Lord MACNAGHTEN.—My Lords: I entirely agree with the judgment of the Lord Chancellor.

Lord JAMES OF HEREFORD.—My Lords: I concur.

Lord COLLINS.—My Lords: I agree.

Judgment appealed from affirmed, and appeal dismissed with costs.

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

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

June 20 *and* 21, 1910.

(Before the LORD CHANCELLOR (Loreburn) Lords MACNAGHTEN, ATKINSON, and SHAW.)

OWNERS OF THE STEAMSHIP DRAUPNER *v.* OWNERS OF THE CARGO OF THE DRAUPNER; THE DRAUPNER. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Inference—Practice—Damage to cargo—Charter-party—Bill of lading—Negligence clause—Liability of shipowner.

Where there was no oral evidence given on either side and the House of Lords was asked to draw the proper inference from admitted facts, it reversed the decision of the Court of Appeal, which in its opinion had drawn the wrong inference.

APPEAL from a judgment of the Court of Appeal (Kennedy, L.J., Sir J. Bigham, P., and Joyce, J.), reported (1909) P. 219, affirming a decision of Bargrave Deane, J. in favour of the respondents, the plaintiffs below.

The action was an action *in rem*, and was brought by the plaintiffs to recover damages for failure to deliver part of a cargo of sleepers shipped at Libau for Boston Dock (Lincolnshire). It was admitted that the cargo short delivered was lost by jettison, and that this jettison was necessary for the common safety of ship and cargo, which were in great peril in consequence of stranding; and it was also admitted that the stranding was caused by the negligence of those on board the *Draupner*.

The question involved was whether the goods were, as respondents contended, carried on terms by which the appellants were responsible for negligence, or whether they were, as appellants contended, carried upon terms which excused the appellants from liability for losses occasioned by excepted perils when occasioned by negligence, and consequently made the loss in such case one to be made good in general average.

The respondents claimed as holders for value of the bill of lading of the cargo signed by the master of the *Draupner* at Libau. The appellants by their defence (as amended) admitted the loss, but alleged that it was a general average loss. They admitted also that the loss was caused by negligence of the master, mariners, or other servants of the owners, but said that the cargo was carried under the terms of a charter-party, dated the 15th Feb. 1907, which excepted loss by perils and accidents of the seas, and stranding, even when occasioned by negligence of the master and servants of the shipowner, and further that the bill of lading was intended to incorporate, and in fact incorporated, such terms as the plaintiffs knew when they became holders of it, and that if the cargo was carried under the bill of lading, and not under the charter-party, and the bill of lading did not incorporate the negligence clause, it was to the knowledge of respondents signed by the master without authority and was not binding.

Bargrave Deane, J. gave judgment for the respondents, the grounds of his judgment being that the master of the *Draupner* was authorised by Mr. Eskildsen, manager of the Northern Steamship Company, and agents for the owners of the *Draupner* at Libau, to sign the bill of lading in the form in which he signed it, and that it was therefore signed with the authority of the appellants, and the appellants were bound by it. The appellants appealed. The Court of Appeal did not support the judgment of Bargrave Deane, J. on the ground on which he decided the case, but held that, though the bill of lading was signed without the authority of the appellants, yet it was not proved on the part of the appellants that the respondents knew or had such notice that the charter-party had been entered into, in the form in which it was in fact entered into, which they had themselves supplied, and stipulated should be used, and therefore that it was not proved that the respondents knew that the bill of lading was signed without the authority of the appellants. The Court of Appeal held that there had been no ratification of the bill of lading by receipt of freight.

Bailhache, K.C. and *M. Hill* appeared for the appellants.

Atkin, K.C. and *Lewis Noad* for the respondents.

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

The LORD CHANCELLOR (Loreburn).—My Lords: In this case there is no question of law in dispute at all. The only question is one of inferences from the facts. The materials necessary to enable us to arrive at a conclusion are all on

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

paper, and all the circumstances which are relevant are, in fact, agreed on both sides, so that the point is simply what conclusions or inferences of fact are we to derive from acknowledged premises. Did the respondents know that the charter-party in this case was in a particular form and contained a negligence clause? Now, they knew that it had been by themselves contracted that the charter-party should be in that particular form; they knew also, admittedly, that a charter-party had been made. Is not that *primâ facie* evidence that they knew that the charter-party was in that form? When the bills of lading were handed to them referring to the charter-party, and nothing was said to intimate that it was not the charter-party for which they had contracted, it seems to me a legitimate inference to say that they must have concluded that it was the charter-party for which they had contracted. There is a point in regard to Mr. Read at Boston having possession of the charter, but I think that nothing can be based upon that fact. *Primâ facie* evidence is evidence which raises a rebuttable presumption of fact; it stands until rebutted; it therefore cannot establish more than a probability, and that probability may be displaced by evidence on which the court can act. In my opinion there is here a *primâ facie* case or probability which has not been displaced by evidence, and accordingly must stand. This matter, which is only a short matter of fact, might perfectly easily have been settled at the trial by one or two questions to a witness; but I have observed that neither the appellants nor the respondents have evinced any desire that the question should be settled in that simple and primitive way, but have preferred that we should come to a conclusion for ourselves. I think that the appellants are right. In expressing that opinion I wish merely to protect myself against this being regarded as a case in which the House has differed on questions of fact from the courts before which the case has previously been presented. I think that your Lordships are always very chary of differing, with regard to questions of fact, from a finding in the courts below, mainly because those courts have a better opportunity than we can have here of observing the weight and importance to be attached to the evidence of the different witnesses. But this is a case in which no oral evidence is in question at all. It is simply a case in which we are asked to draw the proper inferences from admitted facts. I need hardly say that I have some misgivings when I find myself differing from the Court of Appeal, but I do think that the fair and proper inference is that which I have advised your Lordships to adopt.

Lord MACNAGHTEN, Lord ATKINSON, and Lord SHAW concurred.

Judgment appealed from reversed. Judgment entered for the appellants. The respondents to pay to the appellants their costs in this House and below.

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

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

Judicial Committee of the Privy Council.

July 7, 8, and 25, 1910.

(Present: The Right Hons. Lords MACNAGHTEN, ATKINSON, SHAW, and MERSEY, and Sir H. E. TASCHEREAU.)

MONTREAL LIGHT, HEAT, AND POWER COMPANY *v.* SEDGWICK AND OTHERS. (*a*)

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Marine insurance—Constructive total loss—Loss of cargo—Canadian Civil Code, art. 2522.

A cargo of goods was insured, the insurance being expressed to be "against loss by total loss of the vessel and general average only."

The vessel was wrecked and submerged, but the insurers of the vessel refused to treat her as a constructive total loss, and the vessel was raised and repaired at a loss. The cargo was totally lost.

Held, that the loss covered by the policy had in fact occurred; that there was ample evidence to sustain the findings of the jury to that effect; and that the insurers of the cargo were liable on the policy.

Judgment of the court below reversed.

APPEAL by special leave from a judgment of the Supreme Court of Canada in an action brought upon a policy of marine insurance to recover 2700 dollars for a total loss upon a cargo of cement on a river voyage from Montreal to Chambly Canton, Quebec. The action was tried in the Superior Court of the Province of Quebec before Hutchinson, J., sitting with a special jury, who gave judgment in favour of the appellant on the unanimous verdict of the jury. This judgment was unanimously affirmed by the Court of Review (Mathieu Tellier and Pagnuelo, JJ.) on the 22nd April 1908. The defendants appealed to the Supreme Court of Canada (Fitzpatrick, C.J., Davies, Idington, Duff, and Anglin, JJ.), who gave judgment on the 4th May 1909 directing a new trial in regard to certain points leaving certain answers of the jury undisturbed, directing the appellant to pay the respondents' costs in the Court of Review and in the Supreme Court of Canada—the costs of the original trial to abide the event of the new trial. Special leave to appeal from the judgment of the Supreme Court of Canada was granted on the 10th Aug. 1909.

The insurance in question was in respect of cement at and from Montreal to Chambly Canton, laden on barges and pinflats in tow, and was expressed to be "Against total loss by total loss of vessel and general average only."

The cement was loaded on the barge *Maria*, which proceeded in tow on the intended voyage from Montreal to Chambly Canton. The barge was also insured, but with persons other than the respondents.

In the course of the voyage the barge struck on a submerged snag in the Richelieu River at St. Ours, was holed, and thereby sank to the bed of the river, being submerged with the exception of a few feet at the bow and the house at the stern.

On the 27th May the appellant, and on the 6th June the owner of the barge gave notice of abandonment to their respective underwriters

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

Both underwriters combined to raise the barge and declined to accept the notices of abandonment.

The barge lay for three weeks on the bed of the river awash and the cargo of cement, from contact with the water, became a total loss. The cement, which was in barrels, was taken out of the barge by the underwriters' contractor and placed upon the bank of the river. A portion of it was washed away by the water the following spring, and the balance seems to have been taken away by the farmers in the vicinity of the wreck, who used it in the place of stone for building foundations.

The respondents and the underwriters on the ship shared the expense of raising the barge and having her towed to Sorel at a cost of 500 dollars, and agreed to pay a further 50 dollars for putting her on the slip at Sorel. In addition the respondents incurred incidental expenses amounting to 126 dollars.

The surveyors for the shipowner and underwriters of the ship and their umpire valued the barge in her damaged condition in the ways or slip at 1200 dollars, and estimated that the cost of repairs would be 1046.48 dollars. She was, however, partially repaired by the owner at a cost of 650 dollars, and he subsequently sold her for 1750 dollars.

The underwriters contended that on the terms of the policy, although the cement was a total loss, they were not liable to pay unless the barge was also a total or constructive total loss. The conflict throughout the original hearing of the case and the two appeals was whether in fact the barge was a constructive total loss within the meaning of the policy.

After certain formal questions, which need not be set out, the following questions were submitted to the jury and answered unanimously:—

(3) Was the barge wrecked in the Richelieu River, and did she sink to the bottom?—A. Yes.

(4) Were the said barge and the said cargo completely submerged any time on that occasion and trip?—A. Practically submerged, if not completely.

(7) Was the said barge ever put in proper repair to continue her voyage?—A. No.

(8) Was the said barge raised and repaired at a loss, that is to say, was the cost of raising the said barge and of the repairs which were made upon her greater than the value of the barge after the repairs were completed?—A. Yes.

(9) Was the raising and repairing of the said barge made for the sole purpose of attempting to evade payment of the insurance upon the cargo?—A. Yes, in so far as the defendants participated therein.

(10) Was the said barge an actual or constructive total loss?—A. A constructive total loss.

The defendants at the trial took exception to the charge to the jury in respect to Question No. 10. The learned judge directed the jury that there was a constructive total loss when "the voyage and adventure were lost or rendered not worth pursuing," and he added that this voyage was not pursued. Exception was taken to that direction on the ground that it was of no consequence at all whether the voyage was not pursued, and whether the barge was not put in a proper condition to continue her voyage.

Art. 2522 of the Civil Code is as follows:

Total loss may be absolute or constructive. It is absolute when the thing insured is wholly destroyed or lost. It is constructive when by reason of any event insured against the thing, though not wholly destroyed or lost, becomes of little or no value to the insured, or the voyage and adventure are lost or rendered not worth pursuing. Before the insured can claim for a constructive total loss, he must make an abandonment as declared in the following section.

The above article was cited by the trial judge in his summing up to which exception was taken.

The Supreme Court set aside the answer of the jury to Question 10, upon the ground that the jury had been misdirected as to what constituted a constructive total loss, and that art. 2522 of the Civil Code which had been cited to the jury appeared "to be intended for application only to the case of loss of cargo."

The judgment of the Supreme Court in addition to setting aside the finding of the jury upon the tenth question, ordered a new trial to determine (*a*) the break up value of the wrecked vessel and (*b*) whether the vessel was or was not a constructive total loss, which the jury should be asked to find specifically, according to the test propounded in *Macbeth* v. *Maritime Insurance Company* (98 L. T. Rep. 594; (1908) A. C. 144), and that upon the findings which are undisturbed supplemented by such new findings the court should then be asked to enter such judgment as it deemed proper.

Atkin, K.C. and *Geoffrion*, K.C. (of the Colonial Bar), for the appellants, argued that the view of "constructive total loss" taken by the Supreme Court was not in accordance with art. 2522 of the Civil Code, which is not intended to apply only to the loss of cargo, but applies equally to the loss of the vessel. The rule laid down in *Macbeth* v. *Maritime Insurance Company* (11 Asp. Mar. Law Cas. 52; 98 L. T. Rep. 594; (1908) A. C. 144) does not apply. There was no misdirection.

Lafleur, K.C. and *C. A. Pope* (both of the Colonial Bar), for the respondents, contended that the vessel never became a total loss, and therefore the liability under the policy never arose. Judgment should have been entered for the respondents *non obstante veredicto*.

The following authorities were cited in the course of the arguments:—

Hamilton v. *Mendes*, 2 Burr. 1198;
Pole v. *Fitzgerald*, Willes, 641;
Renaud v. *Lamothe*, 32 Sup. Ct. Rep. 357;
Wardle v. *Bethune*, 26 L. T. Rep. 81; L. Rep. 4 P. C. 34;
Falkner v. *Ritchie*, 2 M. & S. 290;
Parsons v. *Scott*, 2 Taunt. 363;
Young v. *Turing*, 2 M. & G. 593;
Gardner v. *Salvador*, 1 Moo. & Ry. 116;
Irving v. *Manning*, 6 C. B. 391; 1 H. L. Cas. 287;
Moss v. *Smith*, 9 C. B. 94;
Rosetto v. *Gurney*, 11 C. B. 176;
Roux v. *Salvador*, 3 Bing. N. C. 266;
Benson v. *Chapman*, 6 M. & G. 792; 2 H. L. Cas. 696;

and the works of Marshall and Arnould on Marine Insurance.

Geoffrion, K.C. was heard in reply.

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

July 25.—Their Lordships' judgment was delivered by

Lord ATKINSON.—This is an appeal from an order of the Supreme Court of Canada, dated the

4th May 1909, reversing an order of the Court of Review of the Province of Quebec, dated the 22nd April 1908, and directing a new trial of an action brought by the appellants (plaintiffs) against the respondents (defendants) on a certain policy of insurance, dated the 15th May 1903, to recover the sum of 2700 dollars damages in respect of the total loss of a cargo of cement alleged to be covered by the policy. The action was tried before Hutchinson, J. and a special jury, and resulted in a verdict for the appellants for the above-mentioned sum, upon which judgment was on the 7th Dec. 1906 duly entered. The facts are simple. The appellants on or before the 18th May 1903 shipped on board a certain barge, of the class specified in the policy, named *Maria*, belonging to one Page, 1500 barrels of cement to be carried to a place called Chambly Canton, situated on the River Richelieu, one of the tributaries of the St. Lawrence. The barge, which was about 90ft. in length, was to be towed on this trip or voyage. On the following day while *en route* she struck against a snag in this river, knocking a hole in her bow of about 3ft. by 2ft. in size. She settled down on the shelving bank of the river, and about 70ft. of her deck were completely submerged. Her bow was held up, presumably by the snag, which had pierced her hull, or by the upper part of the bank of the river; her stern was sunk in the deeper part of the stream, and all but a very small portion of the cement was by the wetting turned, as it were, into stone, and completely destroyed as cement. It was scarcely contended, and could not be contended successfully, that the cargo had not been totally lost. It was abandoned. No fault was found with the amount of the damages awarded, if the defendants were liable for damages at all. The policy of insurance was very peculiar in form. It purported to insure against the total loss of the cement "by total loss of the vessel." The defendants based their defence substantially on these six words "by total loss of the vessel," and contended that they were not liable because, though the cargo of cement, the thing insured, was totally lost and abandoned, the barge which carried it was not totally lost. The result was that the case was tried very much as if the action had been brought by Page, the owner of the barge, against a company which had insured his barge, for total loss of the thing insured, the barge. The construction of art. 2522 of the Civil Code of Lower Canada; its history and genesis; the question whether its framers intended it to be an embodiment of the principles of the English law on the subject of constructive total loss or of the principles of the French law on that subject were each much discussed. But art. 2522 only purports to define what is a constructive total loss of "the thing insured." "The thing insured" in this case was the cement. Of this the loss was absolute, not constructive at all. Whether the barge, as she lay submerged, was so valuable or was so slightly damaged that a prudent owner would, with a reasonable regard to his own interest, most probably cause her to be raised and repaired; or was of such small value or so seriously damaged that he would most probably think that she was not worth being raised and repaired, but would abandon her—vital issues—if the action was one for the loss of the barge, were matters which in no way affected the loss which the plaintiffs, in fact, sustained. And it is difficult to suppose that the parties to this policy of assurance ever entered into it with the intention that these considerations, not in any way affecting the loss the plaintiffs sustained, should be made of the very essence of the contract, and decisive on the question of their right to recover. Cement being easily damaged by water, it is obvious that the defendants would naturally desire to protect themselves from liability for a partial or total loss of the cargo, caused by a slight injury to the barge, or by some casual incident of the voyage; but where a total loss of the cargo is brought about by such a wreckage of the barge as resulted in her sinking to the bottom of the river, becoming entirely flooded, and almost entirely submerged, the peril which the parties to the contract meant to guard against must, their Lordships think, be held to have supervened, and the total loss of the barge which they contemplated be held to have resulted. This would appear to be the view taken by the Court of Review upon this point. In their Lordships' opinion it is the true view. Having regard to this view, then, unless the jury were misdirected to the defendants' prejudice, their answers to Questions 3, 4, 5, 11, and 12 in substance dispose of the case. The questions and answers were as follows:—

3. Was the said barge *Maria* in the course of her voyage to Chambly Canton wrecked in the Richelieu River and did she sink to the bottom?—Yes.

4. Were the said barge and the said cargo completely submerged any time on that occasion and trip?—Practically submerged, if not completely.

5. Were the said barge and the said cargo abandoned by the owners as a total loss?—Yes.

11. Was the said cargo an actual or constructive total loss?—Actual total loss.

12. Could a portion of the said cement have been salved at small cost and delivered sound at Chambly Canton?—No.

Taken together, these findings amount to a finding that the loss covered by the policy had in fact occurred, though they have not found in so many words that the barge was a total loss, and it is not contended that there was not ample evidence in the case to sustain each of these findings. Indeed, if the jury had answered those questions otherwise than they did, so preponderating was the evidence, that their findings, if challenged, could scarcely be allowed to stand. No substantial wrong or miscarriage of justice therefore has been brought about by the alleged misdirection, since, if the judge misdirected at all, he misdirected in reference to Questions 7 and 10, which, in their Lordships' view, are irrelevant questions. The fact found by Question 10 would be evidence, no doubt, on the question of what a prudent owner would do with the wreck, and had the issue for decision been whether or not the barge was a constructive total loss within the meaning of art. 2522, it could not be contended that this question was rightly framed, but their Lordships are of opinion, for reasons already given, that this latter was not properly a matter for decision at all. It lay outside the proper issue—namely, whether the loss of the thing insured, the cement, had, in fact, occurred or been occasioned within the meaning of the policy. At the same time their Lordships

think it right to say that the trial judge's remark in reference to Question 10, that the voyage was not pursued, was not in any sense an instruction to the jury, but was, as he himself said, a mere statement by him of an undisputed fact in the case. For these reasons their Lordships are of opinion that there was no miscarriage of justice at the trial; that the interests of the defendants were not unfairly prejudiced; that the substantial issue of fact upon which the liability of the defendants turned in law was in substance tried; that the findings of the jury upon the several issues which together constitute this substantial issue were amply sustained by the evidence; that consequently there should not be a new trial of this action; and that the decision appealed from granting it should therefore be reversed and the decision of the Court of Review on these points restored. Their Lordships are further of opinion that judgment could not on the evidence in the case and findings of the jury be entered for the defendants *non obstante veredicto*. It is unnecessary to consider whether it is open to the defendants to apply for this latter relief the decision appealed from having been in their favour. Their Lordships therefore think the appeal should be allowed, and will humbly advise His Majesty accordingly. The respondents must pay the costs of the hearing here and in the Supreme Court.

Solicitors for the appellant, *Lawrence, Jones, and Co.*

Solicitors for the respondents, *Botterell and Roche.*

Supreme Court of Judicature.

COURT OF APPEAL.

July 12, 13, *and* 14, 1910.

(Before Vaughan Williams and Buckley L JJ. and Sir S. Evans, President, sitting with Nautical Assessors.)

The Grovehurst. (*a*)

Collision — Crossing rule — Steamship — Steam trawler trawling — Obligation to show triplex light—Duty of steamship to give way—Collision Regulations 1907—*Arts.* 9 (*d*) (1), 19, 21, *and* 27.

Art. 19 *does not apply to a steam trawler with her trawl down and exhibiting the lights mentioned in art.* 9 (*d*) (1) *and it is the duty of steamships approaching her to keep out of her way.*

The Craigellachie (100 *L. T. Rep.* 415; 11 *Asp. Mar. Law Cas.* 213; (1909) *P.* 1) *dissented from.*

The Tweedsdale (61 *L. T. Rep.* 371; 6 *Asp. Mar. Law Cas.* 430 (1889); 14 *P. Div.* 164) *approved.*

Appeal from a decision of Bargrave Deane, J. by which he held the steamship *Grovehurst* alone to blame for a collision which occurred between that vessel and the steam trawler *Europe* on the early morning of the 7th Jan. 1910 in the North Sea, about thirty miles to the northward and eastward of Flamborough Head.

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

The appellants, who were the defendants and counter-claimants in the court below, were the owners of the steamship *Grovehurst*; the respondents, who were the plaintiffs in the court below, were the owners of the steam trawler *Europe* and her master and crew suing for their lost effects.

The case made by the plaintiffs, the owners of the steam trawler *Europe*, in the court below was that shortly before 3.50 a.m. on the 7th Jan. 1910 the *Europe*, a steam trawler of 151 tons gross and 66 tons net register, manned by a crew of nine hands all told, was fishing about thirty miles N.E. by N. of the Spurn Light Vessel. The wind was S.W., a light breeze; the weather fine and clear, and the tide slack flood. The *Europe* was trawling with her head about N. by W., making about two to two and a half knots through the water; her triplex light and under it a white light in a lantern and her 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 *Europe* saw about four to five miles off and about five to six points on the starboard bow the masthead light of a vessel, which proved to be the *Grovehurst*. Shortly afterwards the red light of the *Grovehurst* came into view, and later the green light opened and shut, leaving only the red and masthead lights showing. The *Grovehurst* continued to approach, and as she did so the *Europe* sounded one long warning blast, and, as the *Grovehurst* took no notice, the engines of the *Europe* were stopped, and the *Europe* then blew another long blast. The *Grovehurst* then opened her green light again, and, with all three lights showing, she came on at great speed, and with her stem struck the *Europe* on the starboard side amidships such a severe blow that she sank almost immediately with all her fish and her crew's effects, and two of her crew were drowned.

The case made in the court below by the defendants and counter-claimants was that shortly before 3.30 a.m. on the 7th Jan. 1910 the *Grovehurst*, an iron screw steamship of the port of Landscrona, in Sweden, of 1382 tons gross and 806 tons net register, manned by a crew of eighteen hands all told, was in the North Sea, off Flamborough Head, in the course of a voyage from Riga to Hull laden with a cargo of pit props. The *Grovehurst* was steering a course of S.W. by W. ¾ W. magnetic, and was making about eight to eight and half knots with her engines working full speed. The weather was fine and clear, and the wind was S.W., a moderate breeze. The *Grovehurst* was carrying the regulation masthead, side, and stern lights, which 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 *Grovehurst* sighted the lights of several trawlers to the southward and westward, and in particular the two white lights of a trawler, which afterwards proved to be the *Europe*, bearing about a point on the starboard bow. Shortly afterwards one of the white lights of the *Europe* was shut out and her red light came into view. The helm of the *Grovehurst* was thereupon ported, and when the *Europe* had been brought clear on the port bow of the *Grovehurst* the helm was steadied. The vessels were then in a position to pass all clear of one another, when suddenly the *Europe*, acting

apparently under a starboard helm, closed in her red light and opened her second white light, and immediately afterwards closed in the white light again and opened her green light. The helm of the *Grovehurst* was immediately put hard-a-starboard and her engines full speed astern. The *Europe* then sounded a signal, the nature of which was not distinguishable, and the first blast of what was intended to be three blasts was sounded on the whistle of the *Grovehurst*, but, before the signal could be completed, the *Europe* with her starboard side struck the stem of the *Grovehurst*, doing her damage.

The case was heard in the Admiralty Court on the 17th and 18th March, and on the 21st March 1910 Bargrave Deane, J. delivered the following judgment, finding the *Grovehurst* alone to blame:—

BARGRAVE DEANE, J.—This is an action for damages sustained in a collision which took place between the steam trawler *Europe* and the steamship *Grovehurst*. The collision took place about 3.30 a.m. on the 7th Jan. of this year. The place of the collision was about thirty miles to the northward and eastward of Flamborough Head, on a fishing bank called the Flamborough bank, which is said to be a piece of ground some sixteen miles long by two to three miles in width, and is frequented by vessels from Grimsby for trawling. On either side of it there is said to be rough ground, so that the place is distinctly defined. The trawler came out from Grimsby to fish, and was fishing there for some days before the day of the collision. The *Grovehurst* was coming from Riga, bound for the Humber, and both vessels were exhibiting their proper lights at the time. The *Grovehurst* had her masthead, two side lights, and a stern light; and the trawler, which had her trawl down at the time, was exhibiting the triplex light, and under it a globe light showing a white light all round and the stern light. She was in company with another trawler from Grimsby called the *Marlborough*, and the two vessels were working what is called the upper end or southern end of this bank. The collision took place by the *Grovehurst* striking the starboard side of the trawler, a little forward of the funnel, cutting into her so deeply as to sink her within a very short time, and, unfortunately, two lives were lost, the mate and the engineer of the *Europe* being drowned. Each vessel blames the other, and it is material to see how the facts apparently shape themselves. The trawler, manned by nine hands, and about 100ft. long, fished up and down the bank—that is to say, from north to south, and from south to north—working it by an hour and a half's trawling at a time, I think it is said. She was coming up—that is, according to their parlance—from the north to the south, and when she got up to the south she hauled her trawl. She had her trawl down, with a warp on her starboard side and another warp aft, and the evidence is that when a trawler is so situated, with a warp on her starboard side, she cannot turn to port under a starboard helm. When she has the port warp out she cannot turn to starboard. It is an important fact in this case that the *Grovehurst* says that the trawler turned under a starboard helm, whereas the trawler says she was incapable of doing so owing to the starboard warp being out, and that, as a matter of fact, she turned from port to starboard. She is corroborated as to this particular difficulty in turning with her trawl out by the *Marlborough*, a similar ship, which was trawling on the same ground at the same time. The *Europe* says she was trawling up; she hauled her trawl and let it out again, and, having let it out, she proceeded to turn under her port helm from port to starboard, and, having got straight down again, she was proceeding on showing her starboard side to any vessel approaching from the eastward, and that it was when in that position that she first saw the light of the *Grovehurst* somewhere on her starboard bow. She says that from that time she never altered her course; she kept on the course of north by west, and about a minute or so before the collision, seeing this vessel approaching, she gave her a long blast to warn her, to call her attention to her, and that immediately before the collision, when the *Grovehurst* was approaching in such a position that there was no chance of avoiding the collision, she (the *Europe*) blew another long blast and stopped her engines; that the effect of stopping her engines with this trawl out was to stop her immediately in the water, and that she was struck as described. According to her, she omitted nothing which she could have done to avoid the collision; there was nothing else which could have been done; the whole fault, she says, was the want, of a proper look-out on board the *Grovehurst*; that she came straight on and struck her instead of passing under her stern. The story of the *Grovehurst* is that, coming from Riga across the North Sea, she saw a little on her port bow, first of all, two white lights; then, watching those white lights, she saw them develop into a white and red light, and, still watching them, she says the vessel she was watching must have come round under a starboard helm and turned the white and red lights into two white lights, and then the two lights into white and green lights, and that that was done practically under her bows at a time when it was very difficult, if not impossible, to avoid a collision, and that she at once hard-a-starboarded her helm and put her engines astern, but it was too late to avoid a collision, and the collision happened, and the whole blame is attributed by her to the vessel which she struck for having gone round under her starboard helm under her bows. The story, of course, told by the *Grovehurst*, if it were an absolutely correct one, would relieve her, because a vessel has no right to go about under the bows of another vessel without giving some warning blast and without denoting what she is doing. It is said that the *Europe*, being a trawler, was not under the same rules; but I am of opinion that if this trawler did go about, as described by the *Grovehurst*, she ought to have denoted that by giving a signal. I am not dealing with the difficult question which I shall have to deal with later, as to whether these vessels have or have not to get out of the way of a steam vessel.

There is a third story, and the third story is the story of the *Marlborough*. The *Marlborough*, as I have said, was fishing on this ground, and she is first brought into the story when she is to the northward of the *Europe*, and going about and coming up to trawl to the southward. She had her port

gear down. She went about under a starboard helm, bringing her head to port, and then proceeded, according to her own evidence and that of the *Europe*, to fish up the bank to the southward, in which case she would, of course, be showing white and red to the *Grovehurst* as she approached. According to the *Grovehurst*, there was a vessel away to the northward of the vessel she collided with, and the *Grovehurst* says she was a mile to the northward of the vessel she collided with, and that she was showing at first two white lights, and afterwards, I think she said, a white and red; but she, according to the *Grovehurst*, had nothing whatever to do with this collision—in, fact, she was a mile away at the time. Now, is that true? It is sworn by those on board the *Europe*, and also by those on board the *Marlborough*, that it is not true. It is said by these two vessels that the *Marlborough* was coming up from the northward at the time when the *Grovehurst's* white light was first sighted, and that by the time when the collision occurred the two trawlers were abeam of each other, the two vessels being port to port, the *Marlborough* having come up on the port bow of the *Europe*, and passing at the time port to port. Those on the *Marlborough* say that they stopped their engines about that time, because they intended, having got near to the southern end of the bank, to go about, and that they waited for the *Europe* to go ahead, and get out of their way, with her trawl, before they could likewise follow suit by going round and trawling to the northward. If that is a true story, of course I cannot accept the story of the *Grovehurst*. Now, who is it on the *Grovehurst* who gives evidence? There are really only three persons who give evidence. There was a boy of fifteen at the helm, and it is naturally a matter of comment that we should have practically a child at the helm of this steamer, of some 1382 tons gross; but, on the other hand, it is well known that these Scandinavian steamers do have quite young hands, and, if the boy was a competent helmsman, it does not seem that there is any reason why he should not be there. We have also seen the look-out, and he is also a boy, I think, of some seventeen years of age. But there it is. It seems rather young for a boy of that age to be in such a responsible position on board this ship. But, again, a boy has keen eyesight and perhaps keen intelligence, and probably, being young, he may be much more energetic and alive to what is going on than an older man might be. I do not think that the fact that there were these two lads in responsible positions affects the collision. But one thing did happen which affected the collision, and that is, that the boy on the look out, having reported first two white lights, did report the white and red, and, after that, never reported a white and green. According to the *Grovehurst*, they never saw anything, until the moment of collision, of the white and green, and certainly the look out never reported a white and green. There was on the bridge the chief officer, and the chief officer said that the two white lights were reported, the white and red were reported, but no white and green, and his attention seems to have been directed all the time to the vessel which had the two white lights, and then white and red. Now, was that the *Marlborough?* He says that he ported the helm for the white and red, intending to go under the stern of the vessel showing the white and red, but suddenly, when the white and red, according to them, turn to white and green, which denoted that instead of being a vessel going from north to south, she was going from south to north, they hard-a-starboarded, but it was too late. Their story is that at the moment of collision the vessel which had been carrying the two white lights and the white and red lights was the *Europe*. My belief is that it was not the *Europe*, but that it was the *Marlborough*, and the reason is this, and it seems to me it is a reason which is unanswerable. The *Marlborough* did go about under a starboard helm; she would then be showing the globe all-round light and the stern light to the *Grovehurst*, and, as she got further round, she would show a white and red. The other vessel, the *Europe*, would have to go round under a port helm, and she would never show at any material time a white light and a red, or two white lights, to the *Grovehurst*. Undoubtedly she was showing a white and green at the moment of the collision; but if it is true, as I believe it is true, that at the time in question these two vessels, the *Marlborough* and the *Europe*, were meeting and arriving at a point when possibly the red light of the *Marlborough* might be shut in, and that the other vessel, the *Europe*, had never been observed until she came up to a point where she would be crossing the *Marlborough*, why then that would account for the whole matter, and it may very well be, and I believe it to be, that the *Europe* was never observed from the *Grovehurst* until just before the collision, and that all the attention was fixed on the *Marlborough*, and that they were under the impression that that was the only vessel in the immediate vicinity. I have said it is a question of fact. I have got to say which side I believe. I do not believe the story told by the *Grovehurst* that at the time of the collision the *Marlborough* was a mile away, and there is a very good reason why I do not. Immediately the *Europe* was struck the men at once got into her boat, which was aft. She sank, and the boat floated, and the men on that boat got on board the *Marlborough* at once. If the *Marlborough* was a mile away at the time of the collision with her trawl down, it is impossible that they could have been close at hand, so as to take these men on board at that time. Again, they went to the *Marlborough* and did not go to the *Grovehurst*. They got up to the *Marlborough* before they could get to the *Grovehurst*, although she was close at hand after the collision.

The result of it, in my opinion, is that the cause of this collision was a defective look out on the part of the *Grovehurst*—that they did not observe the vessel with which they collided until the last moment—and the story of her going about in the way described, being an impossibility, still more adds to the strength of my conviction that they never saw the *Europe* until just before the collision and when it was too late to avoid her. For these reasons I am of opinion that the *Grovehurst* is alone to blame. I want to say a word upon trawlers getting out of the way of other vessels. In my opinion, the whole object of the law as to the necessity of carrying the triplex light when the trawl is down is to show vessels approaching, not that the trawler will act under

the ordinary sea rules, but that she at the time is incapable of following the sea rules, and that the vessel which is approaching must get out of the way. There is a case in which it was held that a sailing vessel should do so, and there is a rule which says that sailing vessels shall do so, but there is no rule which says that a steamer must get out of a trawler's way. But if a sailing vessel should do so, *a fortiori* a steamer should, because she has more power to get out of the way of a trawler which is denoting by her lights that she has her trawl down. I say that by the way. I do not believe it affected this collision, except that it might be said, and has been said, that the *Europe* had the other vessel on her starboard side, and therefore it was her duty to get out of the way. But I do not think that rule was meant to apply to this case, where, as has been proved, she had her trawl down at the time of the collision.

On the 27th May the solicitors for the *Grovehurst* gave notice of appeal asking that the *Europe* should also be held to blame.

The following Collision Regulations were referred to during the course of the arguments :—

Art. 3. A steam vessel when towing another vessel shall, in addition to her side lights, carry two bright white lights in a vertical line one over the other, not less than 6ft. apart, and when towing more than one vessel shall carry an additional bright white light 6ft. above or below such lights, if the length of the tow, measuring from the stern of the towing vessel to the stern of the last vessel towed, exceeds 600ft. Each of these lights shall be of the same construction and character, and shall be carried in the same position as the white light mentioned in art. 2 (*a*), except the additional light, which may be carried at a height of less than 14ft. above the hull.

Art. 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. . . . (*c*) The vessels referred to in this article, when not making way through the water, shall not carry the side lights, but when making way shall carry them. (*d*) The lights and shapes required to be shown by this article are to be taken by other vessels as signals that the vessel showing them is not under command and cannot therefore get out of the way.

Art. 9. Fishing vessels and fishing boats, when under way and when not required by this article to carry or show the lights hereinafter specified, shall carry or show the lights prescribed for vessels of their tonnage under way. . . . (*d*) Vessels, when engaged in trawling, by which is meant the dragging of an apparatus along the bottom of the sea.—1. If steam vessels, shall carry in the same position as the white light mentioned in art. 2 (*a*) a tricoloured lantern so constructed and fixed as to show a white light from right ahead to two points on each bow, and a green light and a red light over an arc of the horizon from two points on each bow to two points abaft the beam on the starboard and port sides respectively ; and not less than 6ft. nor more than 12ft. below the tricoloured lantern a white light in a lantern, so constructed as to show a clear uniform and unbroken light all round the horizon. 2. If sailing vessels, shall carry a white light in a lantern, so constructed as to show a clear uniform and unbroken light all round the horizon, and shall also, on the approach of or to other vessels, show where it can best be seen a white flare-up light or torch in sufficient time to prevent collision. All lights mentioned in subdivision (*d*), 1 and 2, shall be visible at a distance of at least two miles.

Art. 17. When two sailing vessels are approaching one another, so as to involve risk of collision, one of them shall keep out of the way of the other, as follows—viz. : (*a*) A vessel which is running free shall keep out of the way of a vessel which is close hauled. (*b*) A vessel which is close hauled on the port tack, shall keep out of the way of a vessel which is close hauled on the starboard tack. (*c*) When both are running free, with the wind on different sides, the vessel which has the wind on the port side shall keep out of the way of the other. (*d*) When both are running free, with the wind on different sides, the vessel which is to windward shall keep out of the way of the vessel which is to leeward. (*e*) A vessel which has the wind aft shall keep out of the way of the other vessel.

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. 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. 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. 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 other than fishing vessels or boats.

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.

Art. 28. 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. : 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, "My engines are going full speed astern."

Art. 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.

Laing, K.C. and *Dawson Miller* for the appellants, the owners of the *Grovehurst*.—The owners of the *Grovehurst* admit they are partly to blame for the collision, but their contention is

that the respondents, the owners of the *Europe*, are also to blame. The appellants are not attempting to disturb the findings of fact, but contend that on those findings the *Europe* should be held to blame. On the facts found the *Europe* was heading to the northward, trawling with her trawl out on the starboard quarter, making about two and a half knots an hour; the *Grovehurst* was on a course of S.W. by W. ¾ W.; the vessels were therefore on crossing courses, and the appellants contend that it was the duty of the *Europe* to keep out of the way of the *Grovehurst*. [Buckley, L.J.—Does art. 19 apply to a trawler with her trawl down?] It is a question of fact in each case; it depends on whether she is so incumbered that she cannot get out of the way. There is a special rule as to sailing vessels getting out of the way of sailing vessels fishing, but there is no such rule with regard to a steamship getting out of the way of steam fishing vessels, so the *Europe* ought to have got out of the way under art. 21, or she should have stopped earlier than she did or not at all. To stop as she did was the worst thing, she could have done; she is only 100ft. long and as she was struck amidships there would have been no collision if she had moved on another 50ft. or stopped a little sooner in accordance with art. 27. The lights which are to be carried by trawlers are dealt with in art. 9; if a trawler is trawling, she is obliged to carry a triplex light (art. 9 (*d*). That article came into force in May 1906; under the former rules the triplex light was optional. The carrying of the triplex light was optional when *The Tweedsdale* (61 L. T. Rep. 371; 6 Asp. Mar. Law Cas. 430 (1889); 14 P. Div. 164) was decided. The *ratio decidendi* of that case was that there were special circumstances which justified a departure from the rules, the special circumstances being that the trawler had not way enough to keep herself under command or get out of the way of other vessels. After that case was decided each case has depended on its own facts. Art. 26 of the Collision Regulations 1897 made it obligatory on sailing vessels to keep out of the way of sailing vessels fishing, but it left the rights and obligations of steamers and steam fishing vessels untouched. Tugs, which are just as much incumbered and carry special lights (art. 3), have to obey art. 21—the crossing rule—and have to keep clear of sailing ships (art. 20). Sailing ships have a complete code for themselves in art. 17, and the only occasions on which they have to get out of the way of other vessels are dealt with in arts. 26 and 4. [Buckley, L.J.—Art. 4 (*d*) says that the lights therein mentioned mean that the vessel cannot get out of the way. Is there any rule which says that any lights mean a vessel need not get out of the way?] There is no such rule which says so in terms, but under art. 27 a vessel may be excused for not getting out of the way when she ought to do so under the rules if by doing so she may avoid a collision. That article means, that a vessel is not to stick blindly to a rule but the rule never comes into operation if the position of danger is brought about by the vessel which seeks to benefit by it; it can only be of assistance when the other vessel breaks the rule. [Buckley, L.J.—The rule seems to say that necessity is the mother of freedom.] There is nothing in the rules which says that an incumbered steam vessel is not to get out of the way; a steam tug has to do so:

The Warrior, 27 L. T. Rep. 101; 1 Asp. Mar. Law Cas. 400; 3 A. & E. 553.

The amount of way which a trawler must have to entail on her the duty of getting out of the way is laid down in *The Dunelm* (51 L. T. Rep. 214; 5 Asp. Mar. Law Cas. 304; 9 P. Div. 164). The trawler must be stationary—that is, not going faster than is necessary to enable her to keep herself under command—if she is not to get out of the way. *The Tweedsdale* (*ubi sup.*) was decided on that ground. If it has been laid down that when a vessel exhibits a triplex light everything must keep clear of her, it is wrong and should be overruled. [Vaughan Williams, L.J.—At that time the master of the trawler might exercise a discretion as to hoisting the triplex light. He has no such discretion now. May it not be that now the discretion has gone everyone must keep out of the way?] The appellants contend that that is not the construction to be placed on the rules. It must depend on whether the trawler can or cannot manœuvre; any other construction would raise great difficulty—*e.g.*, What is to happen if a steam trawler and a sailing trawler are meeting with a risk of collision? *The Tweedsdale* (*ubi sup.*) was followed in 1905 in *The Upton Castle* (93 L. T. Rep. 814; 10 Asp. Mar. Law Cas. 153; (1906) P. 147). Then in May 1906 art. 9 (*d*) came into force which made the triplex light obligatory. *The Cockatrice* (98 L. T. Rep. 728; 11 Asp. Mar. Law Cas. 50; (1908) P. 182) was decided under the present rule, and distinguishes *The Upton Castle* (*ubi sup.*). The drifter was to blame in that case, for she had the fishing lights up when she was free to manœuvre. [Buckley, L.J.—Does not your contention come to this: that, though the trawler has her trawl down, and her lights show everyone it is down, yet she owes the same duty as though it was not down?] The duty is not identical. The true test is, Can the trawler get out of the way? That is shown by *The Craigellachie* (100 L. T. Rep. 415; 11 Asp. Mar. Law Cas. 213; (1909) P. 1). The onus is on the trawler to show that she could not get out of the way. The right construction was put on the rule in *The Gladys* (101 L. T. Rep. 720; 11 Asp. Mar. Law Cas. 352; (1910) P. 13), and the same construction was put on it in *The Pitgaveney* (*ante*, p. 429; (1910) P. 215).

Batten, K.C. and *A. D. Bateson* for the respondents, the owners of the *Europe*.—The question here is what rule is to govern a trawler with her trawl down. The trawler's case is that she is to keep her course, and that it is too dangerous to alter it. That is the practice which has always been followed since *The Tweedsdale* (*ubi sup.*), and Brett, M.R. in *The Dunelm* (*ubi sup.*) recognised that trawlers with their trawls down were in an extremely helpless state. Those two cases gave steam trawlers the same freedom that art. 26 gave sailing trawlers in 1907. *The Tweedsdale* (*ubi sup.*) was followed in *The Upton Castle* (*ubi sup.*), and the latter case was good law and good sense, for in that case the trawler was not incumbered with her trawl; she had not got it down. If the appellants' contention is right, the difficulty for trawlers and other vessels is greatly increased, for, although there is a special light, there is no special duty on

vessels meeting with the light to keep out of the way of it; they sometimes might have to do so and sometimes might not. The object of the triplex light is not merely to show that the vessel showing it can only move slowly, but to warn all vessels to keep clear of a vessel showing it. Even supposing it was the duty of the trawler to keep out of the way, the evidence shows that the other vessel was taking helm action instead of keeping her course and speed as she should have done, and the trawler was therefore justified in doing nothing but stop, for that was the best means of avoiding the collision. The evidence of the chief officer of the *Grovehurst* shows that he knew he should keep out of the way of the trawler.

Laing, K.C. in reply.—No practice of seamen for avoiding ships by taking measures other than and inconsistent with those required by the regulations can be recognised. See

Marsden's Collisions at Sea, 5th edit., p. 331;
The Earl of Wemyss, 61 L. T. Rep. 289; 6 Asp. Mar. Law Cas. 407.

The master of the *Marlborough*, the other trawler in the vicinity, recognised that trawlers should keep out of the way under art. 21. *The Craigellachie* (*ubi sup.*) shows what the real test of the duty is.

Vaughan Williams, L.J.—In my opinion this appeal must be dismissed. In this case Bargrave Deane, J. has held that a steamship of the name of the *Grovehurst* is alone responsible for the collision which took place with the steam trawler *Europe*. The appeal is upon the ground that the learned judge ought to have held that both vessels were to blame. It is not denied by the appellants that the *Grovehurst* is to blame; but it is said that the trawler was also to blame. The material facts are that the trawler at the time immediately before the collision had her trawl down, with a warp on her starboard side, and another aft. When a trawler is so situated, with a warp on her starboard side, she cannot turn to port under a starboard helm, and when she has a port warp out she cannot turn to starboard. I have asked our assessors and they say that that proposition as to incapacity to turn under those circumstances is quite true. There is some contradictory evidence on this point, it being alleged by the *Grovehurst* that the trawler did, in fact, turn under a starboard helm. I think, on the evidence, and Bargrave Deane, J. thought on the evidence, that the trawler did not turn under these circumstances, and could not so turn, and that she never altered her course, but kept on her course, N. by W.; and about a minute before the collision, when, seeing the other vessel approaching, she gave her a long blast to attract her attention; and immediately before the collision, when there was no chance of avoiding the collision, blew another long blast and stopped her engines. The trawler says she omitted nothing which could have been done to avoid the collision, and that the whole fault was the want of proper look-out on board the *Grovehurst*, which came straight on and struck her instead of passing under her stern as she should have done. I agree with that view of the trawler. There is no doubt, however, that the trawler did not get out of the way of the steamer in the way it would have been her duty to do if the rules for ordinary vessels had been followed by the trawler. The whole question in this case is whether trawlers have or have not to get out of the way of a steam vessel—I mean trawlers with their trawls down. Bargrave Deane, J., so far as the facts are concerned, believed the story of the trawler and not the story of the *Grovehurst*, and held that the cause of the collision was defective look-out on the part of the *Grovehurst*. On the question of the obligation of trawlers to get out of the way of other vessels the learned judge says: "I want to say a word upon trawlers getting out of the way of other vessels. In my opinion, the whole object of the law as to the necessity for carrying the triplex light when the trawl is down is to show vessels approaching, not that the trawler will act under the ordinary sea rules, but that she, at the time, is incapable of following the sea rules, and that the vessel which is approaching must get out of the way. There is a case in which it was held that a sailing vessel should do so, and there is a rule which says that sailing vessels shall do so, but there is no rule which says that a steamer must get out of a trawler's way. But, if a sailing vessel should do so, *a fortiori* a steamer should, because she has more power to get out of the way of a trawler which is denoting by her lights that she has her trawl down. I say that by the way. I do not believe it affected this collision, except that it might be said, and has been said, that the *Europe* had the other vessel on her starboard side, and therefore it was her duty to get out of the way. But I do not think that rule was meant to apply to this case, where, as has been proved, she had her trawl down at the time of the collision."

I entirely agree with this conclusion in law of the learned judge. I not only agree with it, but I think it is admirably expressed. I can see no reason for the rule that trawlers should carry the triplex light when the trawl is down, but to show vessels approaching that trawlers with their trawl down must be treated as incapable of obeying the ordinary sea rules, and that therefore other vessels approaching must get out of the trawler's way. The rule referred to, as to the duty, when two steam vessels are crossing so as to involve risk of collision, of the vessel having the other on the starboard side is art. 19. I think that this is one of the rules which the triplex light informs the approaching steamer that the trawler must be taken as incapable of obeying. It is said that this conclusion is negatived by the express provision of art. 26, affirming the duty of sailing vessels to keep out of the way of sailing vessels, or boats fishing with nets or lines or trawls; and it is said that one ought to hold that there is no such duty in the case of steamers, because there is no article corresponding to art. 26 in the case of steamers. I do not agree with this contention. To hold this would be to hold that there is no purpose in steam trawlers exhibiting the triplex light, which they had to do long before rule 26 came into force. This duty of trawlers to exhibit this triplex light is now an absolute duty. Formerly it was an optional duty, to be applied in the discretion of the master of the trawler and according, apparently, to the rate of speed at which the trawler was going. This was found inconvenient, and the articles were altered by making the triplex light a positive duty upon trawlers with their trawls down. The case of *The*

Tweedsdale (*ubi sup.*), decided at a time when the exhibition of the triplex light was discretionary, decided that a steam trawler going slowly with triplex light exhibited had no duty to get out of the way of a sailing ship, the incapacity of the trawler to manœuvre and her triplex light throwing a duty on other vessels to keep out of the way of the trawler. This decision seems to me to be common sense, and in my opinion applies *a fortiori* now that the duty of exhibiting the triplex is an absolute duty. The case of *The Tweedsdale* (*ubi sup.*) is based upon the rule that was then in force, art. 23, but for that article there has now been substituted 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." Really the article which requires the exhibition of the triplex light affirms by the very passing of it that where a triplex light is ordered by the articles to be exhibited by trawlers those trawlers are at once an obstacle to navigation, and an obstacle which may cause danger; and when once you have got it that the articles necessarily affirm that proposition, the consequence is that you are immediately brought within art. 27, and you have a special circumstance which justifies a departure from the rules—a departure from the rules which is really indicated by the provision itself that the trawlers are to carry the triplex light.

I do not know that it is necessary for me to say anything more on the matter, excepting that I do wish to refer to two cases. One is the case of *The Upton Castle* (*ubi sup.*). The headnote there is as follows: "A British steam trawler of upwards of 20 tons gross register, fishing in the sea off the coast of Europe lying north of Cape Finisterre, and carrying the alternative lights prescribed by art. 9 of the Regulations for Preventing Collisions at Sea, as amended by Orders in Council, is, after getting in her trawl, so as to be no longer incumbered, but able to manœuvre, to be treated as a steam vessel under command, and, therefore, she is bound at night to exhibit the lights for a steam vessel prescribed by art. 2, and must, under art. 20, keep out of the way of a sailing vessel. *The Tweedsdale* followed." I do not wish to read passages from the judgment at length, but on p. 152, it seems to me, Bargrave Deane, J. gave a most practical and useful account of how this practice authorised by the provision of the articles as to the triplex light to be carried by a trawler with the trawl down is to be applied. The judgment seems to me to do that in a most practical and sensible manner; that is to say, in other words, it recognises the duty of the trawler when the trawl is hauled up and the fish thrown into the boat, to obey the rules just as if she was an ordinary vessel under way. The only other thing I wish to allude to is the judgment of Bucknill, J. in *The Craigellachie* (*ubi sup.*). I think that that decision is inconsistent with the principle of *The Tweedsdale* (*ubi sup.*), and also inconsistent with the decision in *The Upton Castle* (*ubi sup.*). I think the decision in *The Upton Castle* is right, and that *The Tweedsdale* (*ubi sup.*) is right, and that this decision of Bucknill, J. is wrong. In those circumstances, I think this appeal must be dismissed, with costs.

BUCKLEY, L.J.—The *Grovehurst* has been found alone to blame. The question is whether the *Europe* is to blame also. The *Europe* is a steam trawler. As the vessels approached each other, the *Europe* had the *Grovehurst* on her starboard bow. The *Europe* had her trawl down, with starboard gear out, and under those circumstances a vessel cannot answer her starboard helm, for the warp prevents, or substantially prevents, her from turning to port. The question is, whether the *Europe* owed a duty to obey the starboard hand rule. The question is a very important one upon the construction of the Regulations for Preventing Collisions at Sea It is in the first instance, I think, necessary to bear in mind that if there be approaching each other two vessels, one under command and the other not under command, good seamanship requires that the vessel under command shall keep out of the way of the vessel not under command. This fact is recognised, it appears to me, in the Regulations for Preventing Collisions; that is to say, art. 4 names certain vessels not under command—first, one which from any accident is not under command, and, secondly, a vessel employed in laying or picking up a telegraph cable—and says a vessel under those circumstances shall carry certain defined lights. Then it says that those lights are to be taken by other vessels as signals that the vessel showing them is not under command and cannot, therefore, get out of the way. The regulations do not say that she is not bound to get out of the way. They assume, as a matter of demonstration, that if she is not under command any other vessel will recognise that it is not her duty to get out of the way, but that it is her (the other vessel's) duty to get out of the way of the vessel which is not under command. Good seamanship, apart from the regulations, requires in those circumstances that the vessel which is under command shall keep out of the way of the vessel which is not under command. In construing rule 9 it is essential to bear that in mind. Now, in 1889 Sir Charles Butt, in *The Tweedsdale* (*ubi sup.*), held that under the rules as they then stood, as between a steam trawler with her trawl down and moving at a slow rate of speed, and a sailing ship, the duty of getting out of the way was with the sailing ship; and if that was true as between a steam trawler and a sailing ship, of course it was *a fortiori* true as between a steam trawler and a steamship. In those circumstances, by Order in Council made in Nov. 1896, and which came into operation in July 1897, there was introduced the present art. 26, which provides that as between a sailing vessel and a sailing trawler the vessel shall keep out of the way of the trawler. Of course, if this was right as between a sailing vessel and a sailing trawler, it was *a fortiori* right as between a steam vessel and a sailing trawler; and if Sir Charles Butt was right in holding that as between a sailing vessel and a steam trawler the duty to get out of the way was on the sailing vessel, of course it was *a fortiori* true that as between a steam trawler and a steam vessel it was the duty of the steam vessel to get out of the way. If, therefore, the decision in *The Tweedsdale* (*ubi sup.*) was right, art. 26 added to it would complete the code of rules applicable to the circumstances. In that state of things, in 1906, the rules as to the lights to be carried by trawlers were altered

so as to leave it no longer optional but obligatory upon trawlers when engaged in trawling to have certain defined lights—and the lights of a steam trawler and sailing trawler were totally different. This is to be found in the new art. 9, clause (*d*), headings 1 and 2. A statutory obligation imposed upon trawlers engaged in trawling, to have special lights, must have been, as it seems to me, imposed for some purpose, and the purpose must have been to acquaint other vessels that the vessel is a trawler engaged in trawling, and therefore incumbered by her gear. Presumably the object was that other vessels might know that in some way she stood in an exceptional position. If that exceptional position was that she was relieved from some duty which otherwise she would owe the provision becomes intelligible; but, if not, I do not know what could have been the purpose. As regards steam tugs, art. 3 imposes upon vessels of that description an obligation to carry certain other defined lights, and they are prescribed in this way—that she has to indicate by her lights that she is a tug, and that she has one or more, and how many more, vessels towing behind her. It has been held that a tug remains bound by the "starboard hand" rule, and counsel for the appellants says that a steam trawler, in the same way, is bound by the starboard hand rule. The cases, in my judgment, are not analogous. The tug, although towing, is under command. The object of her lights is to indicate that she is a tug and to give information as to what is the amount of obstruction to be expected from the length of the line of tows behind her. A steam trawler has no such information to give. Her trawl, of course, is behind her, but it sinks very rapidly in the sea. The only fact she has to indicate is that she is a trawler incumbered by her gear, and in those circumstances I have to ask myself what is intended in these rules, by imposing upon her the obligation to carry the triplex light. If the obligation is to say, "Mark you, I am a vessel not under command; I cannot turn this way or that, as I choose; I give you notice that I am not under command"; it will result then that under the principles of good seamanship you must get out of my way because I cannot get out of yours. The result of that is, not that art. 19 does not apply to trawlers—a proposition which I think would not be true, because, for instance, you may have the case of two steam trawlers approaching each other, or two sailing trawlers approaching each other. There is no rule addressed to that case. It may very well be that in those two cases the "starboard hand" rule ought to be obeyed. Art. 19 may very well apply to vessels of this class, but nevertheless upon the paramount principle of good seamanship they may well be relieved of the obligation to obey that rule. If *The Tweedsdale* (*ubi sup.*) is looked at and critically examined I think that is what Sir Charles Butt held. I was puzzled by the sentence in his judgment: "In that state of things I think that art. 23 prevents the application of art. 17, and at once relieves the fisherman from the duty of keeping out of the way, and puts upon the other vessel the duty of keeping clear." I do not think I agree it prevents it unless you read with emphasis "in that state of things," and those are the first words with which he commences; and if you read art. 23 you find the words, "In obeying and construing these rules due regard shall be had to all dangers of navigation," &c. If you read that to mean "In obeying and construing these rules due regard shall be had to the fact that good seamanship requires that a vessel under command shall keep out of the way of a vessel which is not under command, and there is a danger of navigation unless I keep out of her way," then the whole difficulty is solved. I think that is what Sir Charles Butt intended to say; in other words, you are to give paramount authority to the paramount obligation to obey the rules of good seamanship, and if you find a vessel not under command, good seamanship requires that the vessel which is under command shall give way to the vessel not under command. Following that principle, I think *The Tweedsdale* (*ubi sup.*) was quite right. I think this appeal must be dismissed.

THE PRESIDENT.—Upon this appeal it is admitted that the *Grovehurst* was to blame for the collision; but it is contended that statutory blame also attaches to the *Europe* under art. 19 of the Collision Regulations of 1897 and sect. 419 of the Merchant Shipping Act 1894. The appellants contend that under art. 19 the *Europe* was under a statutory obligation to keep out of the way of the *Grovehurst*, and, consequently, that the *Grovehurst* was bound under art. 21 to keep her course and speed. The *Europe* was a steam trawler, dragging her trawl along the bottom of the sea, and was accordingly "engaged in trawling." The *Grovehurst* was a powerful screw steamer, free to manœuvre as the officer in charge might direct. She answered the description of an unincumbered steamer which was given by Lord Kingsdown in the case of *The Independence* (14 Moore's P.C. Cases, 103) in the following passage: "A steamer unincumbered is nearly independent of the wind. She can turn out of her course and turn into it again with little difficulty or inconvenience. She can slacken or increase her speed, stop or reverse her engines, and can move in one direction or the other with the utmost facility. She is therefore with reason bound to give way to a sailing vessel close hauled, which is less subject to control, and less manageable." The argument of counsel for the appellants involved, I think, the proposition that *The Tweedsdale* (*ubi sup.*) was wrongly decided; and he accordingly submitted that *The Tweedsdale* (*ubi sup.*) was not good law, and ought to be overruled. That case was decided in 1889, five years after Lord Esher (then Brett, M.R.) in *The Dunelm* (*ubi sup.*) made the following observations: "My view of an Act of Parliament—and this article is equivalent to an Act of Parliament—which is made applicable to a large trade or business is, that it should be construed, if possible, not according to the strictest and nicest interpretation of language, but according to a reasonable and business interpretation of it, with regard to the trade or business with which it is dealing." *The Dunelm* (*ubi sup.*) was referred to in *The Tweedsdale* (*ubi sup.*). In my view the decision in *The Tweedsdale* (*ubi sup.*) proceeded upon the lines of that canon of construction of the Collision Rules, and was in accordance with good sense, and was good law. The substance of the decision was that, having due regard to all dangers of navigation (art 23, now art. 27), a steam trawler engaged in trawl-

ing in the circumstances of that case was not bound by art. 17 (now art. 20) to keep out of the way of a crossing sailing vessel. *A fortiori* the steam trawler would not be bound to keep out of the way of a crossing steamer. If the facts relating to the steam trawler in *The Tweedsdale* (*ubi sup.*) had been identical with those in the present proceedings as to speed, difficulty of manœuvring, and so forth, I think the decision would have been the same, and that it would have been right. Again, *a fortiori* the decision would have gone the same way if the crossing vessel in the same state of facts had been a steamer and not a sailing vessel. *The Tweedsdale* (*ubi sup.*) was decided twenty-one years ago. At that time an option was given to trawlers to carry either of two sets of lights. The decision, as I read it, was that if the trawler could be reasonably regarded as a vessel incumbered by her trawl so as to be unable to manœuvre with reasonable freedom, she had a right to use one set of lights, and she would then be free from the obligation to keep out of the way under art. 17 (now art. 20). If not, then she had to carry the "under way" lights of a vessel free to manœuvre reasonably freely, and the obligation referred to would attach to her. The responsibility of choosing the lights rested on those who navigated the trawler. This could not be regarded as very satisfactory, either to those responsible for trawlers engaged in fishing, or to those in charge of other vessels navigating in or through the same waters. It involved great uncertainty, and in navigation uncertainty involves risk of accident. The difficulties in the way of trawlers, and of steam trawlers, manœuvring are described by Lord Esher in *The Dunelm* (*ubi sup.*). I need not quote the passage. As to speed in trawl-fishing, as it was known at the time, he said this: "Trawl-fishing is a thing which must be very slow, because the net is on the ground, and if trawlers go at all too fast they tear their nets to pieces." As I have said, the decision in *The Tweedsdale* (*ubi sup.*) related to a steam trawler. Seven or eight years elapsed, and no case appears to have arisen in which a decision to the same effect could have been given—as it undoubtedly would have been given—in reference to a sailing trawler. After this lapse of time, revised Collision Regulations were made, and in the rules made on the 27th Nov. 1896 to come into force on the 1st July 1897, art. 26 appears for the first time, expressly prescribing that sailing vessels under way shall keep out of the way of (*inter alia*) sailing trawlers. It is contended for the appellants that this raises the necessary inference, upon a sort of *expressio unius* principle, that steam trawlers were to be treated as steam vessels within art. 19, and were thereby bound to keep out of the way of any other crossing steamer; so that whatever the difficulties might be in the way of the incumbered vessel manœuvring freely or readily (as in the present case) she must keep out of the way; and whatever the speed of the other steamer might be (*e.g.*, twenty knots of an ocean liner) she must keep her speed as well as her course. I cannot come to the conclusion that such an inference is either obligatory or reasonable. Nine years more pass by during which no doubt is cast upon the authority of *The Tweedsdale* (*ubi sup.*). Indeed, on the other hand, it had, in July 1905, been followed in *The Upton Castle* (*ubi sup.*). Then in April 1906 new rules were promulgated, which came into force on the 1st May 1906, by which the option as to the lights to be carried by steam trawlers, which existed in 1889 and which remained in existence up to the 1st May 1906, was taken away. Thereafter it was made compulsory on steam trawlers engaged in trawling to carry the lights prescribed by the new art. 9 (*d*). In 1889 Sir Charles Butt had said in effect: "Where those in charge of a steam trawler reasonably decide to carry the 'exceptional lights' of an incumbered trawler, and not the ordinary lights of a steamer under way, they are not bound to keep out of the way of a crossing vessel," and the new article appears in 1906, prescribing that in all cases of trawlers engaged in trawling they should carry their special lights, which take the place of the old optional "exceptional lights." I think it must be taken that the new article was made with knowledge of, and with reference to, the law as laid down in *The Tweedsdale* (*ubi sup.*). There had been for seventeen years an exemption in favour of steam trawlers engaged in trawling from the obligation to keep out of the way where the exceptional lights were reasonably carried, and I think that when special lights were prescribed and made compulsory it must be taken that they are reasonably carried, and that the trawlers under the new rules enjoy the like exemption. No case has been cited or found which casts a doubt upon *The Tweedsdale* (*ubi sup.*). If the case of the *Craigellachie* (*ubi sup.*) is, upon the facts, inconsistent with *The Tweedsdale* (*ubi sup.*) as it appears to be, in my opinion, it cannot stand. It would seem to be entirely in the interest not only of the fishing community, but also of all those who navigate waters where the fishing business is carried on, that there should be no uncertainty as to the course to be pursued, arising from a want of knowledge of the manœuvring facilities of a trawler, and that where fishing lights are carried by a trawler, crossing steamers not incumbered should know that the incumbered vessel is there and is incumbered, and that they should direct their operations accordingly. But if by reason of any increased speed of trawlers, or any other circumstances, it is thought that in the interests of safe navigation the exemption referred to should not exist any longer, the change must be brought about by new rules on the authority of the Admiralty, the Board of Trade, and the Privy Council. We must deal with the case as the law now stands, and I agree with the other members of the court that this appeal fails, and must be dismissed, with costs.

Appeal dismissed.

Solicitors for the appellants, *Stokes* and *Stokes*, agents for *Bramwell, Bell*, and *Clayton*, Newcastle-on-Tyne.

Solicitors for the respondents, *Deacon* and *Co.*, agents for *Grange* and *Wintringham*, Great Grimsby.

Tuesday, March 8, 1910.

(Before Lord Halsbury, Fletcher Moulton and Farwell, L.JJ., and Nautical Assessors.)

The Curran. (*a*)

Collision — Fog — Failure to hear fog signals— Bad look-out — Collision Regulations 1897, *art.* 29.

Where in a fog collision those on one steamer did not hear the whistles of an approaching steamer and the Admiralty Court held that they ought to have been heard, the Court of Appeal affirmed such decision and refused to reverse it on the ground that in some cases fog may prevent the transmission of sound.

Damage action.

Appeal by the owners of the steamship *Curran* from a decision of Bargrave Deane, J. holding they were partly to blame, by reason of a defective look-out, for a collision which occurred between their vessel and the steamship *Ince Bank* about 10.5 a.m. on the 30th May 1909 in the English Channel about sixteen miles to the southward and eastward of the Lizard.

The case made by the appellants, defendants and counter-claimants in the court below, was that shortly before 10.10 a.m. on the 30th May 1909 the *Curran*, a steel screw steamship 236ft. long, of 1106 tons gross and 427 tons net register, whilst on a voyage from Swansea to Rouen, laden with a cargo of coal and manned by a crew of fourteen hands all told, was in the English Channel to the southward and eastward of the Lizard. The weather at the time was a thick fog, the wind was about south-west moderate, and the tide was turning to flood of little force. The *Curran* was proceeding on a course of E.S.E. magnetic at a speed of about three knots. Her whistle was being duly sounded for the fog, in accordance with the collision regulations, and a good look-out was being kept on board of her. In these circumstances those on board the *Curran* heard a long blast from the whistle of the *Ince Bank*, apparently on the port bow. The engines of the *Curran* were at once stopped and a prolonged blast was sounded on her whistle, and this signal was repeated after a short interval; but shortly afterwards the *Ince Bank* came into sight bearing about a point on the port bow and distant about three ships' lengths, and crossing the course of the *Curran* at a high rate of speed. The engines of the *Curran* were at once put full speed astern and her whistle was sounded three short blasts; but the *Ince Bank* continued to come on fast, and with her starboard side at the after part of the forerigging struck the *Curran* a heavy blow on the starboard bow, doing her damage. Just before the actual collision the helm of the *Curran* was starboarded in order, if possible, to ease the blow.

Those on the *Curran* charged those on the *Ince Bank* with not keeping a good look-out; with proceeding at an immoderate speed; with failing to stop their engines on hearing the whistle of the *Curran* forward of their beam; and with failing to ease, stop, or reverse their engines.

The case made by the respondents, plaintiffs in the court below, was that shortly before 10.5 a.m. on the 30th May 1909 the *Ince Bank*, a screw steamship of 3372 tons gross and 2162 tons net register, manned by a crew of twenty-six hands all told, while on a voyage from London to Sharpness laden with a part cargo of lumber, was in the English Channel about sixteen miles to the southward and eastward of the Lizard. The weather was a thick fog, the wind about south, a light breeze, and the tide was the last of the ebb, of no great force. The *Ince Bank* was upon a west by south course, making about five to six knots. Her whistle had been and was being sounded regularly for fog according to the regulations, and a good look-out was being kept on board her. In these circumstances a whistle from the *Curran* was heard by those on the *Ince Bank*, apparently on the starboard bow and a considerable distance away. The engines of the *Ince Bank* were immediately stopped and her whistle was kept going. She was kept on her course, her engines being given a turn slow ahead from time to time to keep steerage way. The *Curran* was heard to continue to blow fog signals, and later came into sight, apparently swinging under starboard helm at excessive speed, about 500ft. off and bearing about one point on the starboard bow. The engines of the *Ince Bank* were immediately put full speed astern and her helm hard-a-port, and three short blasts were blown upon her whistle. Three short blasts were then heard from the *Curran*, and she came on at speed, and with her starboard bow struck the starboard side of the *Ince Bank*, which vessel was still upon her course, just abaft the fore-rigging a heavy blow, doing her such damage that she had to put into Falmouth for repairs.

Those on the *Ince Bank* charged those on the *Curran* with not keeping a good look-out, with neglecting to go at a moderate speed, with failing to stop on hearing the whistle of the *Ince Bank* forward of their beam, with improperly starboarding, and with neglecting to ease, stop, or reverse their engines.

The following Collision Regulations 1897 were referred to during the course of the case:

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.

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 a seaman, or by the special circumstances of the case.

The case was before the court on the 30th and 31st July 1909. The judgment of Bargrave Deane, J. was as follows:—

Bargrave Deane, J.—This is an action and a cross-claim with regard to a collision between two steamers at a place which is approximately fixed at from twelve to fifteen miles to the southward and eastward of the Lizard, and it happened a little after ten o'clock in the morning of the 30th May last. The two steamers were bound, one across the channel to Rouen from the Lizard, and the other down from the north to proceed to the southward and westward, and the collision took

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

place in what was admittedly very thick weather. The plaintiffs' steamer is much larger than the defendants' steamer; the *Ince Bank* is said to be a vessel of 3,372 tons gross, whereas the *Curran* was 1106 tons gross, therefore the large vessel was very nearly three times the size of the smaller. The question which I have to consider is chiefly one of fact—namely, as to the speeds at which these two vessels were travelling before the collision and at the time of the collision. I have come to the conclusion that at the time of the collision neither vessel was going fast, but that each was going at a low speed. It is said on behalf of the *Curran* that she was stopped dead in the water. I do not believe that, but I do not think she was going fast. With regard to the other vessel, it is admitted that she was going from one and a half to two knots at the time of the collision. I think that probably is about right. Probably the *Curran* was going a little less; perhaps one knot. The reason why I say that the speed of the two vessels at the time of the collision was not much is the nature of the damage. As far as I am able to judge from the nature of the damage on both these vessels, the collision was rather a collision of two vessels bumping against each other—more of a lateral movement than of a movement forward. The *Ince Bank* had her starboard side pierced by the starboard anchor which was in the hawse-pipe of the *Curran*, and if the vessels had been going at any real speed you would have expected that the wound would have been not a mere puncture as it was, but a wound showing a certain amount of movement aft, so as to make it more of a jagged wound, as though the anchor had been torn through it. For the same reason, if you look at the injury on the starboard bow of the *Curran*, the injury was not exactly a grazing wound, but rather a crumpling wound, as of the plates being crushed in by the contact. Therefore I have to consider the other aspects of the case, because my own view and the view of the Elder Brethren who advise me is that I ought not to find that they were going at any great speed at the time of the collision. Each vessel accuses the other of going at a great rate; I think each says the other was going six or seven knots. I think that is an exaggeration, and a common exaggeration in these cases, especially in the case of a fog, where the time is extremely short and the observation is generally very limited. But there are other aspects of the case which I have to deal with. The *Ince Bank*, as I have said, was going on a course of W. by S., and she says that she heard a whistle some twenty-four or twenty-five minutes before the collision, and that she immediately stopped her engines, and that at the time she was going five or six knots. That is an admission which is a very serious one, because, admittedly, she was then going five or six knots through very thick weather. That was an unpardonable rate of speed under the circumstances. She says that she stopped at once, and that she then proceeded, stopping and a touch ahead with her engines, up to the time when she first sighted the *Curran* at a distance, I think she says, of about a ship's length, the result of which was that she was unable to stop her way, and the collision occurred. She says that she heard this whistle for twenty to twenty-five minutes. The wind was on her port side, and it is possible that hearing the whistle as she did may not involve that the other vessel heard it as long. But I must blame the *Ince Bank* for this, that she undoubtedly, from the history of her movements on that morning, was going too fast through this fog, and my belief is that the story she tells about the length of time at which she heard these whistles is exaggerated, and that, in point of fact, she was going a great deal too fast through the fog under the circumstances. With regard to the *Curran*, there is this to be said about her. She was going on a course of E S.E. from four miles off the Lizard; she was bound to Rouen, in France, and she says she only heard the whistle of the *Ince Bank* once before the collision, that then she stopped her engines at once, and that the result was that, having come in sight of this vessel at a very short distance, she was stopped dead in the water. As I have said, I believe she had way on her. I do not believe that part of her story. Why did she not hear the whistle of the *Ince Bank* sooner? I have said that sometimes the direction of the wind may affect sound at sea, but you will find by looking at the compass that there was not a very great difference, so far as the wind affected them, in the direction of the wind, and that if this wind affected one it probably affected the other. My belief is that she ought to have heard the sounds of the whistle from the *Ince Bank* if the *Ince Bank* was whistling. I have no doubt she was whistling, because it is admitted she did whistle at some time, and was heard before she appeared in sight, and, if she was whistling at all, I think it is natural to assume that her story is true that she was whistling at the proper intervals of something like a minute. Believing, as I do, that the *Ince Bank* was whistling, why was it that the *Curran* did not hear the whistle of the *Ince Bank* sooner than at the very short distance described? We are told that before this whistling was heard the man at the wheel was sent forward to go on the look-out, and the look-out man was sent aft to take the wheel, and I cannot help thinking that at that time there was some lapse on the part of those on board the *Curran* resulting in the look-out being defective. It is said that the chief officer of the *Curran* took the wheel whilst this exchange was being made, and that the man at the wheel went forward and relieved the look-out man before the look-out man left the forecastle head, but that does not explain why the whistle was not heard sooner. I come to the conclusion that there was a defective look-out on the part of the *Curran*, and that that was a serious matter relating to this particular collision. The result of this is that I find both these vessels to blame: the *Ince Bank* for going too fast in a fog, which resulted, in my opinion, from her having too much way on her and not being able to check her way altogether at the time of the collision, and that, in addition, she, by her own evidence, was navigating too fast, and too dangerously fast, in what is agreed to be a thick fog; and with regard to the *Curran*, she had a defective look-out.

On the 27th Oct. 1909 the owners of the *Curran* served a notice of appeal claiming that the *Ince Bank* was alone to blame for the collision.

On the 8th March 1910 the appeal was heard.

Aspinall, K.C. and *A. A. Roche* for the appellants.—The court is unwilling to infer negligence from the fact that fog signals are not heard:

Marsden's Collisions at Sea, 5th edit., pp. 34 and 35.

The transmission of sound is notoriously uncertain in fog. The fact that a fog signal is not heard is no evidence of bad look-out:

The Rosetta, 59 L. T. Rep. 342; 6 Asp. Mar. Law Cas. 310 (1888).

Laing, K.C. and *J. B. Aspinall*, for the respondents, were not called on.

LORD HALSBURY.—I personally decline to assume that the learned judge was wrong in the inferences reasonably derivable from the facts proved. Our assessors concur in that view. There is nothing to my mind to show that the learned judge was wrong.

FLETCHER MOULTON, L.J.—I am of the same opinion. I am conscious, as I am sure the learned judge was conscious, that there is very often eccentricity in the behaviour of fog with regard to sound, but it would be a very serious thing if sailors got the idea that they would never be held liable for bad look-out if they failed to hear whistles because fogs do not carry sound with the same certainty as clear atmosphere. In this case I think the improbability that, with a proper look-out, these sounds steadily given out from this large steamer would not have been heard by the *Curran* is so great that unless there is a strong case to the contrary we ought not to hold that they could not have been heard. It seems to me that the line on which the learned judge has gone is right.

FARWELL, L.J.—I agree.

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

Solicitors for the respondents, *Botterell* and *Roche*, for *Weightman* and *Pedder*, Liverpool.

June 22 and 23, 1910.

(Before VAUGHAN WILLIAMS, MOULTON, and BUCKLEY, L.JJ.)

ASTRAL SHIPPING COMPANY LIMITED *v.* OWNERS OF THE TONGARIRO, HER CARGO AND FREIGHT; THE DRUMLANRIG. (*a*)

Collision—Both to blame—Cargo owners—Right of cargo owners to recover whole of their loss—Judicature Act 1873 (36 *&* 37 *Vict. c.* 66), *s.* 25, *sub-s.* 9.

Two vessels came into collision; the damage action was settled on the terms that both vessels were to blame. On the reference before the registrar to assess the amount of the claims, the cargo owners on the defendants' ship claimed to recover the whole of their loss. The registrar held, following the case of The Milan (5 *L. T. Rep.* 590; 1 *Mar. Law Cas. O. S.* 185 (1862); *Lush.* 388), *that the cargo owners were only entitled to half their claim. On appeal to the Admiralty Court the decision of the registrar was confirmed. On appeal to the Court of Appeal:*

Held, that the owners of the cargo on the defendants' ship were only entitled to recover half their damage, for even if the case of The Milan (ubi sup.) *was wrong in principle when it was decided, it was now binding on the court by reason of sub-sect.* 9 *of sect.* 25 *of the Judicature Act* 1873.

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

APPEAL from a decision of Sir Samuel Evans, President, confirming a report of the Admiralty registrar, by which he held that the owners of the cargo on the steamship *Tongariro* were only entitled to recover from the owners of the *Drumlanrig* half the damages they had sustained by reason of a collision which occurred between the two steamships.

The collision between the steamship *Drumlanrig* and the steamship *Tongariro* took place on the 27th Nov. 1908, about 5.30 a.m., in the English Channel, about nine miles off Dover, the *Tongariro* being outward bound for New Zealand with 202 passengers and a valuable cargo.

The owners of the steamship *Drumlanrig* instituted proceedings *in rem* against the owners of the *Tongariro* to recover the damage they had sustained by reason of the collision, and in that action the owners of the *Tongariro* counter-claimed for the damage they had sustained.

The action came on for hearing on the 17th Dec. 1908 and was settled on the terms that each party should bear their own costs of the action, and that the plaintiffs, the owners of the *Drumlanrig*, should pay to the defendants, the owners of the *Tongariro*, a moiety of the damages sustained by them in consequence of the collision, and by consent the President, Sir Gorell Barnes, condemned the owners of the steamship *Drumlanrig* and their bail in a moiety of the defendants' damages. The President further ordered that the amount of such damages was to be agreed upon between the parties, or was to be referred to the registrar and merchants to report the amount thereof.

On the 25th June 1909 the Astral Shipping Company Limited, the owners of the steamship *Drumlanrig*, issued a writ against the owners of the steamship *Tongariro* and her cargo, and her master, crew, and passengers, and all other persons claiming to have sustained damage by reason of the collision, claiming to limit their liability for the damage caused by the collision in accordance with the provisions of the Merchant Shipping Acts 1894 to 1906.

On the 2nd July 1909 the statement of claim in the limitation suit was delivered. The owners of the *Drumlanrig* set out the order made by the President in the collision action and admitted that the collision was partly caused by the negligence of those on the *Drumlanrig*. They alleged that their tonnage for the purposes of the limitation suit was 4142·88 tons, and that their liability, calculated at 8*l.* a ton in accordance with the provisions of the Merchant Shipping Acts, was 33,143*l.* 0*s.* 10*d.*, and declared their willingness to pay that sum and any further sum for interest on that sum as the court might direct.

On the 12th July 1909 a defence in the limitation suit was delivered, which put in issue the ownership of the *Drumlanrig*, that the collision occurred without the actual fault or privity of the plaintiffs, that there was no loss of life, and the tonnage calculation and the amount of the same to be paid were not admitted.

The limitation suit came before Bargrave Deane, J. on the 26th July 1909, and an order was

made that the owners of the *Drumlanrig* were entitled to limit their liability, and they were directed to pay into court the sum of 33,143*l.* 0*s.* 10*d.*, together with interest at 4 per cent. on that amount from the date of the collision until the payment into court. On that being done, it was ordered that all proceedings in the collision action should be stayed, and all persons claiming against the fund were ordered to bring their claims into the registry on or before the 26th Nov. 1909.

On the 6th Dec 1909 certain owners of cargo on the *Tongariro*, who had not been parties to the collision action which was settled on the 17th Dec. 1908 filed the following claim in the registry:

	£	s.	d.
1. Damages to goods and loss to merchants by reason of damage, delay, &c.	23,324	11	7
2. Freight paid by merchants for forwarding goods ex *Tongariro* to destination to save loss by delay and otherwise	1,042	1	7
3. Paid dock charges, cartage, warehousing, &c.	8	19	11
4. Surveys upon damaged cargo, including charges and expenses thereon	293	4	7
	£24,668	17	8

The defendants claim one moiety of the above, together with interest and costs.

On the 17th Feb. 1910 the same cargo owners amended their claim by striking out the words "one moiety of," so that their claim as amended ended as follows: "The defendants claim the above together with interests and costs." They thus claimed the whole 24,668*l.* 17*s.* 8*d.*

The claim came before the registrar, assisted by merchants, on the 22nd Feb. and the 1st March 1910, and on the 9th March the registrar reported that he found that the amounts in respect of which the claimants were entitled to claim against the fund in court were as stated in the schedule to the report, namely: In respect of item 1, 21,011*l.* 18*s.* 4*d.*; item 2, disallowed; item 3, 8*l.* 19*s.* 11*d.*; item 4, 185*l.*—in all 21,205*l.* 18*s.* 3*d.* Of this sum they were allowed 10,602*l.* 19*s.* 1*d.*

He further reported that as the fund in court was more than sufficient to satisfy the amounts found due to the claimants, they were entitled to the usual rate of interest, and the plaintiffs, the owners of the *Drumlanrig*, were entitled to repayment out to them of the balance (if any) remaining in court. The claimants were also entitled to the costs of proving their claim.

In the registrar's reasons he stated that

A further point which arose and which should be referred to was whether the owner of cargo could recover for whole or half damages against the fund in court. By their statement of claim in the limitation action, the owners of the *Drumlanrig* admitted that they were partly to blame for the collision, and they assert that therefore the owners of cargo can only be paid half damages out of the fund in court, as things now stand. It is clear that the owners of the *Drumlanrig* are entitled to put forward this defence. Sect. 503 of the Merchant Shipping Act 1894 does no more than give a limit to a liability, and if those who pay money into court can reduce the claim below such limit, they are entitled to take the balance out of court, as has been done in several cases. Therefore the owners of the cargo cannot obtain more than half their damages unless they can prove that the *Drumlanrig* is wholly to blame. They are not bound by the assertion in the statement of claim in the limitation action, and they have the right, just as much as a cargo owner, whose claims were adverse to the shipowner, who has admitted that the adverse ship is partly to blame—each claiming against a fund in court—would have to prove that he was entitled to full damages. This can be done either by trial of an issue before myself and an Elder Brother of the Trinity House or, if the parties prefer it and the court is willing, by the trial of a similar issue by the court in the ordinary manner on pleadings.

On the 22nd March the owners of cargo filed a notice of objection to the report of the registrar, and on the 27th April the solicitors filed a consent to the objections to the registrar's report being heard on motion, the notice of motion to state the grounds of objection.

On the 28th April the cargo owners on the *Tongariro* delivered a notice of motion in objection to the registrar's report, asking for an order that the report should be varied by allowing to them their claims, as assessed by the registrar, in full, and that it should be declared that under the decree in the limitation suit the cargo owners were entitled to the whole of their damages without further proof that the *Drumlanrig* was wholly to blame, on the grounds that:

(1) By the said decree the owners of the *Drumlanrig* were pronounced to have caused the loss sustained by the said cargo owners by reason of the improper navigation of the *Drumlanrig* on the occasion of the collision between that vessel and the *Tongariro*, and are answerable in damages therefor, and that under such decree the innocent owners of cargo on board the *Tongariro* are without proof of further facts entitled to recover the whole of their damage. (2) Even if the said decree according to its true and proper interpretation were to be read as establishing that both vessels were to blame for the said collision, still the innocent owners of cargo on board the *Tongariro* would be by law entitled under the said decree to recover the whole and not merely one moiety of their damage against the plaintiffs.

On the 27th May 1910 the motion came on for hearing before the President, Sir Samuel Evans.

The following is sub-sect. 9 of sect. 25 of the Judicature Act 1873:

In any cause or proceeding for damages arising out of a collision between two ships, if both ships shall be found to have been in fault, the rules hitherto in force in the Court of Admiralty, so far as they have been at variance with the rules in force in the courts of common law, shall prevail.

H. C. S. Dumas and *H. M. Robertson* for the appellants, the owners of the cargo on the *Tongariro*.—The owners of the cargo on the *Tongariro* were not parties to the collision action, and were not parties to the settlement in it. The settlement gave effect to what would have been a decree of both to blame, but technically there was no such decree; there was a compromise. The owners of the *Drumlanrig* then pressed the owners of the *Tongariro* and the owners of the cargo on board her to tell them the amount of their damage. A figure was given which exceeded the amount of the statutory liability of the *Drumlanrig*. The owners of the *Drumlanrig* then limited their liability, and in the claim in the limitation proceedings admitted that the collision was partly

caused by their negligence, that statement was not put in issue, and it is to be observed that there is no allegation that both vessels were in fault. [The President.—That means that the owners of the cargo are at large as to proceeding for the damage, and are not bound by the agreement.] That is so, and in the decree in the limitation suit there is no finding of both to blame. The cargo owners carried in their claim to the registry, and the result of the reference is that there is enough to pay them in full. The owners of this cargo have had their property carried on a ship which has collided with another ship under circumstances that both ships may or may not be to blame. If the ship carrying their cargo is not to blame, they are entitled to the whole of their damage from the other ship. If the carrying ship was in fault at common law, the cargo owner might still recover the whole of his damage against the other: (*The Bernina*, 56 L. T. Rep. 258; 6 Asp. Mar. Law Cas. 112 (1886); 12 P. Div. 58, overruling *Thorogood* v. *Bryan*, 8 C. B. 115). The owners of the *Drumlanrig* are attempting to cut down the cargo owners' common law right by relying on sub-sect. 9 of sect. 25 of the Judicature Act 1873. It is submitted that the common law rule prevails unless both ships have been found to be in fault. [The President.—You are asking me to assume that only one of the vessels was to blame, or do you ask for the trial of an issue as to whether both are to blame?] The cargo owners might ask for an issue, but they do ask that the registrar's report should be varied by declaring that they are entitled to be paid in full unless the other side show they are not. *The Milan* (*ubi sup.*), which decided that the innocent owner of cargo on a ship where both vessels were in fault could only recover half his damage, is wrong. That case was applied rather than followed in *Chartered Bank of India* v. *Netherlands Steam Navigation Company* (48 L. T. Rep. 546; 5 Asp. Mar. Law Cas. 65 (1883); 10 Q. B. Div. 521). *The Milan* (*ubi sup.*) was decided after *Thorogood* v. *Bryan* (*ubi sup.*), and the latter case was overruled by *The Bernina* (*ubi sup.*), and in that case Lord Esher expressly states that the court did not decide whether *The Milan* (*ubi sup.*) could be supported.

Aspinall, K.C., *Laing*, K.C., and *R. H. Balloch*.—The owners of the cargo on the *Tongariro* can, at all events, be paid 50 per cent. of their claim, there is no dispute that they are entitled to that. The appellants admit that this court is bound by *The Milan* (*ubi sup.*), so that case need not be dealt with. As to the first point, these cargo owners originally thought they were only entitled to half their damage, but they amended their claim and claimed the whole of it. Up to the limitation suit these cargo owners had obtained no judgment against the *Drumlanrig* at all, and in that suit the owners of the *Drumlanrig* only admitted they were partly to blame, they have not admitted they are solely to blame. Having proved nothing, these cargo owners come before the registrar, taking advantage of the limitation suit, and say, "Give us the whole of our damage." The registrar has refused to do so, and offered to allow them to have an issue to try to prove that the *Drumlanrig* was alone to blame; that was done in *The Karo* (58 L. T. Rep. 186; 6 Asp. Mar. Law Cas. 245 (1887); 13 P. Div. 24). There is no doubt that the settlement was one of both to blame, but as the fault on the *Tongariro* was the fault of a compulsory pilot, the owners of the *Drumlanrig* get nothing, while the defendants got half their damage. In order to get a decree in a limitation suit one must admit liability.

Dumas in reply.—There is no necessity to admit liability in a limitation suit:

The Amalia, 8 L. T. Rep. 805; (1863) Br. & L. 151.

The President.—I think in this case, so far as my decision is concerned, counsel for the cargo owners has got a clear course to the House of Lords to upset *The Milan* if he can succeed in doing so. On this point, of course, I must follow *The Milan*, as counsel for the appellants wanted me to do, so that the matter will be open for him to proceed to the Court of Appeal and subsequently to the highest tribunal. As to the other point taken by the cargo owners, I think, having heard counsel for the *Drumlanrig*, who was in the collision case, and having heard counsel for the cargo owners, who does not put his recollection against that of counsel for the *Drumlanrig*, and having looked at the documents, I must assume that the basis of the compromise or agreement, and therefore of the decree, in this case was that both vessels, the *Drumlanrig* and the *Tongariro*, were to blame. In the pleadings in the limitation suit, pars. 4 and 5 set out pretty clearly what the agreement was and what the admission of the plaintiffs in the proceedings was. The second head of the agreement is this: "The plaintiffs to pay to the defendants a moiety of the damages sustained by them," and that includes the claim of the cargo owners. Paragraph 5 is: "The plaintiffs admit that the said collision was partly caused by the negligence of those on board the *Drumlanrig*." Now, those two paragraphs are not traversed at all in the defence of the cargo owners. I do not say that the cargo owners cannot take other proceedings and recover the whole of the damage suffered by them, but I have come to the conclusion that this case, being one where the basis of the decree is the agreement of both to blame, is covered by *The Karo*, and in *The Karo* it was held that, on the reference to the registrar, the owners of the cargo could not have more than their moiety, but if they liked they could get an issue directed to establish their proposition, if they could establish it, that the blame was solely to be attributed to one vessel, in this case the *Drumlanrig*. That issue is not now asked for in this case, and the cargo owners are left to pursue any remedies they may have, either in this court or in the King's Bench, to get the other moiety. In these proceedings I must affirm the report of the registrar, and say that the owners of the cargo on the *Tongariro* are not entitled to have more than a moiety out of the fund in court, as the case is absolutely covered by *The Karo*. The report will be confirmed and the motion will be dismissed with costs, and if it is necessary to do so, I will grant leave to appeal as the point is an important one.

On the 6th May 1910 the cargo owners on the *Tongariro* delivered a notice of appeal asking for an order that the President's decision might be reversed and that the objections of the cargo owner should be allowed.

The appeal came on for hearing before the Court of Appeal on the 22nd June 1910.

Bailhache, K.C. and *H. C. S. Dumas* for the appellants.—It is admitted that the damage action was settled on the terms that both vessels were to blame, and as the appellants did not accept the offer of having an issue tried as to whether the owners of the *Drumlanrig* were alone to blame, they accept the position that both vessels are to blame, although the owners of the *Tongariro* have not been found to blame or admitted they are to blame. The first case in which the principle of both to blame is authoritatively laid down is in Sir W. Scott's judgment, delivered in 1815, in *The Woodrop Sims* (2 Dods. 83), but in the thirty years which follow that case no such decision was ever given in the Admiralty Court. That case does not apply the principle to cargo on a chartered ship, and in the case of *Hay* v. *Le Neve* (1824, 2 Shaw, 395), which follows *The Woodrop Sims* (*ubi sup.*), there is nothing to show that the cargo was not owned by the shipowner. Then in 1849 *Thorogood* v. *Bryan* (*sup.*) decided that a passenger in an omnibus was so identified with the owner that, if the owner or his servants were guilty of negligence which contributed to an accident, the passenger could not recover damages from the other wrongdoer. That being the state of the law in 1861, *The Milan* (*ubi sup.*) was decided, and in that case the cargo owners recovered half their loss, and the shipowners nothing. There was then no statutory presumption of fault, but sect. 298 of the Merchant Shipping Act 1854 provided that, if in any case of collision it appeared to the court before which the case was tried that such collision was occasioned by the non-observance of any regulation, the owner of the ship by which the regulation had been infringed should not be entitled to recover any recompense whatever for any damage sustained by such ship unless it was shown to the satisfaction of the court that the circumstances of the case made a departure from the rule necessary. So in *The Milan*; as the ship carrying the cargo had broken a regulation, the shipowner could recover nothing, and the learned judge, although he denounced the rule laid down in *Thorogood* v. *Bryan* (*ubi sup.*), partially adopted it. [Buckley, L.J.—On the authority of that case, the cargo owner should have got nothing.] That is so. It is clear from the judgment in *The Milan* that it is not based on the decision in *Hay* v. *Le Neve* (*ubi sup.*), and when the Admiralty practice is spoken of, it refers to the practice as to ships, and though the cargo owner is identified with the ship, he is not identified with it to the full extent of the statute. In 1873 the Judicature Act (36 & 37 Vict. c. 66), s. 25, sub-s. 9, was passed. That section was only intended to prevent the rule as to contributory negligence from applying to cases of collision between ships: (*The City of Manchester*, 4 Asp. Mar. Law Cas. 106; (1879) 42 L. T. Rep. 521; 5 P. Div. 221, 222). The correctness of the rule laid down in *The Milan* (*ubi sup.*) has never been discussed. The rule has been applied in *Chartered Bank of India* v. *Netherlands Steam Navigation Company Limited* (5 Asp. Mar. Law Cas. 65; (1883) 48 L. T. Rep. 546; 10 Q. B. Div. 521, at p. 538); but the rule is traced no farther back than *The Milan* (*ubi sup.*), and the appellants contend that the section of the Judicature Act cannot apply to a misapplication of an Admiralty rule. It was also applied in *The Vera Cruz* (5 Asp. Mar. Law Cas. 254; (1884) 51 L. T Rep. 24; 9 P. Div. 88), but that case was reversed in the Court of Appeal on another point (5 Asp. Mar. Law Cas. 270 (1884); 51 L. T. Rep. 104; 9 P. Div. 96), on the ground that the Admiralty Court had no jurisdiction to try the case. *The Bernina* (6 Asp. Mar. Law Cas. 112; (1887) 56 L. T. Rep. 258; 12 P. Div. 58) overruled *Thorogood* v. *Bryan* (*ubi sup.*), and it was held that sect. 25, sub-sect. 9, of the Judicature Act 1873 did not apply to an action for personal injuries; and Brett, M.R. expressly kept open the question as to whether the rule in *The Milan* applied to cargo. In *The Karo* (6 Asp. Mar. Law Cas. 245; (1887) 58 L. T. Rep. 188; 13 P. Div. 24), Butt, J., at the end of his judgment, casts some doubt on *The Milan*. *The Milan* was referred to by Sir Francis Jeune. in *The Englishman and Australia* (7 Asp. Mar. Law Cas. 603; 70 L. T. Rep. 846; (1894) P. 239) in terms which seem to doubt its authority; and the same learned judge, in *The Frankland* (9 Asp. Mar. Law Cas. 196; 84 L. T. Rep. 395; (1901) P. 161), refers to it as depending on a principle which had been much shaken. In *The Milan* (*ubi sup.*), Dr. Lushington made use of an undoubted Admiralty rule as to ships, and misapplied it to cargo by means of the doctrine of identification; the Judicature Act only confirms the rule and not the misapplication of it, and the appellants are therefore entitled to recover the whole of their damage. The case of *The Milan* (*ubi sup.*) has not been followed in America: (*The Alabama*, 2 Otto, 695; *The Atlas*, 3 Otto, 302). In *The Circe* (10 Asp. Mar. Law Cas. 149; 93 L. T. Rep. 640; (1906) P. 1) it was decided with regard to life claims that the rules as to the division of loss did not apply to them because there was no variance between the rules of Admiralty and common law. But for the misapplication of a rule there would be no variance in this case.

Aspinall, K.C., *Laing*, K.C., and *R. H. Balloch* for the respondents.—The appellants suggest that Dr. Lushington invented the rule laid down in *The Milan* (*ubi sup.*), and that the decision is wrong, saying it rests on the doctrine of identification. It was not invented by Dr. Lushington, and does not rest on the doctrine of identification. No matter how the rule of division of loss came into existence, it has been recognised since 1861. [Buckley, L.J.—Since the case of *The Bernina* I do not think *The Milan* rests on any principle.] It did not rest on the principle of identification: (see the observations of Lord Esher M.R. in *The Bernina*, 12 P. Div., at p. 76). The only principle on which *The Milan* was decided was that of rough justice, half the loss was recoverable from each of the wrongdoing ships. In other words, the cargo owner got the whole of his loss, but only half from each ship. If *The Milan* depends on any principle, it is to be found in the last paragraph of the judgment, and it is not based on identification. Then the Judicature Act 1873 recognised and crystallised the rule. [Buckley, L.J.—Surely the rules referred to in the section must be founded on some principle.] The rule has been recognised by this court in *Chartered Bank of India* v. *Netherlands Steam Navigation Company Limited* (*ubi sup.*), and that case binds this court. In two cases in Burrell's Admiralty Cases edited by Marsden (*The Friends Goodwill and The Peggy*, 1785, p. 328, and *The Petersfield and Judith*

Randolf, 1789, p. 332) the rule as to division of loss is applied to cargo, and there is nothing to show that the cargo belonged to the shipowner.

Dumas in reply.—Where both ships are in fault, the carrying ship may be sued for the whole loss sustained by the cargo owner, the action being founded on the contract of carriage: (*The Bushire*, 5 Asp. Mar. Law Cas. 416 (1885); 52 L. T. Rep. 740). There is no principle except the doctrine of identification to prevent the other vessel being sued in tort for the whole loss.

Vaughan Williams, L.J.—I do not think it is necessary I should take time to consider my judgment, although this is a very important case, and a case which, as I understand, is brought really for the purpose not only of deciding this particular dispute, but of getting a decision which will affect a large number of cases in which those who send cargoes to sea may be very anxious to have determined. I cannot help saying I am glad to understand that this case is likely to go further—to the House of Lords—and I think it should. When one is told that the rule in question—the rule, that is, that we are asked to say is a rule of the Admiralty Court in the sense mentioned by sect. 25, sub-sect. 9, of the Judicature Act 1873—is a rule which cannot be supported upon any principle, and can only be supported because it is in actual application in the Admiralty Division, one is certainly minded to look very closely at it and see whether this particular rule is a rule in the sense that I have just been speaking of. Whatever the rule is, it is a rule which admittedly, at the time when it was laid down by Lord Stowell, did not apply to cargo at all. The rule, as laid down by Lord Stowell, was laid down in *The Woodrop Sims*, which is a case reported in 2 Dodson's Reports, at p. 83. The rule is thus spoken of by Lord Stowell, then Sir William Scott, at p. 85: "This is one of those unfortunate cases in which the entire loss of a ship and cargo has been occasioned by two vessels running foul of each other. There are four possibilities under which an accident of this sort may occur. In the first place it may happen without blame being attributable to either party, as where the loss is occasioned by a storm or any other *vis major*; in that case, the misfortune must be borne by the party on whom it happens to light; the other not being responsible to him in any degree. Secondly, a misfortune of this kind may arise where both parties are to blame—where there has been a want of due diligence or of skill on both sides; in such a case the rule of law is that the loss must be apportioned between them, as having been occasioned by the fault of both of them. Thirdly, it may happen by the misconduct of the suffering party only; and then the rule is that the sufferer must bear his own burthen. Lastly, it may have been the fault of the ship which ran the other down; and in that case the injured party would be entitled to an entire compensation from the other." Lord Stowell in that case was merely dealing with the case as between two ships, and was not dealing at all with the case of a cargo carried in either of the ships concerned. That being so, I think it is not disputed—at all events it is very arguable—that the case of *The Milan* (*ubi sup.*), in so far as it extended Lord Stowell's rule to cargoes, was an extension of the rule beyond anything to which it had previously been applied. It is quite true that at p. 401 Dr. Lushington does speak of it as if it was not an extension of Lord Stowell's rule, or at all events not a new extension of the rule, because he speaks in this way of its application in the case of the owners of cargo. "The practice of the Court of Admiralty appears to have been uniform, that where both ships are to blame and where the provisions of the statute do not interfere, the owners of cargo, equally with the owners of ships, recover a moiety of their damage." Then he goes on to mention the case of the *Anna Kimball*, the *Bonito*, and various other cases, in which he speaks of half the value of the cargo as being what was recovered. The reporter's note at the bottom of p. 401, however, is: "The above cases are not reported at all, or do not mention the point in question." The result of this has been that we have not got these cases before us. It is also very remarkable that if you look at the decision of Lord Stowell you really find it is a decision which, even as between ships, it is difficult to account for upon any principle, unless you call the principle of identification a principle, because it is not nearly so plain as it is in the case of *The Milan* (*ubi sup.*). When you come to deal with the case of *The Milan* (*ubi sup.*), you find not merely identification applying to the owner of cargo or the vessel in which the cargo is being carried, but the owner of the cargo, being possibly, at all events, guilty of no negligence and no wrongdoing at all—being what is called in the cases "innocent"—is made to accept from each of the ships the half of the damage sustained, and it seems to me almost impossible to justify the application of this rule without resting it upon the principle of the identification of the cargo owner with the owner of the ships or the ship in which his goods were carried. The fact that Dr. Lushington should have applied this rule as to the division of loss in this way and based it upon such a principle is all the more remarkable because he does it after a forcible denunciation of the absence of principle in the case of *Thorogood* v. *Bryan* (*ubi sup.*), the case in which the passenger was identified with the omnibus and prevented from recovering any damages at all. It was not that he had half his damages, but he did not get any at all. Having denounced that decision as utterly incompatible with any known principle, Dr. Lushington proceeds to apply half of this principle which he has just denounced—it is too unprincipled and too illogical to say that the passengers shall not recover at all; but there is just enough force left to enable one to come to the conclusion that the cargo owner shall be content, when he is suing a person from whom he can get the whole of the damages, to get judgment against that man only for one half. But all that I have got to deal with here is something quite different really from the mere question of what was decided by *The Milan* (*ubi sup.*). I have not, according to my view, even to decide whether what was decided in *The Milan* (*ubi sup.*) was right or wrong. As the case is brought before us here, I think the respondents are right; I have not got any jurisdiction really to consider whether *The Milan* (*ubi sup.*) was right or not. As I have said already, there is a great deal of ground for saying that the decision of Dr. Lushington, applying Lord Stowell's rule to cargoes, was an extension of

Lord Stowell's rule. I suppose that after that decision was given the question of the propriety of that decision might have been raised at any time, at all events in an Appellate Court; but what is said now is that even on the supposition that we have no authority to justify Dr. Lushington's statement that the rule as to division of loss has been applied to cargoes before, that now it has been applied so often and in so many cases that it has become a rule; and if it has become a rule I take it that it falls within these words "In any cause or proceeding for damages arising out of a collision between two ships, if both shall be found to have been in fault, the rules hitherto in force in the Court of Admiralty, so far as they have been at variance with the rules in force in the courts of common law, shall prevail." If this is really a rule I doubt very much whether we should have any power to alter that rule; but be that how it may, I clearly take it, whether theoretically we have the right to do so or not, we should not be disposed, even if we had jurisdiction to do so, to undo a rule or to revoke a rule which for some time has been in constant application. For myself, not only am I of opinion that this is a rule which has been in constant application over a very long period, but I am also of opinion that it is a rule which the Court of Appeal recognised as being a rule of the Admiralty Court, in the decision in *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Company* (*ubi sup.*). It is quite true that in that case there were three Lords Justices who delivered judgment, namely, Brett, Lindley, and Baggallay, L.JJ., but Lindley, L.J. with whom Baggallay, L.J. concurred, said: "Assuming, then, that the defendants are liable to the plaintiffs for the loss occasioned by the negligence of the master of the *Atjeh*, it is necessary to determine the amount of damages to which the plaintiffs are entitled. The action viewed as an action of tort appears to come distinctly within sect. 25, sub-sect. 9, of the Judicature Act 1873—that is the sub-section which I have just been reading—and the rules of the Admiralty Court have to be ascertained and applied. It becomes unnecessary, therefore, to discuss the doctrine laid down in *horogood* v. *Bryan* and other cases of that class; for the Admiralty Court has never adopted that doctrine. See *The Milan*. According to the rules of the Admiralty Court, if the two ships belonged to different owners, then, as both ships were to blame, the plaintiffs would have been entitled to recover one half of the amount of their loss from the owners of the *Atjeh*, and one half from the owners of the *Crown Prince*. See *The Milan*." Then they go on to determine what was the question in that case, namely, how far that rule, which they clearly recognise as a rule, would apply or extend to a case where both ships belonged to the same owners, and the judgment proceeds: "As both ships belong to the same owners, the above rule would render the defendants liable for both halves, *i.e.*, for the whole of the loss, and this would be the result, were it not for the special stipulation contained in the bill of lading, and which exonerates the defendants from the share of the loss attributable to the negligence of those in charge of the *Crown Prince*. The contract in this case exonerates the defendants from half of the loss, and leaves them liable for the other half; and the plaintiffs are entitled to judgment on this footing. Unless the parties can agree upon the sum for which judgment is to be entered, the amount must be ascertained by a reference to a master or a referee." After that decision, however fully we may have a right to review the decision of Dr. Lushington in *The Milan* (*ubi sup.*), here we have got a decision which we must follow—the decision which I have just read.

This particular case is one which really, I think, on the face of it, shows how little the rule as to damages is based upon any principle. In this case the money having been brought into court in the limitation of liability suit, when you have deducted from that sum the amount necessary to meet these halves, there is still a large sum, about 11,000*l.*, left, and the question arises is the rule that I have been referring to such that the cargo owners cannot come upon this balance—the unused balance of the sum in court—for the other half of their damages? It seems to me that the very facts of this case go to show that they cannot. I desire to mention that I have not got the two American cases which were cited before us, but they were both cases, if I remember rightly, of the Supreme Court; but whatever court they were in, I entirely agree not only with the judgments, but with the vigorous reasoning which led to them. Still, we have only to do as the President of the Admiralty Division did in this case—to follow the law; we have no jurisdiction to amend it. I am of the opinion, therefore, that this appeal should be dismissed, and dismissed on the usual terms.

Fletcher Moulton, L.J.—This appeal arises out of a collision between the steamship *Drumlanrig* and the steamship *Tongariro*. The *Drumlanrig* has paid into court the maximum amount for which she can be held liable under the provisions as to the limitation of liability, with an admission that she was partly to blame for the collision. By the frank statement of counsel for the appellants we are to decide this case upon the basis that the *Tongariro* was also to blame. The actual point before us arises from the fact that the owners of the cargo on the *Tongariro* have sent in a claim against the fund in court for the whole of the damages that they have suffered by the collision. The registrar, acting upon what is admitted to be the rule universally applied in such cases, has allowed them only one-half of the amount of their damages; the consequence of so doing being that there will be a surplus of the fund in court rather greater than the remaining half of the cargo owners' damages, which will, on our decision, be handed back to the owners of the *Drumlanrig*. The appellants contend that they are entitled to receive out of the fund in court the whole of the damages which they have suffered. They do not deny that the rule which received its first judicial enunciation in the judgment of Dr. Lushington in the case of *The Milan* (*ubi sup.*), and which has always been followed since, is against them; but they desire to get that case overruled and have the rule now in force replaced by a rule that the owners of cargo on the one vessel are entitled to receive their full damages from the other vessel. I think the points which we have to decide are very short, and we have had the assistance of an extremely able argument and have been referred, I believe, to all the cases which can possibly assist us.

It is evident that from a very early date —certainly as early as 1815—the Admiralty Court refused to adopt the common law doctrine that where there has been a collision arising from the fault of both vessels, both parties, being guilty of negligence, must bear their own loss; and in the earliest case to which we were referred, *The Woodrop Sims* (*ubi sup.*) it was laid down that the Admiralty Court apportioned the total loss between the two guilty parties; but no method of apportionment was laid down in that case. I cannot help thinking that the case in the House of Lords in 1825, *Hay* v. *Le Neve* (*ubi sup.*), showed that at that time the apportionment was in halves, but whether it was universally so, or not, I do not know. Certainly the rule as to halves seems to have applied to the case of the ship. It was thought in *Hay* v. *Le Neve* (*ubi sup.*) that it also applied to the cargo, but, as it is not stated whether the cargo belonged to the shipowner, one is not able to deduce anything very clearly from that case as to the point which we have to decide. But in 1861 the very point we have to decide came before Dr. Lushington in *The Milan* (*ubi sup.*). The state of the law at that time was as follows: In *Thorogood* v. *Bryan* (*ubi sup.*), a case of collision between two omnibuses, a passenger in one of the omnibuses was held at common law to be so identified with the omnibus in which he was carried that if there had been negligence on the part of the driver of his omnibus he could not recover. No doubt this doctrine of identification was accepted in the courts of common law. Now, it was urged in the case of *The Milan* (*ubi sup.*) that the Admiralty Court ought to adopt the same rule, and that the negligent navigation of the wrongdoing carrying vessel should be held in law to be the negligence of the owner of the cargo carried if he is not the owner of the ship. Dr. Lushington formally refused to follow the common law doctrine on that point, and I must confess that I do not think that the decision of Dr. Lushington has always been treated in the way in which it should have been treated. It has been suggested that he did not mean the words that he used. They are as clear as words can be, and I have not the very slightest doubt that he meant to say all that he did say, and I can find no objection whatever to that part of his decision which is here material. He refers to the case of *Thorogood* v. *Bryan* (*ubi sup.*), which he says has been put before him as laying down a rule to the effect that a cargo owner selecting a ship to carry his cargo is so far identified with the ship which is carrying his cargo that the negligence of those on board the ship must be taken to be his negligence. He says: "With due respect to the judges who decided that case, I do not consider that it is necessary for me to dissect the judgment, but I decline to be bound by it"—he gives full reasons —"because it is a single case; because I know upon inquiry that it has been doubted by high authority; because it appears to me not reconcilable with other principles laid down at common law; and, lastly, because it is directly against *Hay* v. *Le Neve*, and the ordinary practice of the Court of Admiralty—for if, by the practice of the Court of Admiralty, the owner of a delinquent ship, where both ships are to blame, may recover one half of his loss, *a fortiori* the innocent owner of the cargo cannot be deprived of a like remedy." Now, in the clearest way possible he says he has decided this case upon the practice of the Admiralty Court, and he rejects the doctrine laid down definitely and accepted in common law. That is not the only part of the judgment which shows that this is a judgment in defiance of the common law doctrine and based upon the Admiralty practice, because at p. 401 he says that "the practice of the Court of Admiralty appears to have been uniform, that where both ships are to blame, and where the provisions of the statute do not interfere, the owners of cargo, equally with the owners of ships, recover a moiety of their damage." He gives five or six cases in which that has been held, and they show that it has been so held not only in a court of first instance, but in the Court of Appeal and the Judicial Committee of the Privy Council. So, no judge could have made it plainer that this was an Admiralty decision rejecting the decision of the common law courts in *Thorogood* v. *Bryan*. Then, in the concluding parts of his judgment, he gives the reason which he believes to underlie this Admiralty practice.

Now, the President of this court seems to think that this Admiralty practice is very unjust. For my own part I think that if you look at the whole question it is just as likely to do justice in the majority of cases as the doctrine which prevails at common law; but, whether it is just or not, Dr. Lushington lays down, and I think clearly and rightly lays down, that it has become the Admiralty practice, and he suggests a reason for it. He suggests that the Court of Admiralty looked upon the two peccant ships as two tortfeasors, and it divided the responsibility equally between them, so that the owners of the cargo recovered one half of their damages from one ship and the other half from the other ship. That, certainly, is at least as just a doctrine as the common law doctrine that there is no contribution between tortfeasors. It is suggested that that decision in *The Milan* (*ubi sup.*) has been affected by the fact that the decision in *Thorogood* v. *Bryan* (*ubi sup.*) has been overruled by the decision in *The Bernina* (*ubi sup.*). How a case in which the judge elaborately makes it clear that so far from basing his decision on *Thorogood* v. *Bryan* (*ubi sup.*) he decides as he does in spite of *Thorogood* v. *Bryan* (*ubi sup.*) can possibly be affected by the overruling of *Thorogood* v. *Bryan* (*ubi sup.*) I do not see, and it is quite clear that the judges who overruled *Thorogood* v. *Bryan* (*ubi sup.*) realised this, for Lord Esher points out that this case of *The Milan* does not depend upon *Thorogood* v. *Bryan* (*ubi sup.*), and the same is pointed out by Lord Lindley. Therefore, so far as the grounds upon which *The Milan* (*ubi sup.*) was decided are concerned, they are absolutely unaffected by anything done since, excepting one thing which I am going to refer to, which was in my eyes a statutory enactment making the Admiralty rules permanently effective. That is to be found in sect. 25, sub-sect. 9, of the Judicature Act 1873, which reads: "In any cause or proceeding for damages arising out of a collision between two ships, if both shall be found to have been in fault, the rules hitherto in force in the Court of Admiralty, so far as they have been at variance with the rules in force in the courts of common law, shall prevail." I ask myself what rules were in force which were or could be at variance with

the rules of common law, and the answer seems to me to admit of no doubt—it is the rule with regard to damages, by which only one-half of the damage can be recovered against the other wrongdoing ship. I think no suggestion has been made of any other rules to which this gives affirmation. It is suggested that one rule, namely, the rule in the case of damage to two ships, is earlier in origin than that which extended it to the case of cargo on the ships. Both those rules were in force and were constantly applied long before the Judicature Act 1873 was passed, and therefore on the interpretation of that provision in the Judicature Act I hold that by that statute this rule in *The Milan* was directed to prevail, and that, in spite of *Thorogood* v. *Bryan*, or any other doctrine, it was to be the rule to be applied in the Court of Admiralty, and nothing else. Even if I doubted as to the interpretation of this provision in the Judicature Act I do not think it is open to this court to take a different view. In *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Company* (*ubi sup.*), Lindley, L J. who delivered a judgment in which Baggallay, L.J. concurred—the judgment of the majority of the court—distinctly lays down that this rule is referred to in the section which I have read in the Judicature Act, and distinctly decides that it is therefore made binding. We have no power to overrule that decision, and that part of the decision was necessary for the judgment in that case, so that it is no *obiter dicta*. In these circumstances I hold that both by the interpretation which I myself should put upon that section of the Judicature Act, and by the authoritative interpretation put upon it in this court in the *Chartered Mercantile Bank* case, this rule is a rule that is to prevail. Therefore the appeal must be dismissed.

Buckley, L.J.—A collision having taken place between the *Drumlanrig* and the *Tongariro*, an action was brought in the Admiralty Division by the owners of the one ship against the other in respect of damages or loss. Those proceedings were compromised, and effect was given to the compromise by a consent order by the President condemning the owners of the *Dunlanrig*, and their bail, in a moiety of the damages of the *Tongariro*. The claim of the owners of the *Tongariro* has been brought in and allowed at 22,350*l.*; a moiety of that would be 11,175*l.* The *Drumlanrig* took proceedings to obtain limitation of liability, and that amount has been brought into court. The cargo owners of the *Tongariro* have brought in their claims, and those have been allowed at 21,433*l.* There is sufficient, therefore, in the 34,000*l.* that is in court to answer 20*s.* in the pound on 21,000*l.* for the cargo owners, and 11,000*l.* for the shipowners in the case of the *Tongariro*. But the owners of the *Drumlanrig* say that the cargo owners of the *Tongariro* are not entitled to more than one moiety of the amount of their damages, which would be 10,600*l.*, and there ought to be paid back to them out of court a balance which would result in about 10,000*l.* or 12,000*l.* The question is whether that is right or whether that is wrong. Now, in the proceedings neither vessel had been found to blame, because an order was made by consent without any finding upon the subject; but in the limitation suit the *Drumlanrig*, although not found to be to blame, admitted herself to be partly to blame, and counsel for the appellants, the owners of cargo on the *Tongariro*, has elected to argue this case as if there had been a finding that the *Tongariro* also was to blame. He says, fairly enough, that the consent order which was made was made on the basis that was so; therefore we have to adjudicate upon this footing, viz., as if there was a finding that both the *Tongariro* and the *Drumlanrig* were to blame. Now, the case has been presented to us by the appellants as if the matter for determination was whether in Dec. 1861 Dr. Lushington rightly decided the case of *The Milan*. Now, speaking for myself, I want to say that I cannot find that the decision in *The Milan* was based on any legal principle at all. If it was based on any legal principle—counsel for the appellants say that it was to a certain extent—it was based, according to their contention, upon *Thorogood* v. *Bryan* (*ubi sup.*); but, inasmuch as *Thorogood* v. *Bryan* has been overruled by the case of *The Bernina* (*ubi sup.*), *The Milan*, if it was decided on that principle, was decided on a wrong principle. Under the circumstances, there is no principle at all, so far as I can see, upon which it can be said that, as a matter of legal principle, the decision of Dr. Lushington in *The Milan* was right. But that is not a matter which, in my view, assists the appellants at all. Counsel for the appellants have argued that Dr. Lushington was proceeding thus in this case: that, while disclaiming any authority for *Thorogood* v. *Bryan* (*ubi sup.*) to bind him, he was really adopting it, subject to a limitation. The facts in *The Milan* (*ubi sup.*) were that both vessels were to blame, but the *Lindisfarne* was to blame in such a way as that, by virtue of sect. 298 of the Merchant Shipping Act 1854, she could not recover because she was guilty of a breach of a regulation, and the Act of Parliament provides that under those circumstances she cannot recover. The question in that case was whether the cargo owners on the *Lindisfarne* could recover. They were the claimants, and counsel for the appellants in this case have sought to say Dr. Lushington was proceeding upon the footing that the cargo owners were to be put in the same position as the owners of the *Lindisfarne*, the ship concerned—that is to say, entitled to recover only a moiety, the cargo owners being discharged from the statutory bar which has precluded the ship from having anything under the circumstance that she was within sect. 298 of the Merchant Shipping Act 1854.

Now, I have listened to the argument, but I confess it has wholly failed to convince me. I do not think the *Lindisfarne* proceeded on any such footing at all. It seems to me that it proceeded on this footing: The right of these cargo owners in a court of law would have been one thing; they would have been, he says, recovering their whole loss; but he says I am sitting in the Court of Admiralty; the Court of Admiralty has higher notions of justice than common law. The Court of Admiralty thinks it right, in the case of ships, that if both are to blame you shall not be driven to this—that neither can recover anything—but that they should divide the loss between them; and what he goes on to say is, "I think the same principle ought to be extended to the case of cargoes"; and, therefore, he was not, to my mind, asserting that, upon any legal principle at all, there was any right to do that which he was going to do, but he was saying: "Sitting here

in the Court of Admiralty, this is what I think is just and fair, and therefore I shall do it." Before I leave the case of *The Milan* (*ubi sup.*) I wish to say I do not think it quite stops there, because a question has been raised as to whether Dr. Lushington was inventing this for the first time, or that he was originating this ; but I find him saying on p. 401: "The practice of the Court of Admiralty appears to have been uniform, that where both ships are to blame, and where the provisions of the statute do not interfere, the owners of cargo, equally with the owners of ships, recover a moiety of their damage." Those words, "where the provisions of the statute do not interfere," I confess I do not understand. I think there is a little confusion of thought there. Of course, if he meant to express, as he has just been saying in the earlier part of the judgment, that to the cargo owner the provisions of the statute do not apply, the words are perfectly intelligible, but that is not the run of the sentence. I think he must mean that, but it is quite immaterial for the present purpose, he has stated there that, in his experience, which was great, there was a practice in the Court of Admiralty which was uniform, and that practice was that owners of cargo recover a moiety only of their damage. It seems to me, therefore, that *The Milan* (*ubi sup.*), if we are going to treat it as a decision based on legal principle, rested on none at all, and in that sense it was wrong; but if it was an enunciation of a rule which the Court of Admiralty were going to adopt because they thought it was fair, and had adopted it for many years, then of course that is a totally different matter. It is not a question of a decision which is to be overruled as being erroneous, but a statement of a course of practice which may or may not at the present time, in point of fact, be valid in point of law.

Now, whether it is valid in point of law depends on sect. 25, sub-sect. 9, of the Judicature Act 1873: is this a rule of the Court of Admiralty or not. Now, that section mentions "Rules hitherto in force in the Court of Admiralty," "Rules in force in the courts of common law," and a little later, in sub-sect. 11, "Rules of equity" and "Rules of common law." Now, no doubt it is a little difficult to see exactly what the word "rules" means there, but I apprehend that it extends to such a case as this. As we all know, according, to the decision in the case of *Mason* v. *Bond*, the rule in the Court of Chancery was that a secured creditor in an administration was entitled to prove for the whole of his debt, and then realise his security as much as he could both under one and the other. That was not the rule in the Court of Bankruptcy, there is a statutory rule there. The secured creditor had to value his security and prove only for his difference. The one was the rule of equity ; the other was a rule, by force of statute there, of the Court of Bankruptcy. Many similar illustrations might be put. Of course, the old conflict between equity and law was that equity thought that law did not do justice, and therefore equity intervened and introduced principles or rules of her own which tempered the severity of common law, and the rule of equity was inconsistent with and repugnant to, and, under certain circumstances, overrode, the previous rules and practice of a court of law. Now, I think the word "rules" here points to something of that kind, and here there is a court of peculiar jurisdiction—the Court of Admiralty—and it has rules similar to the rule in *Mason* v. *Bond*. It thought it fair under certain circumstances not to follow the principles of common law and say as between two tortfeasors neither shall sue the other; it thought fit to say, there being two tortfeasors, they should share the loss between them. That, I apprehend, was the rule of the Court of Admiralty. Now, I have gone into that, but I do not think it was necessary to do so, because, in my view, so far as this court is concerned, the matter for decision before us is really concluded by the decision in the case of *Chartered Bank of India* v. *Netherlands India Steam Navigation Company* (*ubi sup.*). There the facts were that an action was brought at law—the action was brought by the owner of cargo on the *Crown Prince*, and he sued the owner of the other vessel, the *Atjeh*, with which the collision occurred; but a peculiar circumstance of the case was that the owner of that steamer was also the owner of the *Crown Prince*. The question for decision was what the cargo owner was entitled to recover from the defendants in that state of things. Now, what was affirmed was this: If it had not been the fact that there had been a common owner, there is no question but that at law the cargo owner could have recovered from one tortfeasor, the owner of the other vessel, the total amount of the damages. The court was considering whether he could do so or not in an action brought at law, and what the court held was, that, inasmuch as the tortfeasor whom the cargo owner was suing as owner of the second vessel was also the owner of the first vessel, he could not recover at law more than half for this reason, that if the proceedings had been, as they were not, in the Court of Admiralty, the cargo owner would, in the Court of Admiralty, only have got half his damages from the other vessel; and they base that upon this: First, they affirm that under sect. 25, sub-sect. 9, of the Judicature Act 1873 this rule, so to call it, of the Court of Admiralty is a rule within that section—it expressly decides that point; and then, secondly, finding that that was so—that it was a rule of the Admiralty Court—they necessarily also affirm what that rule was because they gave effect to it, and they affirm that the rule was that the cargo owner could only get half his damages. Now, it seems to me that that covers the whole ground here. It decides both that the practice—whatever you like to call it—which is found in *The Milan* (*ubi sup.*) is a subsisting rule of the Court of Admiralty, and decides that, by virtue of sect. 25, sub-sect 9, of the Judicature Act 1873, that is now also the rule at law, because the rule of Admiralty is to prevail. Under these circumstances I think, although the case has taken some time in this court, there was nothing to argue, and that this case is entirely governed by that decision.

Solicitors for the appellants, *Cattarns* and *Cattarns*.

Solicitors for the respondents, *Botterell* and *Roche*, agents for *Weightman*, *Pedder*, and *Co.*, Liverpool.

June 27, 28, *and July* 7, 1910.

(Before Vaughan Williams, Fletcher Moulton, and Buckley, L.JJ.)

Markt and Co. Limited *v.* The Knight Steamships Company Limited; Sale and Frazar Limited *v.* The Knight Steamships Company Limited. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Practice—Parties—Joinder of plaintiffs—Representative action—Order XVI, r. 9.

The plaintiffs were shippers of goods on board a vessel belonging to the defendants on a voyage to Japan during the Russo-Japanese War. On her voyage the vessel was sunk by a Russian cruiser on the ground that she was carrying contraband of war.

The plaintiffs thereupon instituted an action against the defendants, the writs being issued "on behalf of themselves and others owners of cargo lately laden on board" the vessel, and the claim as indorsed on the writs was "For damages for breach of contract and duty in and about the carriage of goods by sea."

The defendants took out a summons asking that the writs, or so much of the writs as related to parties other than the plaintiffs, be set aside on the ground that the provisions of Order XVI, r. 9, *were not applicable.*

Held (*Buckley, L.J. dissenting*), *that the plaintiffs, not being "persons having the same interest in one cause or matter," were not entitled to sue for damages in a representative capacity, and that the writs ought therefore to be set aside.*

Appeals by the defendants from an order of Bucknill, J. refusing to set aside the writs in the following actions.

The first action, as appeared from the writ therein, was brought by "Markt and Co. Limited on behalf of themselves and others owners of cargo lately laden on board the steamship *Knight Commander*." The claim indorsed on the writ was "For damages for breach of contract and duty in and about the carriage of goods by sea."

The second action, as appeared from the writ therein, was brought by "Sale and Frazar Limited on behalf of themselves and others owners of cargo lately laden on board the steamship *Knight Commander*."

The plaintiffs Markt and Co. Limited carried on business in the United States of America, and the plaintiffs Sale and Frazar Limited carried on business in Japan. The facts of the case were that the plaintiffs and those whom they purported to represent had shipped goods on board the steamship *Knight Commander*, belonging to the defendants, when she was on a voyage from New York with general cargo for Japanese ports in July 1904, at the time of the war between Russia and Japan. When distant about ninety miles from Yokohama, the *Knight Commander* was held up by a Russian squadron and searched, and on the ground that she carried contraband of war and that her papers were not in order, and also because there was not on board the steamer a sufficient quantity of coal to carry her to a Russian port, notice was given to her captain and crew to quit the vessel, which was then sunk by shell fire, and all her cargo and crew's effects were lost.

By a letter dated the 5th May 1910 the plaintiffs' solicitors gave notice to the defendants' solicitors that Messrs. Sale and Frazar Limited were claiming on behalf of themselves and the following (here follows a long list containing forty-four names), and also that in the writ issued in the name of Markt and Co. Limited they claimed on behalf of themselves and all the other firms and companies above mentioned and also on behalf of Messrs. Sale and Frazar Limited.

The defendants took out a summons in each action for an order that the writ of summons and all subsequent proceedings be set aside for irregularity, or, in the alternative, that so much of the writ as related to parties other than the plaintiffs named therein, other than Sale and Frazar Limited, be struck out on the ground that the persons on whose behalf the action purported to be brought were not persons having the same interest in one cause or matter, and were not persons in whom any right to relief in respect of or arising out of the same transaction or series of transactions was or could be alleged to exist.

Bucknill, J., affirming the order of Master Wilberforce, refused to set aside or vary the writs in the action.

The defendants appealed.

Order XVI. provides:

Rule 9. Where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued, or may be authorised by the court or a judge to defend in such cause or matter, on behalf or for the benefit of all persons so interested.

Leslie Scott, K.C. and *Keogh* for the defendants.—The question is whether a representative action can be brought by shippers for breach of contract where the causes of action are different. Claims have been put forward by owners of cargo, who say they are not shippers of contraband goods, whilst others have presented claims against the ship for breach of contract for not having the ship adequately documented so that a heterogeneous collection of issues would arise at the trial as to what might be contraband or non-contraband. The true proposition applicable is that, although in this case all the parties have suffered a common wrong—namely, the destruction of the ship by the Russian cruiser—they have no common right or interest, so that Order XVI., r. 9, does not apply. They referred to

Duke of Bedford v. *Ellis and others*, 83 L. T. Rep. 686; (1901) A. C. 1;

Smurthwaite and others v. *Hannay and others*, 7 Asp. Mar. Law Cas. 485 (1894); 71 L. T. Rep. 157; (1894) A. C. 494.

Bailhache, K.C. (*Leck* with him) for the plaintiffs.—It is sought to bring an action on behalf of all the owners of cargo with the authority of each owner in respect of a common cause of action. Meanwhile proceedings are pending against the Russian Government in the Prize Court at Libau, and, if those proceedings are successful, the present actions will not go on. The plaintiffs are anxious to preserve their rights in order to prevent the Statute of Limitations running against them. The owners of cargo have a common right here the same as in the case of the fruit and vegetable growers in *Duke of Bedford*

(*a*) Reported by Edward J. M. Chaplin Esq., Barrister-at-Law.

v. *Ellis and others* (*sup.*). [Fletcher Moulton, L.J.—A common right must have a common source.] There would have been the same cause of complaint if there had been no bills of lading at all. It was not necessary for the purpose of the statement of claim to refer to the bills of lading at all. The plaintiffs desire to represent the owners of non-contraband goods only, and are quite willing that the claims should be amended accordingly. He referred to

Beeching v. *Lloyd*, 3 Drew. 227;
Drincqbier v. *Wood*, 79 L. T. Rep. 548; (1899) 1 Ch. 393.

Keogh in reply.

Cur. adv. vult.

July 7.—The following written judgments were delivered:—

Vaughan Williams, L.J.—The plaintiffs in this case claim to sue in a representative character on behalf of themselves and others owners of cargo lately taken on board the steamship *Knight Commander*. The defendants are the Knight Commander Steamship Company Limited. The indorsement on the writ is: "The plaintiffs' claim is for damages for breach of contract and duty in and about the carriage of goods by sea." The question which we have to decide is whether or not the plaintiff company is entitled to sue in a representative character on behalf of others the owners of cargo lately taken on board the steamship *Knight Commander*. The writ does not qualify the word "others." The writ does not disclose whether all the owners are intended, and does not define which are the same. There is another action pending against the same defendants in which Markt and Co. Limited are plaintiffs. This action is also a representative action and in all respects similar to the action in which Sale and Frazar Limited are plaintiffs, and the writ is issued by the same solicitors on the same day. A summons was issued in each case by the defendants for an order to set aside the writ of summons for irregularity; or, in the alternative, that so much of this writ as relates to parties other than the named plaintiffs be struck out on the grounds that the persons on whose behalf the action purports to be brought are not persons having the same interest in one cause or matter, and are not persons who have any right to relief in respect of or arising out of the same transaction or series of transactions, and that they are persons on whose behalf another action is brought for the same alleged causes of action. These actions are not actions brought under the provisions of Order XVI., r. 1, which deals with the joinder of plaintiffs claiming right to relief in respect of or arising out of the same transaction or series of transactions as alleged to exist, whether jointly, severally, or in the alternative, where if such persons brought separate actions common questions of law or fact would arise. These actions are brought under the provisions of rule 9 of Order XVI., which runs: "Where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued, or may be authorised by the court or a judge to defend in such cause or matter, on behalf of or for the benefit of all persons so interested." If one looks merely at the indorsement on the writ, and at the words of Order XVI., r. 9, it is difficult to come to the conclusion that those words justify the present plaintiffs suing as representatives of numerous persons "having the same interest in one cause or matter," who may sue or be sued or may be authorised by the court to defend in such cause or matter on behalf of or for the benefit of all persons so interested. The action is brought, as appears from the indorsement on the writ, "for damages for breach of contract and duty in and about the carriage of goods by sea." So far as this action is an action for breach of contract, the origin of the contract was the respective bills of lading issued by the ships to the respective shippers. There is nothing on the writ to show that the bills of lading and the exceptions therein were identical, or that the goods the subject of the bills of lading were of the same class either in kind or in relation to the rules of war under which the same article may be contraband or not according to its destination. As to the letter of the 5th May 1910, written by the solicitors for the plaintiffs and addressed to the solicitors for the defendants, if one treats it as part of the indorsement of the writ, which it is not, it is convenient to consider whether it affects substantially the question whether the action is an action which on the face of it appears to disclose the fact that this action is an action brought by numerous persons having the same interest in one cause or matter. The letter begins with a notice that the plaintiffs abandon some eight actions by owners of cargo lately on board the steamship *Knight Commander* against the Knight Commander Steamship Company, and then in respect of writ No. 1379 informs the defendants that Messrs. Sale and Frazar Limited are claiming damages on behalf of themselves and some forty-six persons with names and addresses, which include nations and places all over the world, and the letter concludes with these words: "In the writ issued in the name of Markt and Co. Limited, those gentlemen claim on behalf of themselves and all the other firms and companies above mentioned, and also on behalf of Messrs. Sale and Frazar Limited above mentioned." I do not think that it appears by the writ, even as amplified by the letter, that there is any bond or connection with either of the persons whom the plaintiffs appeared to represent except that these people are all of them shippers of goods on board the same ship, the whole cargo of which was lost by the sinking of the *Knight Commander* by a Russian warship during the Russo-Japanese War. There is, in my opinion, no common purpose, so far as the shippers are concerned, and no connection which would justify a representative action either under rule 9 or under the old Chancery practice. But a construction has been put upon this rule 9 of Order XVI. by the House of Lords in the case of *Duke of Bedford* v. *Ellis and others* (*sup.*) which gives a somewhat more expanded area to the words of the rule than *primâ facie* appears, and which, it is said, justifies the present representative action. I think not. Upon p. 8 of the report of *Duke of Bedford* v. *Ellis and others* one finds in the judgment of Lord Macnaghten these words: "Under the old practice the court required the presence of all parties interested in the matter in suit, in order that a final end might be made of the controversy. But when the parties were so numerous that you never could 'come at

justice,' to use an expression in one of the older cases, if everybody interested was made a party, the rule was not allowed to stand in the way. It was originally a rule of convenience; for the sake of convenience it was relaxed. Given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent." Now the words "given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent" are the words by which Lord Macnaghten describes the old practice before the Judicature Act of the Court of Chancery. And on p. 9 he says: "There are plenty of other cases which show that, in order to justify a person suing in a representative character, it is quite enough that he has a common interest with those whom he claims to represent"; and goes on to say, speaking of the case before him: "All growers have the same rights. They all rely on one and the same Act of Parliament as their common charter." Lord Macnaghten then proceeds to quote from the judgment of Lord Eldon in *Cockburn* v. *Thompson* (1809, 16 Ves. 321) and *Adair* v. *New River Company* (1805, 11 Ves. 429). "The strict rule," he said, "was that all persons materially interested in the subject of the suit, however numerous, ought to be parties . . but that being a general rule established for the convenient administration of justice must not be adhered to in cases to which consistently with practical convenience it is incapable of application." "It was better," he added, "to go as far as possible towards justice than to deny it altogether." He laid out of consideration the case of persons suing on behalf of themselves and all others, "for, in a sense," he said, "they are before the court." The headnote to the report of *Adair* v. *New River Company* referred to by Lord Macnaghten contains the following passage: "The general rule requiring all persons interested to be parties may be dispensed with, where it is impracticable or extremely difficult. In such a case, to obtain a decree, to establish the right of suit to a will, for instance, the court only requires parties sufficient to secure a fair contest; and, the right being established in that way, consequential relief may be had against the rest in another suit." These two quotations seem to dispose of any objection based upon the omission of some of the parties interested, and also of the suggestion that there cannot be a representative action in a case where individual consequential relief is claimed by or against those before the court. I think that, even taking the old practice as described by Lord Macnaghten as governing the present practice, the writ in the present case cannot be supported, but I must observe that the practice regarding representative actions was limited to the Court of Chancery and was not adopted by the common law courts. What we have to do is to construe the rules of the Judicature Act which define the application of the practice as to representative actions for the Common Law Division and the Chancery Division alike, and which, properly construed, will, I suppose, govern the present practice notwithstanding any prior practice in the Court of Chancery.

I will now call attention to some differences in claim and in fact between *Duke of Bedford* v. *Ellis and others* (*sup.*) and the present case. In *Duke of Bedford* v. *Ellis and others* (*sup.*) the claim was based upon the Covent Garden Market Act 1828, which the plaintiffs alleged gave various preferential rights in respect of the use of the market to a class of growers. They alleged that the Duke of Bedford in the management of his market did not comply with the provisions of the Act in certain particulars, and had (*inter alia*) exacted excessive tolls from the growers. They claimed declarations that they were entitled to the alleged preferential rights, an injunction to restrain the duke from doing any acts contrary to the declarations so claimed, and an account of the sums charged in excess during the six years preceding the issue of the writ. Whereas in the present case there is no common origin of the claims of those who shipped goods on board the *Knight Commander*; the contracts were constituted by the bills of lading, which manifestly might differ much in their form and as to the exceptions, and probably would vary somewhat according to the nature of the goods shipped. It was said that this difficulty was got over by the alternative claim to the rights of the shippers against the shipowners as constituted by the mere fact of shipment, and that such rights were in all cases identical. I doubt if the indorsement includes anything but a claim in contract. The bill of lading in each case might qualify the liabilities of the shipowner as a carrier by sea. I do not see anything in the indorsement to differentiate the class on whose behalf the plaintiffs claim to sue in a representative character from a class constituted by those who shipped goods on board the *Knight Commander* when she started on this voyage. These shippers no doubt have a common wrong in that their goods were lost by the sinking of the *Knight Commander* by the Russian warship, but I see no common right or common purpose in the case of those shippers who are not alleged to have shipped to the same destinations. Moreover, it may be that there were contraband goods on board which justified the Russian action. It may be that some of the shippers knowingly shipped goods which were contraband of war. It may be that some of the shippers were innocent of such shipping of contraband goods. All sorts of facts and all sorts of exceptions may defeat the right of individual shippers. The case of each shipper must, to my mind, depend upon its own merits. The case is in no sense covered by the words of Lord Macnaghten on p. 9 of the report of the case of *Duke of Bedford* v. *Ellis and others* in the House of Lords: "All the growers have the same rights. They all rely on the same Act of Parliament as their common charter." There is nothing in the indorsement to show that the shippers for whom the plaintiffs seek to recover in a representative action may not in fact rely on different sources of right. I am not saying that on the facts suggested in argument, but not alleged in the indorsement on the writ, a class might not be constituted whose claims might be derived from and based upon a common source of right. But the indorsement on the writ is not limited to any such class, and I do not believe that recourse would have been had to any such form of action had it not

been for difficulties arising in respect of the Statute of Limitations if any other form of action had been adopted. And I do not think that the Judicature Act, orders, and rules intended that rule 9 of Order XVI. should be available whenever those on whose behalf the plaintiff affected to sue could show that the alleged right to relief was in respect of or arose out of the same transaction or series of transactions, whether jointly, severally, or in the alternative, where if such persons brought separate actions any common question of law or fact would arise, such as to allow a joinder of plaintiffs under Order XVI., r. 1.

I ought to mention the case of *Beeching* v. *Lloyd* (3 Drew. 227). In that case there was a bill by two of the intended shareholders of a projected company on behalf of themselves and all other depositors for the return of the deposits paid by the two plaintiffs. The bill alleged gross fraud in concocting the company and obtaining the deposits. A demurrer for want of equity and on the ground that no two depositors could sue together for the mere return of deposits was overruled. The bill prayed that it might be declared that the defendants named were severally bound to pay the plaintiffs and the other persons who had paid deposits to the bankers of the New South Wales Navigation Company in respect of the shares subscribed for by them the prospective amounts which were paid by them respectively. And Kindersley, V.C. in overruling the demurrer said at p. 244: "Now, it appears to me to be a just principle, that if an individual induces others to enter into a partnership, and induces them by fraud to put money into what purports to be a common stock, it is impossible to say that each of those persons must file a separate bill. In such case there is not only a common object in the persons borrowing, but a common object in those lending. Several persons here have been induced by fraud to concur in advancing money for the formation of a joint-stock company; and it appears to me that in that state of things a bill may be filed by several of them, and that the principle established in *Jones* v. *Garcia del Rio* (Turn. & Russ. 297) does not apply." Now, that case to which the Vice-Chancellor referred he says establishes this principle, that "in cases simply of separate and distinct frauds against several persons, those persons cannot join in suing. But it appears to me that there is a distinction between that case and this. There the object was, on the part of the representatives of the Peruvian Government, to raise a loan, and to get for that purpose as much money lent as possible. Now the lending of money by one person has no sort of connection with the lending by another. There is a common purpose, it is true, so far as concerns the borrower, but there is no common purpose as concerns the lenders; there is no contract between them, and therefore that case, it appears to me, does not apply to the present." The common purpose in *Beeching* v. *Lloyd* (*sup.*) of those who took shares was to enter into a partnership. I find no such common purpose between the shippers. The purpose of each shipper was to forward his individual goods by a general ship to various destinations. The case of *Beeching* v. *Lloyd* (*sup.*) does show, however, that where there is a common purpose a plaintiff may sue in a representative capacity even though each party to the common purpose will have individually to show that he personally was induced by the fraud alleged to do the act in respect of which relief is claimed on his behalf. This statement by Kindersley, V.C. seems to accord with the passage on p. 7 of Lord Macnaghten's judgment in *Duke of Bedford* v. *Ellis and others*, in which he says: "If the persons named as plaintiffs are members of a class having a common interest . . . it does not matter in the least that the nominal plaintiffs may have been wronged or inconvenienced in their individual capacity." In the present case, as I have already said, I do not find the common interest or purpose. I think that the plaintiffs in these two actions cannot sue in a representative capacity, and that this appeal ought to be allowed. It was urged before us that the indorsement on the writ might be amended in some such form as "the plaintiffs Markt and Co. Limited on behalf of themselves and all other owners of cargo lately shipped on board the steamship *Knight Commander* other than those who shipped goods which were absolute or conditional contraband." I do not think that such an amendment ought to be allowed. I find no common purpose in it. We have never had this amendment so brought before the court as that both sides could have a proper opportunity of arguing the new points which might well be discussed before the court allowed the amendment. I think that the plaintiffs should be left to issue such new writs as they may think fit. I doubt whether any amendment could be so framed as to disclose a common purpose of the shippers or any class of the shippers. There is no common statutory right as there was in *Duke of Bedford* v. *Ellis and others* (*sup.*), nor any common fund in course of formation as there was in *Beeching* v. *Lloyd* (*sup.*).

Fletcher Moulton, L.J.—In the month of July 1904, during the Japanese War, a Russian cruiser stopped and searched on the high seas an English steamship called the *Knight Commander*. After the examination the cruiser transhipped the crew of the steamer and sunk it there and then by shell fire. In defence of these proceedings the Russian Government alleged that the ship's papers were unsatisfactory, and that its cargo contained contraband both absolute and conditional. Legal proceedings were instituted on behalf of the owners of the ship and cargo before the Prize Court at Libau. These have been very protracted and are still unfinished, though it is suggested that the conclusion may be expected soon. Under the circumstances (confessedly influenced by the consideration that six years have nearly expired since the sinking of the vessel) parties interested in the cargo on board the *Knight Commander* have brought these two actions against the owners of that ship. In both cases the plaintiffs purport to sue in a representative character. The defendants contend that it is not competent for them so to do, and that they can only sue for their individual damages. We have to decide whether this contention is right. Before discussing the important legal question here raised, it is necessary to examine carefully the writs in the two actions. In the one writ the plaintiffs are described as Markt and Co. Limited on behalf of themselves and others owners of cargo lately taken on board

the steamship *Knight Commander*. In the other action the plaintiffs are described exactly in the same way with the exception that Sale and Frazar Limited are substituted for Markt and Co. Limited. It will be seen that the description of the classes on behalf of which the respective plaintiffs claim to sue is quite indefinite. The plaintiffs do not purport to sue nor do they propose or desire to sue on behalf of all the owners of cargo lately taken on board the ship in question, but only on behalf of some of such owners, and the writ does not specify which. In an endeavour to cure this defect, which must otherwise be unquestionably a fatal one, the solicitors for the plaintiffs in the two actions wrote a letter of the 5th May 1910 to the solicitors of the defendant company, setting out a list of some forty-four persons, firms, or companies (in which appears the name of Markt and Co. Limited), and informing the defendants that in the writ in the Sale and Frazar action Messrs. Sale and Frazar Limited were claiming to sue on behalf of all firms in this list. They further informed the defendant company that in the Markt and Co. Limited action the plaintiffs were claiming to sue on behalf of all the firms and companies in the same list, and also on behalf of Messrs. Sale and Frazar Limited It will be seen, therefore, that by admission of the solicitors for the plaintiffs the two actions are brought by two different plaintiffs in respect of precisely the same people, they being ascertained not by anything appearing on the record, but by the letter in question. It is not pretended by the plaintiffs that these are the whole of the firms who shipped by the *Knight Commander*. On the contrary, we were informed by counsel that they were only (so far as the plaintiffs' knowledge extended) the firms that had shipped goods free from the objection that they were either absolute or conditional contraband. No reference, however, is made to this principle of selection either in the letter or in the writ, nor is there any evidence or admission that the facts are as thus suggested. It will be seen, further, that the firms in the list carry on business some in Japan, some in the United States of America, and some in England and elsewhere. On behalf of this list of people, constituting, so far as can be gathered from the record, no specific class, but merely a collection of individuals identified by their names appearing in a list contained in a letter from the plaintiffs to the defendants, the plaintiffs each in his own action propose in a representative capacity to make claims for damage. It can hardly admit of doubt that these two writs as they stand are hopelessly bad. In the first place, it is essential in the case of representative actions that the class on behalf of which the relief is sought should be defined in the writ. It is impossible for the court to give any judgment as to the rights of parties by virtue of their being members of a class without its being defined what constitutes membership of the class. A mere list tells the court nothing, more especially when that list does not appear on the record. If such an action as this could possibly go to trial, the case of each firm whose name appears in the list would have to be gone into in order to ascertain the facts relating to it, so that the court might be able to pronounce whether and why its name should be included in such list. In other words, it would not be a representative action at all. If judgment were given upon such a writ as this, no estoppel could arise either for or against the defendants without each case being individually examined into. But there is another objection which, to my mind, is absolutely fatal. I will take for this purpose the most authoritative statement of the case in which representative actions can be brought—that is, the statement of Lord Macnaghten in the case of *Duke of Bedford* v. *Ellis and others* in the House of Lords. It is as follows: "Given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent." These words show that where the claim of the plaintiff is for damages, the machinery of a representative suit is absolutely inapplicable. The relief that he is seeking is a personal relief applicable to him alone, and does not benefit in any way the class for whom he purports to be bringing the action.

It is suggested, however, that this difficulty could be got over by amendment of the writ so that the plaintiffs would be described something in the following fashion: "The plaintiffs Markt and Co. Limited on behalf of themselves and all other owners of cargo lately shipped on board the steamship *Knight Commander* other than such as shipped goods which were absolute or conditional contraband." Plaintiffs' counsel showed no willingness to accede to any such suggestion, but no doubt would prefer to amend his writs in this fashion rather than that the writs should be set aside so far as they are representative in character. I will therefore consider the case assuming this alteration to have been made. There are two modes in which actions may be brought to establish the individual rights of several persons in one and the same action. The one mode is by joining them as plaintiffs; the other is by one or more bringing a representative action in respect of all of them. These modes of procedure are entirely distinct in character, and the cases in which they are applicable are widely different, and are laid down in separate and distinct rules—the former in Order XVI., r. 1, and the latter in Order XVI., r. 9. The relation of the parties interested to the conduct of the action differs widely in the two cases, as does also the effect of the judgment. It is, to my mind, a confusion between these two modes of procedure, which have nothing to do with each other, that has led to the issue of these two writs which we have here to consider. The joinder as plaintiffs in one action of persons who are suing in respect of several rights claimed to belong to them individually is substantially a creation of the Judicature Acts and the rule made under them. Under the old practice at common law plaintiffs suing for individual relief had in general to bring individual actions. But it is evident that in some cases such actions must to a great extent be mere repetitions one of the other, and therefore, to avoid unnecessary expense, various devices were resorted to, even before the Judicature Acts, by which the result of one action was made to govern the rights of many plaintiffs, as, for instance, the selection of one of the actions as a test action. But it was rarely that any such method could be applied except with the consent of all parties, and this was felt to be an evil which needed to be remedied. Accordingly, Order XVI., r. 1, was framed. In its original form it

was held by the House of Lords not to apply to the joinder of plaintiffs with the object of enforcing separate causes of action in one and the same action. Accordingly, the form of the rule was altered, and now it clearly gives distinct plaintiffs in certain cases the right to unite as plaintiffs in one action to enforce separate rights of action belonging to them individually and not jointly. The cases in which this can be done are exhaustively enumerated in the rule by virtue of the alterations made therein; for, by the decision of the House of Lords to which I have referred, no right so to join different plaintiffs suing in respect of different causes of actions existed while the rule was in its original state. The rule reads as follows: "All persons may be joined in one action as plaintiffs in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally, or in the alternative, where if such persons brought separate actions any common questions of law or fact would arise." Then follows a proviso giving to the court a power of modifying the procedure if it shall appear that such joinder may embarrass or delay the trial of the actions. Judgment may be given for such of the plaintiffs as succeed, and the defendant is protected with regard to the costs which relate to the plaintiffs who are unsuccessful. This makes it clear that (subject to the control of the court) persons can unite as plaintiffs though seeking individual relief in cases where the investigation would to a great extent be identical in each individual case. The policy of the rule is to avoid needless expense where it can be done without doing injustice to anyone. And it carries out its object. No plaintiff can complain, for he cannot be made a plaintiff without his consent, so that, if he avails himself of the rule, it is because he desires so to do. The defendant has no cause to complain, because the plaintiffs are liable for his costs if he succeeds, and he has just the same right in the action as against each plaintiff as if a separate action had been brought against him by that plaintiff. No doubt there are cases in which he might be placed at a disadvantage by reason of the operation of laws of evidence, but in such cases the court can protect him from such an application of the rule as would work injustice. Now, I am far from saying that Order XVI, r. 1, might not be applied to such a case as the one to which the present actions relate, or that two or more owners of goods on board the *Knight Commander* might not unite in bringing an action against the owners of the ship in respect of the loss of their goods. But the parties interested decline to take this which is the proper course. The reasons are obvious and, to my mind, they bring into prominence the justice of the rule. If such parties do unite as plaintiffs, they must accept the ordinary responsibilities of plaintiffs. They would be liable for costs in case of failure; possibly they might have to give security for costs if not resident or carrying on business in this country; they could, if necessary, be ordered to give discovery or to answer interrogatories; and, in short, they would so jointly evade none of the rights or privileges which the defendants would as litigants possess if separate actions had been brought by each plaintiff. But they would not in any way be penalised. They would have to establish their individual rights against the defendants as in separate actions, but nothing more; and the investigation and discussion of their claims, so far as they applied to all the cases, would take place once for all, and thus expense would be saved. Seeing that their rights against the owners of the ship are in virtue of contracts separately made by each, and that the only common element is the partial identity in the alleged facts which must be established and in the arguments which must be adduced to support their several claims, they certainly cannot in justice to the defendants deserve further advantage than they would obtain by such a joinder, and the fact that they are not content therewith prepares me to expect that what they seek to do will be found to be in some way unfair to the defendants. Representative actions are now regulated by Order XVI., r. 9. They originated in the Court of Chancery, and were of common occurrence in that court prior to the date of the Judicature Acts. There is no doubt that by Order XVI., r. 9, the procedure by representative action is extended to the common law side of the Supreme Court. But here a word of caution is necessary. In extending it the rule also formulates it. It may or may not accurately express the practice of the Court of Chancery at that date, but that is immaterial. It is the language of the rule that governs us now, and even if cases could be found in which the Court of Chancery would have applied the procedure in cases not within the language of the rule, that would not affect the present practice in any branch of the Supreme Court. The rule defined what was in future to be the practice of the Supreme Court, and it is, to my mind, immaterial whether on a consideration of the older decisions we are of opinion that in thus laying down the future practice it limited or enlarged or left unchanged the existing practice. We are bound to take the rule as a statutable formula of the practice and thus as a new point of departure. Rule 9 reads as follows: "Where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued, or may be authorised by the court or a judge to defend in such cause or matter, on behalf or for the benefit of all persons so interested." Nothing could be more striking than the contrast between the language of this rule and of rule 1. The reason is obvious. In cases under rule 1 all the parties have the status and responsibilities of ordinary litigants, and the plaintiffs are such by their own consent. In representative actions it is wholly different. The plaintiff is the self-elected representative of the others. He has not to obtain their consent. It is true that consequently they are not liable for costs, but they will be bound by the estoppel created by the decision. The differences from the point of view of the defendant are equally striking. Those on whose behalf the action (so far as it is a representative action) is brought are not responsible for the costs, and are not subject to the ordinary liabilities of litigants in respect of discovery. The language of the rule appears to me to present no difficulties of construction and to make clear the limitations of its scope. They answer in all respects to what one would expect from the

considerations to which I have referred. The essential conditions of a representative action are that the persons who are to be represented have the same interests as the plaintiff in one cause or matter. There must therefore be a common interest alike in the sense that the subject and its relation to that subject must be the same. As I have already stated, Lord Macnaghten phrases it thus: "Given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent." Whether we start from the language of the rule or from this authoritative interpretation of it the present actions, even if the writs be amended as suggested, fail in every particular to answer the necessary conditions of a representative action.

Counsel for the plaintiff suggests that the people in the list are in similar circumstances because they shipped goods under similar bills of lading in the same ship. Assuming for the sake of argument that this is so (although nothing of the kind appears on the record), each of these parties made a separate contract of shipment in respect of different goods entitling him to its performance by the defendants and to damages in case of non-performance. It may be that the claims are alike in nature, and that the litigation in respect of them will have much in common. But they are in no ways connected; there is no common interest. Defences may exist against some of the shippers which do not exist against the others, such as estoppel, set-off, &c., so that no representative action can settle the rights of the individual member of the class. But that which to my mind most strikingly indicates the fundamental error of the suggestion that the circstances of these cases justify a representative action is that I can conceive no excuse for allowing any one shipper to conduct litigation on behalf of another without his leave and yet so as to bind him. The proper domain of a representative action is where there are like rights against a common fund, or where a class of people have a community of interest in some subject-matter. Here there is nothing of the kind. The defendants have made separate contracts which may or may not be identical in form with different persons. And that is all. To my mind, it is impossible to say that mere identity of form of a contract or similarity in the circumstances under which it has to be performed satisfies the language of rule 9. It is entirely contrary to the spirit of judicial procedure to allow one person to interfere with another man's contract where he has no common interest. And to hold that by any procedure a third person can create an estoppel in respect of a contract to which he is not a party merely because he is desirous of litigating his own rights under a contract similar in form, but having no relation whatever to the subject-matter of the other contract, is in my opinion at variance with the whole system of procedure and is certainly not permitted by rule 9. But the writs, even as proposed to be amended, fail to comply with Lord Macnaghten's interpretation of the rule in another and most essential particular. The relief sought is damages. Damages are personal only. To my mind, no representative action can lie where the sole relief sought is damages, because they have to be proved separately in the case of each plaintiff, and all question of representation ceases. It is true that in *Duke of Bedford* v. *Ellis and others* (*sup.*) there was the claim for damages, but that was only a personal claim by the named plaintiffs, and it was solely on that ground that the action was held to be well framed so far as damages were concerned. The claims here are necessarily claims for damages only, and therefore no representative action can be brought. To hold that a representative action can be brought in a case where the causes are mere independent actions for damages arising out of one and the same set of circumstances would be to confound rule 1 with rule 9, and, as I have said, the language of these two rules shows that they are intended to have wholly different applications. As I have said, in my opinion we have to consider the language of rule 9 and be guided by it, and we are not justified in treating the earlier Chancery decisions as being authorities if they would extend or limit the ambit of the rule according to its natural construction. But I have examined all the cases in Chancery to which we were referred, and I can find in no one of them the slightest justification for bringing a representative action under such circumstances as in the present case. The case that goes the furthest is *Beeching* v. *Lloyd* (*sup.*). In that case it was alleged that subscriptions to a projected company had been obtained by gross fraud. The subscribers had paid sums into a certain banking house in respect of the shares subscribed for them, and a representative action was brought by two of the subscribers on behalf of themselves and the other subscribers to have the deposits returned to them. It appeared that the money contributed was partly applied in paying for an estate called the Kennington Estate, and Kindersley. V.C. held that, if that were established, there might be a common fund which might be applicable towards satisfaction of the plaintiffs' demands. He accordingly overruled the demurrer to the bill specifically on this ground alone, without deciding whether the action was maintainable otherwise. So far from this giving countenance to the plaintiffs' arguments in the present case, it emphasises the necessity that there should be a common fund against which the parties represented have claims if the procedure of a representative action is to be used. Finally, it is suggested that the difficulty can be got over by substituting for the claim for damages a claim for a declaration that persons shipping non-contraband goods are entitled to damages from the owners of the vessel under the circumstances of the case. To the best of my knowledge, no declaration of this type has ever been made by an English court, and it appears to me to be contrary to their practice. They do not permit a plain claim for damages to be split up into an abstract proposition of this kind. Each plaintiff has to prove the whole of his case. But, even if such a declaration were made, it would not, in my opinion, affect the purpose of the plaintiffs. A declaration by the court has no further effect than an admission by the parties; the Statute of Limitations would run from the original cause of action, and not from the date of the admission. For all these reasons I am of opinion that the writs before us are bad so far as they purport to be representative, and that they cannot be cured by any amendment, and that therefore this appeal

should be allowed with costs here and below. If the plaintiffs choose to proceed with the actions as personal actions on behalf of the named plaintiffs they can do so, but of course that does not affect the question of costs.

BUCKLEY, L.J.—In the year 1904 numerous persons and firms, amounting in the aggregate to some forty-five in number, shipped goods upon the steamship *Knight Commander*, on a voyage from New York to certain ports, including Yokohama and Kobe. When off Yokohama the *Knight Commander* was captured and sunk by Russian cruisers on the alleged ground that she was carrying contraband of war to Japan. The plaintiffs named in the writs allege that the defendants, the owners of the steamship, are liable for damages for breach of contract and duty in and about the carriage of their goods, and each of the other forty-four persons and firms makes similar claims in respect of their goods. The claimants have not issued, as they might have forty-five writs. They have issued two writs, each of them expressed to be a writ in a representative action, and Mr. Bailhache has explained to us that the intent of the two writs (whether adequately expressed or not) is that the one shall be the writ in an action in which the plaintiffs are representative of all owners of goods shipped upon the vessel not being shippers of contraband goods, and the other representative of all owners of goods shipped on the vessel, including shippers of contraband goods. The two writs were issued on the 5th May, and on the same day the plaintiffs sent to the defendants' solicitors a letter giving the names and addresses of all the persons and firms on whose behalf they claimed. The question before the court does not arise in the usual form. Commonly the point is that, forty-five writs having been issued, an application is made by the defendants to consolidate them, or to stay forty-four of them until the forty-fifth has been tried. There are here but two writs, and the defendants' complaint is that there are not forty-five. This is an objection which the plaintiffs might easily meet by issuing further numerous writs, but the Statute of Limitations has or may have run since these two writs were issued, and the point of substance is or may be whether these writs should be set aside or limited to the claims of the named plaintiffs alone, with the result that all the other represented plaintiffs shall become barred by the Statute of Limitations. There is, no doubt, a difficulty in sustaining the writs in their present form, but in my opinion an order ought not to be made to set the writs aside if by amendment they can be put in such a form as to render the actions proper representative actions within the rules. The question before the court arises upon Order XVI., r. 9, and not upon Order XVI., r. 1. But considerations with reference to Order XVI., r. 1, are, in my opinion, not irrelevant. Order XVI., r. 1, is a rule which allows of the joinder of several persons as co-plaintiffs. Under that rule many named persons may be in the circumstances mentioned in the rule joined as co-plaintiffs in respect of several rights to relief. Order XVI. r. 9, is a rule which allows one named person to sue as representing both himself and numerous other persons. The purpose and intention of rule 9 was to apply to all divisions of the High Court the practice which had prevailed in the Court of Chancery when the parties were so numerous that you never could "come at justice" if everybody interested was made a party: (per Lord Macnaghten in *Duke of Bedford* v. *Ellis and others* (*sup.*). *Taff Vale Railway Company* v. *Amalgamated Society of Railway Servants* (85 L. T. Rep. 147; (1901) A. C. 426) was a case in which the matter arose in the form of the question whether an unincorporated society could be sued by its collective name. Lord Lindley there said, at p. 151: "The rules as to parties to common law actions were too rigid for practical purposes when those rules had to be applied to such (*i.e.*, unincorporated) societies. But the rules as to parties to suits in equity were not the same as those which governed courts of common law, and were long since adapted to meet the difficulties presented by a multiplicity of persons interested in the subject-matter of litigation. Some of such persons were allowed to sue and be sued on behalf of themselves and all others having the same interest. This was done avowedly to prevent a failure of justice: (see *Meux* v. *Malby*, 2 Swanst. 277, and the observations of Jessel, M.R. in *Commissioners of Sewers* v. *Gellatly*, 3 Ch. Div. 615). The principle on which the rule is based forbids its restriction to cases for which an exact precedent can be found in the reports. The principle is as applicable to new cases as to old, and ought to be applied to the exingencies of modern life as occasion requires." It is, of course, no objection to a representative action that the rights as between each of the representated plaintiffs and the defendant arises under a separate contract made by one plaintiff with the defendants to which no other of the plaintiffs is a party. That is so in most if not in every representative action. When one creditor sues on behalf of himself and all other creditors for administration, the debt of each represented creditor arose, of course, under a contract to which no other of his co-plaintiffs was a party. The question is not whether there are numerous separate contracts. "To justify a person suing in a representative character, it is enough that he has a common interest with those whom he claims to represent": (per Lord Macnaghten (1901) A.C., at p. 9). "Given a common interest and a common grievance, a representative suit was in order if the relief enough was in its nature beneficial to all whom the plaintiff professed to represent": (per Lord Macnaghten, *ibid.*, p. 8). It may be, and I think it is, the case that in a representative action the plaintiff must be in a position to claim some relief which is common to all, but it is no objection that he claims also relief personal to himself. In a creditor's action for administration the plaintiff claims administration for the benefit of all, but it results in relief to himself and to every represented creditor severally. Many representative actions are actions in which the represented parties all have a common right against property—*e.g.*, where one debenture-holder sues on behalf of himself and all others to enforce a security which enures for the benefit of all. But it is not necessary that the parties shall have a common right against property. The creditor who sues on behalf of himself and all other creditors for administration is not enforcing a right against property on which he has a security. At the same time, it is true that he is enforcing the right of himself and others to be paid out of the deceased's assets, and in that sense he is enforcing

rights against a fund. But in the Court of Chancery the rule did not stop here. In *Beeching* v. *Lloyd* (*sup.*) Kindersley, V.C. overruled the demurrer on two grounds. The first was that there was an allegation sufficient to support a claim against a common fund which might be applicable towards satisfaction of the plaintiff's demand. With this I am not concerned. But the second, which he calls the main ground of demurrer, was a claim by the plaintiffs for themselves and all others who had paid deposits in respect of the subscription for certain shares to recover from six gentlemen, on the ground of fraud, moneys which the defendants had received to be put into the common stock of a projected joint-stock company. The Vice-Chancellor rested his decision upon the ground that there was a common purpose in several leaders if the subscriptions of all were to go into a common stock. His decision affirmed the proposition that a common purpose in advancing money which is to go into a joint-stock fund justifies a representative action to render defendants personally liable, notwithstanding that the remedy sought is a personal judgment against them, and not the enforcement of rights against that common fund or any common fund. In *Duke of Bedford* v. *Ellis and others* Lord Halsbury and Lord Brampton dissented from the judgment of the majority of the House, but there is a paragraph in Lord Brampton's judgment, to which Lord Halsbury assented, from which it seems to me plain that even the dissenting Lords in that case would have decided this case in favour of the view which I am taking. In that case there were four plaintiffs—Ellis, Gray, Miller, and Ashby—who claimed certain rights as tenants of yearly cart stands. There were other plaintiffs—Pullinger and Peacock—who claimed as tenants in respect of yearly pitching stands. The passage to which I refer, and which I will read in a moment, affirms that the four persons first named were rightly joined and could rightly sue in a representative action, and that the same was true of the latter two, but that the claim of the four and the claim of the two could not be combined in one action—that the action must be confined to either the one or the other. But the passage affirms that as to the one class the claim ought to stand. The passage is as follows: "As regards claim No. 2, relating to the yearly cart stands, the four plaintiffs—Ellis, Gray, Miller, and Ashby—have undoubtedly stated separate causes of action in respect of which they have jointly claimed a declaration; they have also claimed injunctions and separate accounts and repayment of excessive charges. They clearly are rightly joined. The same common question would have arisen if they had brought separate actions." So far this is a case under Order XVI., r. 1, and affirms that these four plaintiffs could combine in respect of separate causes of action in which they jointly claimed a declaration, but claimed separate accounts and repayment of excessive charges made on each of them respectively. Lord Brampton then goes on: "They are also entitled to sue on behalf of all other growers having the same interest in one cause or matter—that is to say, the preferential rights they claim to be accepted as tenants of yearly cart stands as described in sect. 7 of this Act." This passage relates to the right to sue under Order XVI., r. 9 and affirms that these plaintiffs could under that rule sue on behalf of all other growers on the ground that they had within the words of rule 9 the same interest in one cause or matter.

To apply this to the present case. On the question whether the owners of the *Knight Commander* committed a breach of contract or duty in shipping on the vessel goods which were contraband of war, all shippers of goods which were not contraband of war have the same interest. It is not accurate to say that they have a similar interest. They have exactly the same interest, although it will result in the case of each of them in a different measure of relief. In *Beeching* v. *Lloyd* (*sup.*) the common purpose or object (the Vice-Chancellor uses both words) was to contribute to the joint stock of the company to which all the represented parties intended to subscribe. In this case the purpose or object of each and all of the shippers was to consign their goods by a vessel which should observe the duty of not shipping also goods which were contraband of war—a duty which her owners owed to all such shippers alike. Cargo owners on a general ship are not partners, but they have a common interest in the ship on which their goods are carried. In respect of that interest they are in a position to claim relief which is common to all of them. They can claim a declaration that the defendants are liable to the plaintiffs and those on whose behalf they sue for breach of contract and of duty in shipping contraband of war. In respect of that liability which exists towards all, each is entitled severally to relief which exists only towards himself. Supposing that declaration be made, the named plaintiffs, say Markt and Co. Limited, can recover the damages to which they are entitled. To enable the represented firms to recover the damage which upon the footing of the declaration may be recoverable by them requires, no doubt, further steps such as are always necessary in a representative action to give to the represented parties the particular relief to which each is entitled in respect of the common relief which is for the benefit of all. Subsequently proceedings would be necessary, and in these it would be open to the defendants to contend that as regards any particular plaintiff by representation he was for some reason personal to himself not entitled to recover. Such difficulties always occur in every representative action. The purpose of Order XVI., r. 9, was, I think, to extend to common law actions the flexibility which had for many years been enjoyed in actions in the Court of Chancery. If I may so respectfully, I wholly agree with Lord Lindley that the principle upon which the rule is based forbids its restriction to cases for which an exact precedent can be found in the reports. This seems to me to be exactly a case in which the spirit—nay, more, the words—of Order XVI., r. 9, justify, and good sense requires, that the principle should be extended to a case for which I daresay no precedent is exactly to be found. If the writ in Markt and Co.'s action were amended so that the plaintiffs should be expressed to be Markt and Co. Limited on behalf of themselves and all others the owners of cargo lately taken on board the steamship *Knight Commander* not being shippers of goods which were contraband of war, and the

indorsement were amended so as to ask for a declaration that the defendants were liable to the plaintiffs and those on whose behalf they sue for breach of contract and (or) duty in and about the carriage of goods by sea and for damages, that writ would, I think, be good within Order XVI., r. 9. The same would be true with the writ in the other action if that were similarly amended, but expressing the represented class to be owners of goods shipped, including shippers of goods which were contraband of war. The course which the court ought to take in my opinion is to offer the plaintiffs an opportunity of amending their writs in those respects, and, upon their electing so to do, to dismiss these appeals.

Appeals allowed.

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

Solicitors for the defendants, *Rawle, Johnstone*, and *Co.*, agents for *Laces, Wilson, Todd, Stone, Fletcher*, and *Hull*, Liverpool.

June 29, 30, *and July* 8, 1910.

(Before Cozens-Hardy, M.R., Farwell and Kennedy, L.JJ.)

Moel Tryvan Shipping Company Limited *v.* Andrew Weir and Co. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Charter-party—Cancelling clause—Non-arrival at fixed date—Date when option to cancel must be exercised.

A charter-party provided, "The charterers or their agents have the option of cancelling this charter-party provided the ship is not arrived as within described at a loading port on a certain date."

Shortly before that date the charterers were informed by the shipowners that the ship was detained and could not arrive by the cancelling date, and they were asked to state whether they would exercise their option to cancel or not. This they refused to do, and required the shipowners to send the ship to the loading port in accordance with the charter-party.

The ship arrived late, when the charterers exercised their option to cancel, and refused to load her.

Held, that the charterers were entitled to exercise the option to cancel on the arrival of the ship at the loading port, and were not bound to do so before.

Decision of Bray, J. (11 *Asp. Mar. Law Cas.* 342 (1909); 101 *L. T. Rep.* 955) *affirmed.*

Appeal from a decision of Bray, J. at the Liverpool Assizes.

The facts are sufficiently stated in the head-note and in the judgments of the Court of Appeal.

Horridge, K.C. and *Keogh* for the appellants.—As no date is fixed for the exercise of the option, it is implied by law that it must be exercised reasonably. Those American authorities which are not in favour of the appellants are founded on a misapprehension of *Shubrick* v. *Salmon* (3 Burr. 1637). In that case the cancelling clause expressly provided that the charterer might exercise his option after the vessel had arrived. In *The Progreso* (50 Fed. Rep. 835) the clause provided when the option was to be exercised. Again, in *The Samuel Hall* (49 Fed. Rep. 281) the judge proceeds on a misconception of that case. The statement in Carver on Carriage by Sea, sect. 222, which is in favour of the respondents, proceeds on the same misapprehension of that case. The note in Scrutton on Charter-parties, 5th edit., p. 87, is in favour of the appellants. The only English authority is *Bucknall* v. *Tatem* (9 Asp. Mar. Law Cas. 127 (1900); 83 L. T. Rep. 121), and the remarks there on this point are *obiter*. The defendants have no right to read into the cancelling clause "after arrival," and such a case as this forms no exception to the general rule of law that options must be exercised within a reasonable time. If the charter-party is not cancelled before the arrival of the ship at the port, and it is the duty of the plaintiffs to send her there, when she arrives it is the duty of the defendants to fill her. When the date of the option to cancel the charter has passed, the only question is what is a reasonable time to be allowed to the charterers to cancel it. They also referred to

Karran v. *Peabody*, 145 Fed. Rep. 166;
Mercantile Steamship Company Limited v. *Tyser*, 5 Asp. Mar. Law Cas. 6, note (1881); 7 Q. B. Div. 73;
Tharsis Sulphur and Copper Company v. *Morel*, 7 Asp. Mar. Law Cas. 106 (1891); 65 L. T. Rep. 659; (1891) 2 Q. B. 647, 650, 652;
Adamson v. *Newcastle Steamship Freight Insurance Company*, 4 Asp. Mar. Law Cas. 150 (1879); 41 L. T. Rep. 160; 4 Q. B. Div. 462, 468.

Leslie Scott, K.C. and *W. Norman Raeburn* for the defendants.—The shipowner must insert words in the charter-party to protect himself, and there is nothing about exercising the option to cancel within a reasonable time in this one. The charterer is not bound, as Lord Bowen said in *Tharsis Sulphur and Copper Company* v. *Morel* (*ubi sup.*), to consider the benefit or otherwise of the other party. The plaintiffs are seeking to read into the cancellation clause a term which is not expressed, but in *Hamlyn and Co.* v. *Wood and Co.* (65 L. T. Rep. 286; (1891) 2 Q. B. 488, 491) Lord Esher said the court will not imply a term in a written contract unless, on considering the terms of the contract in a reasonable and business manner, an implication necessarily arises that the parties must have intended that the suggested stipulation should exist, and he then referred to the judgment of Bowen, L.J. in *The Moorcock*, 6 Asp. Mar. Law Cas. 357, 373 (1889); 60 L. T. Rep. 654; 14 P. Div. 64, 68). The reasonable time for exercising the option was from the 15th Dec. to forty-eight hours after the arrival of the vessel, for the charter party provides that loading must commence within forty-eight hours after the arrival:

Hick v. *Raymond*, 7 Asp. Mar. Law. Cas. 23, 97, 233 (1892); 68 L. T. Rep. 175; (1893) A. C. 22;
Thorn v. *Mayor, &c., of London*, 34 L. T. Rep. 545; L. Rep. 10 Ex. 112, 123.

Horridge, K.C. in reply. *Cur. adv. vult.*

Cozens-Hardy, M.R.—This appeal raises one point, said to be of general importance and not covered by any English authority, whether under an ordinary cancelling clause shipowners can require charterers to exercise the option before the ship arrives at the loading port. The plaintiff

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

are the owners of the sailing ship *Langdale*. The defendants are the charterers. By the charter-party, dated the 18th March 1907, it was provided that the ship should with all convenient speed, after discharge of cargo on the West Coast of South America, sail and proceed to Newcastle, New South Wales, and there load a full cargo of coal which the charterers bound themselves to ship. And after the usual clauses excepting certain perils and providing for freight at the rate of 23s. per ton, there was a cancelling clause in the following words: "The charterers or their agents have the option of cancelling this charter-party provided the ship is not arrived as within described at Newcastle, New South Wales, by the 15th Dec. 1907." The ship was delayed by bad weather or other circumstances not due to any default on the part of the plaintiffs, and the charterers were asked, when it was manifest that the ship could not arrive before the 15th Dec., and again after that date had passed and the ship was still on the West Coast of South America, to say whether they intended to cancel the charter. The charterers declined to say anything before the ship arrived. The ship did not arrive until the 15th June 1908, on which day the charterers gave notice that they cancelled the charter. The shipowners sue the charterers for breach of contract in not loading her when she arrived, and assert that the option to cancel could only be exercised within a reasonable time after it was known that the ship could not arrive by the named date. The charterers rely upon the cancellation on the 15th June. Bray, J. has given judgment in favour of the charterers, and, in my opinion, his decision was right. Under the charter-party the shipowners were bound to take their ship to Newcastle, however much behind time it might arrive. If it arrived before the 15th Dec. the charterers were bound to load. If it arrived after that date the charterers were not bound to load, though they had the right to load. Whether they should load or not would depend upon whether on the arrival of the ship freights had risen or fallen, and also upon whether they had a cargo ready. The cancelling clause is obviously inserted for the exclusive benefit of the charterers, and I fail to see how as a matter of business the charterers can tell whether it will be to their interests to cancel before the arrival of the ship. I decline to hold that there is any implied condition that the option shall be exercised within a reasonable time after the cancelling date. This is in accordance with the view taken by the American courts. Bray, J. so fully discusses the English and American authorities that it would be a waste of time for me to repeat what he said. The appeal must be dismissed with costs.

Farwell, L.J.—I am of opinion that on the true construction of this charter-party, taken as a whole, the parties have expressed, not, indeed, in so many words, but with reasonable clearness, the limits of time within which the power of cancellation is to be exercised by the charterers. The objective point of the contract is Newcastle, N.S.W.; the ship is to sail and proceed there, and when she is there the charterers are to ship on her a full cargo of coal. The ship is consigned to the charterers' agents at Newcastle, N.S.W., and, although she is not bound to arrive by any given date, so that the shipowners are not liable for breach of contract if she fails, yet non-arrival by the 15th Dec. 1907 is treated as default by the shipowners, and thereupon the charterers are entitled to cancel the contract, and this power of cancellation is given to the charterers or their agents—*i.e.*, their agents to whom she is assigned at Newcastle. The material circumstances which will guide the charterers in exercising their option to cancel or not will obviously be the state of the markets, the rate of freights, and the like when the ship arrives at Newcastle. The charterers are entitled by the express words of the contract to exercise their option by their agents there, with whom such knowledge would be. The non-arrival on the 15th Dec. while the ship is somewhere in mid-ocean may and probably will be immaterial; it is impossible to predicate on that day what the state of things in Newcastle will be on that unknown day in the future at which the ship will actually arrive there. I am therefore of opinion that the period during which the option is to be exercised extends from the 15th Dec. until twenty-four hours after the vessel has completed her discharge at Newcastle, being the period at which the lay days began under the charter-party, and that Bray, J. was right in the conclusion at which he arrived. It follows that, as this is the true construction of the contract, no question of reasonable time arises. If the contract were silent as to the period of time within which the charterers were to exercise the option, then I think it clear that there would be an implied term that the option should be exercised within a reasonable time, it cannot be exercisable only on the 15th Dec., and, if so, this would be a question of fact for the jury. But I may add that it is difficult to see how a jury if properly directed, under ordinary circumstances such as the present, could fail to come to the same conclusion as to the reasonable time that I have come to on the construction of the charter-party. They would be directed that the charterers were entitled to a reasonable time in which to ascertain the relevant facts necessary to enable them to make up their minds; that they were not bound to consider the shipowners' interests, but their own only (see *Tharsis Sulphur and Copper Company* v. *Morel*, *ubi sup.*; *Scarf* v. *Jardine*, *ubi sup.*); and that the shipowner is bound to send his ship to Newcastle unless the charterer elects not to require it: (*Shubrick* v. *Salmon*, 3 Burr. 1637). This appeal fails, and therefore should be dismissed with costs.

Kennedy, L J.—I am of opinion that the considered judgment of my brother Bray, J. in favour of the defendants ought to be affirmed, and I have but little to add to the expression of my general concurrence in the reasons which he has given for his conclusion. The contractual obligation of the shipowners, the plaintiffs in this action, is clear. They are bound to see that their ship, unless prevented by certain excepted causes and perils, proceeds to Newcastle, New South Wales, the named port of loading in Australia, and is there placed at the disposal of the charterers. The corresponding and correlative right of the shipowners is also clear. It is to have their ship loaded by the charterers after her arrival at the loading port as and with the cargo and within the time fixed by the charter-party, subject always to a stipulated risk of defeasance —viz., that if the ship's arrival is delayed beyond

an agreed date, the charterers' obligation to load thereupon ceases to be enforceable against them. In that event they may load or not load the ship as they please. I seek in vain for any words in the cancelling clause or elsewhere in the charter-party which entitle the shipowners to say that the charterers are not to have the full benefit of the undertaking of the shipowners that their ship shall proceed to the port of loading because the ship fails to get there at a named date. But they cannot get the full benefit if they are called upon to decide at any moment before the ship is at their disposal at the loading port. The contractual duty of the shipowner to proceed to the port of loading does not cease because, before the ship arrives there, the day comes after which, if the ship has not arrived, the charterers' contractual duty to load her, when she does arrive, is converted, by the special clause of the charter-party, into a matter of their free choice. In fact, the plaintiffs in this case at one stage attempted to take up this position, but under good advice abandoned it; and their counsel, on the hearing of the appeal before us, expressly disclaimed any such contention. But it is contended by the plaintiffs' counsel that if, after the date named in the cancelling clause has arrived, but the ship has not, the charterers decline within some period which is described as a "reasonable time" to answer an inquiry whether when the ship arrives the charterers will load her or not, the charterers become bound, whenever she arrives, to load her under the charter-party, and to pay, of course, the chartered freight. I agree with Bray, J. that from the mercantile point of view so vague a stipulation as that of "a reasonable time" under which in some way the conflicting interests of shipowner and charterer are to be harmonised, and under which the charterer, as, indeed, is the present case, would be asked to anticipate, days and weeks, or, possibly, months ahead, what his interests might be when the ship arrives, would certainly be deemed unpractical and unbusinesslike. But what we have to consider is the proper legal meaning of this contract; and I can see no justification from this standpoint for reading into this contract a limitation of the exercise of the charterers' option such as counsel has argued for. It seems to me that the cancelling clause, read, as it must be, with the rest of the contract of which it only forms part, itself supplies the period within which the charterers' choice must be exercised, viz., the named date as the commencement and as the termination—the date after the ship's arrival at which the ship's right to require the charterers to load her commences under the provisions of the charter-party as to her loading.

If I am right in this view, there is no room for an implication of a duty on the charterers' part to exercise their right of option within "a reasonable time" (whatever that might be construed to mean) after the date has been reached which ends the absolute right of the owner of the ship to have his ship loaded when she arrives at Newcastle. The law reads into a contract a reasonable time for an act—be it for giving of a notice, or doing a work, or paying money, or exercising an option—where the intention of the parties to a contract, which has fixed no time, either expressly or by just implication, must be presumed to have included such an implication. There is no room for it otherwise, and here, as I have already pointed out, the contract itself giving the charterers the right to have the ship proceed to Newcastle, and also the right, if she does not arrive by a certain day, to refuse to load her, and fixing the time after her arrival when, unless the charterers decide not to load at all, they must begin to load, has itself given the range of time within which the charterers may exercise their option. The only judicial authorities extant upon the exact point raised by these plaintiffs, the American decisions, are entirely in accord with my view. Counsel for the plaintiffs seemed to invoke the aid of certain dicta in the judgment of Lush, J. (the dissentient judge) in *Adamson* v. *Newcastle Steamship Freight Insurance Company* (*ubi sup.*). That judgment proceeded upon the view, which Cockburn, C.J. and Manisty, J. rejected, that according to the true construction of that charter-party the contract did not terminate upon the happening of a certain event, but that each of the parties, charterer and shipowner, had an option on the happening of that event to cancel the charter-party; and, in the passage referred to, Lush, J. was evidently pointing out that, in the circumstances, if either of them sought to take advantage of the option, he ought to say so within a reasonable time after the right arose, because otherwise he would very likely mislead the other party, who also had a right of option under the same clause, and who might be induced by this silence to incur many expenses and difficulties. Under the charter-party each of the two contracting parties had rights of cancellation the exercise of which had to be adjusted. The charterers in the present case have not to consider any corresponding right of the shipowners, for the shipowners have no right of cancellation, and are bound to see that their ship proceeds to the loading port. The dicta referred to appear to me to have no application to the very different relation created by the particular contract of charter-party in the present case.

Solicitors: *Walker, Son,* and *Field,* agents for *Weightman, Pedder,* and *Co.,* Liverpool; *William A. Crump* and *Son.*

June 9, 13, 14, 15, 16, *and July* 28, 1910.

(Before Vaughan Williams, Fletcher Moulton, and Buckley, L.JJ.)

Denaby and Cadeby Main Collieries Limited v. Anson. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Harbour—Port of Portland—Rights of Crown—Mooring coal hulk—Right of navigation.

Members of the public are not entitled to keep a floating hulk or coal depot permanently in Portland Harbour for the purpose of bunkering ships with coal, even though they cause no obstruction to navigation. Such an act cannot be justified as an act incidental to navigation.

Decision of A. T. Lawrence, J. (11 *Asp. Mar. Law Cas.* 348 (1910); 102 *L. T. Rep.* 76) *affirmed.*

Appeal by the plaintiffs from a judgment of A. T. Lawrence, J. at the trial of the action without a jury.

(a) Reported by Edward J. M. Chaplin, Esq., Barrister-at-Law

The action was brought by the plaintiffs claiming an injunction to restrain the defendant, Captain C. E. Anson, R.N., harbourmaster of the port of Portland, from seizing, taking possession of, or trespassing upon the plaintiffs' steamship *Persia*, lying at her own anchors in Portland Harbour, within the area appropriated to merchant shipping, or from removing her therefrom.

By the points of defence it was alleged that in Feb. 1903 regulations were made by Order in Council, pursuant to the Dockyard Ports Regulation Act 1865, by which it was provided (*inter alia*) that moorings for private vessels might be laid with the written permission of the King's Harbourmaster, but were to be removed on his requisition, and that all merchant and other vessels were to be subject to his directions; that in Dec. 1909 the plaintiffs threatened to moor the *Persia* permanently as a coal hulk without such permission; that the *Persia* was an obstruction to navigation; that the bed of the harbour was the property of the Crown; and that the defendant had a right to remove the *Persia*.

The facts as found by the learned judge showed that the plaintiffs in Nov. 1909 issued circulars to their customers informing them that they proposed to station the *Persia* at Portland as a "hulk," or "floating depot," for the purpose of bunkering ships with coal. They stated that the *Persia* would be equipped with the most approved appliances for affording quick dispatch to vessels seeking coal by day or night. Immediately on this circular coming to the attention of the defendant he informed the plaintiffs that permission could not be granted to add to the number of coal hulks already moored in Portland Harbour. The plaintiffs disregarded this notice, the *Persia* entered the harbour and took up a position in the part of it which is appropriated as a merchant shipping anchorage. The defendant, after pointing out that she was there in violation of the notice he had given and of the directions of the Lords of the Admiralty, ordered her to leave the harbour; this she refused to do. The defendant then threatened to have her removed, whereupon the present action was brought and an injunction claimed.

At the trial the learned judge refused to grant an injunction and entered judgment for the defendant, being of opinion that the title to the soil in the port of Portland was vested in the Crown subject only to the public rights of and incidental to navigation over it; that the right of navigation was a right of passage, with rights of stopping, anchoring, &c., for purposes incidental to passage to and fro, and that a member of the public had, therefore, no right to moor a floating hulk or coal depot within such port for the purpose of bunkering ships with coal.

The plaintiffs appealed.

Leslie Scott, K.C., *Greer* (*Courthope Wilson* with them) for the plaintiffs.—This case raises the question as to the public rights of user over navigable waters and harbours in this country, and as to whether the Crown, assuming that the bed of Portland Harbour is vested in it (which the plaintiffs admit), has the right without statutory powers to exclude from a public mercantile harbour a coal hulk stationed there for the purpose of bunkering steamers that call there for coal, although the presence of such a floating means of coal supply in that harbour is in fact demanded by the shipping trade of the country, and although the hulk does not constitute any obstruction in the harbour. On the evidence it is admitted that harbours furnished with a coal supply are essential to merchant shipping, also that no other means of coal supply is possible at Portland, the deep water coal pier being reserved for the use of the Admiralty. It is admitted that Portland Harbour is the most convenient port for vessels coming up Channel to coal at. The Dockyard Ports Regulation Act 1865 is a general Act applying to all harbours, and the definition of "vessel" in sect. 2 would cover a vessel which was used for carrying supplies of coal, and might be propelled from within or without. A similar definition was contained in the Harbours, Docks, and Piers Clauses Act 1847. See

> *Hedges and Son* v. *London and St. Katharine Docks Company*, 5 Asp. Mar. Law Cas. 539 (1885); 54 L. T. Rep. 427; 16 Q. B. Div. 597.

The powers of management over the harbour are limited in two ways. In the first place, the harbour master is constituted an independent authority over the harbour as a whole, over private and public vessels; and, secondly, the powers of regulating the harbour must be granted by Orders in Council. They referred to

> Dockyard Ports Regulation Act 1865 (28 & 29 Vict. c. 125);
> Order in Council, Feb. 16, 1903.

The question of public policy involved is this Are matters, where private interests clash with public, to be dealt with by an Act of Parliament or an Order in Council, or are they to be left to a department of State? There is, of course, this limitation, that, in the interests of the naval defence of the country, the Admiralty should have greater powers over dockyards than are contained in the Act. The right of this vessel to be in a certain portion of the harbour is recognised by the Act, and neither the harbourmaster nor the Admiralty have any power to exclude her from such portion. [Vaughan Williams, L.J.—A port ought to be free and open for subjects and foreigners, per Hargrave's Tracts, 84; see also Comyn's Digest, vol. 5, p. 152.] There is no limitation on the public right of user, except that it must not amount to a nuisance which is a question of fact. [Buckley, L.J.—You are claiming the right in a trader to establish a trade in a port.] The Act gives the harbourmaster an independent discretion as to the admission of vessels, but such discretion must be exercised for the welfare of all ships entering the harbour:

> *The Excelsior*, 3 Mar. Law Cas. O. S. 151 (1868); 19 L. T. Rep. 87; L. Rep. 2 A. & E. 268.

The harbourmaster has not the right to exclude a private vessel unless the circumstances are such that the vessel would be creating a nuisance, but in the present case there was ample room in the harbour for the plaintiffs' vessel. With the extension of commerce it has become necessary for him to allow the use of the harbour for purposes which are incidental and ancillary to navigation, such as the provision of coal hulks.

And in considering whether the mooring of such a hulk in Portland Harbour is an excessive exercise of a public right, due regard must be had to the general benefit of the public. That is the test which must be applied. It is reasonable that the plaintiffs' vessel should remain in the harbour so long as she is no hindrance to the vessels using the port. They also referred to

Sharpe v. *Wakefield and others*, 64 L. T. Rep. 180; (1891) A. C. 173;
Dick and Page v. *Badart Frères*, 5 Asp. Mar. Law Cas. 49 (1883); 48 L. T. Rep. 391; 10 Q. B. Div. 387;
Amalgamated Society of Railway Servants v. *Osborne*, 101 L. T. Rep. 787; (1910) A. C. 87;
London Association of Shipowners and Brokers Limited, and Peninsular and Oriental Steam Navigation Company v. *London and India Docks Joint Committee and London and St. Katharine Dock Company*, 7 Asp. Mar. Law Cas. 195 (1892); 67 L. T. Rep. 238; (1892) 3 Ch. 242;
Rex v. *Russell*, 6 B. & C. 566;
Attorney-General v. *Terry*, 2 Asp. Mar. Law Cas. 174, 217 (1874); 30 L. T. Rep. 215; L. Rep. 9 Ch. 423;
Original Hartlepool Collieries Company Limited v. *Gibb*, 3 Asp. Mar. Law Cas. 411 (1877); 36 L. T. Rep. 433; 5 Ch. Div. 713;
Booth v. *Ratté*, 62 L. T. Rep. 198; 15 App. Cas. 188;
Attorney-General v. *Wright*, 8 Asp. Mar. Law Cas. 320; 77 L. T. Rep. 295; (1897) 2 Q. B. 318;
Crown Lands Act 1866, 29 & 30 Vict. c. 62;
Gann v. *Free Fisheries of Whitstable*, 2 Mar. Law Cas. O. S. 179 (1865); 12 L. T. Rep. 150; 11 H. L. Cas. 192.

The *Solicitor-General* (Sir Rufus Isaacs, K.C.) and *B. A. Cohen* for the defendant.—The plaintiffs have failed to establish any right in law to moor their coal hulk permanently in Portland Harbour, or to cite any authority in support of their contention. It is not in dispute that the soil of the harbour is vested in the Crown, and no suggestion has been made of any special grant giving greater rights to the plaintiffs than to any other member of the public. What are then the plaintiffs' rights as members of the public? The only rights they have—apart from fishery—are the rights of navigation over the river and of anchoring in the bed of the river, together with all things reasonably incident to navigation. The intention to remain in the harbour and carry on a trade is not included in the above. No such right has ever been established. The only possible authority is *Rex* v. *Russell* (*sup.*), but that case has been overruled by Jessel, M.R. in *Attorney-General* v. *Terry* (*sup.*), and the principle on which the right has been claimed has been repudiated by the courts. See

Rex v. *Ward*, 4 A. & E. 384.

The plaintiffs have to establish that the only means of obtaining coal must be from their hulk, but in point of fact there has been no complaint by any shipowner of any difficulty in obtaining coal. There is no lawful right in the plaintiffs to come to Portland Harbour for the purpose described, the only right they have being limited to navigation and things ancillary thereto. The plaintiffs further say they cannot be indicted for a common law nuisance, because what they have done has been for the public benefit. What are the rights of navigation over tidal rivers has been discussed in

Lord Fitzhardinge v. *Purcell*, 99 L. T. Rep. 154; (1908) 2 Ch. 139, 167;
Orr Ewing v. *Colquhoun*, 2 App. Cas. 839.

No such right as the plaintiffs contend for is to be found in the books. Further, even assuming that the cases cited by the plaintiffs as to public benefit have any application, on the evidence as it stands the plaintiffs are not in a position nor are they the proper persons to assert that right. On the facts the answer as to public benefit and convenience must be in favour of the defendant. The rights claimed by the plaintiffs go beyond those appertaining to navigation; they might be extended to a claim to introduce a dredger for the purpose of deepening the harbour. The fallacy underlying the plaintiffs' contention is this, that necessity assumes a right which does not in any way exist, and they justify it on the ground of public advantage. But what necessity is there? Is it with a view to increasing trade? As a matter of fact, Portland Harbour is not a mercantile port at all; it is a harbour of refuge, as is shown by the following Acts of Parliament:

10 Vict. c. 24;
13 & 14 Vict. c. 116;
20 & 21 Vict. c. 32;
28 & 29 Vict. c. 125.

The evidence establishes that it is not a commercial port in the ordinary sense of the term, but only so far as it is used for the export of Portland stone. It is in the main constructed and used for naval purposes. It is said that the rights of the Crown are limited by the Act of 1865, but that Act does not limit the prerogative of the Crown, and, looking both at the Act and at the Order in Council passed thereunder, the position taken up by the harbourmaster in this case is amply justified. The Act was passed for the regulation of all naval ports and dockyards in the United Kingdom. Sect. 3 gives power to the King in Council to define the limits of dockyard ports. Sect. 4 provides for the appointment of a fit person as the King's Harbourmaster, whose duty is also to protect the port; that is to say, the Crown has a general right over the port subject to the public right. Sect. 5 provides that port regulations are to be made by Orders in Council, but that section does not limit the rights of the harbourmaster in the port. With regard to the Order in Council, sects. 13 to 16, which are headed "Anchorage Regulations," place merchant vessels entirely under the control of the harbourmaster. No injunction could therefore be granted against the harbourmaster for ordering a merchant vessel to leave the harbour. A. T. Lawrence, J. doubted whether he had any power to review the discretion of the harbourmaster or of the Admiralty, whose servant he was. They also referred to

Hargrave's Tracts, 85;
Attorney-General v. *Wright* (*sup.*).

Leslie Scott, K.C. in reply.—The rights of the public are not restricted to fishery and navigation only; they have been extended to other cases. Thus it has been held that the public have a right to use the cranes erected on public quays:

Bolt v. *Stennett* 8 Term Rep. 606.

He also referred to

Millar v. *Taylor*, 4 Burr. 2303;
Dashwood v. *Magniac*, 65 L. T. Rep. 811; (1891) 3 Ch. 306;
Maxim Nordenfelt Guns and Ammunition Company Limited v. *Nordenfelt*, 68 L. T. Rep. 833; (1894) A. C. 535;
Carter v. *Murcot*, 4 Burr. 2163;
Attorney-General v. *Parmeter and others*, 10 Price, 378.

Cur. adv. vult.

July 28.—The following written judgments were delivered:—

Vaughan Williams, L.J.—In this case the plaintiffs sue for an injunction to restrain Captain C. E. Anson, R.N., harbourmaster of the Port of Portland, from seizing, taking possession of, or trespassing upon the plaintiffs' steamship *Persia*, lying at her own anchors in Portland Harbour within the area appropriated to merchant shipping or removing her therefrom. By the points of defence it was alleged that in Feb. 1903 regulations were made by Order in Council pursuant to the Dockyard Ports Regulation Act 1865 by which it was provided (*inter alia*) that moorings for private vessels might be laid with the permission of the King's Harbourmaster, but were to be removed on his requisition, and that all merchant and other vessels were to be subject to his direction; that in Dec. 1909 the plaintiffs threatened to moor the *Persia* permanently as a coal hulk without such permission; that the *Persia* was an obstruction to navigation; that the bed of the harbour was the property of the Crown; and that the defendant had a right to remove the *Persia*. I think that the claim of the plaintiffs in this action is a claim against the defendant (the harbourmaster) for obstructing them in the exercise of a public right. I do not think that Portland Harbour is a mere harbour of refuge. In the early history of the exercise by the King of his Royal prerogative in respect of harbours, the limits of a harbour, and also the classes of cargoes allowed to be brought into the harbour, used to be referred to a Royal Commission, and in my opinion it is impossible after the Act of 1865 and the Orders in Council made thereunder to hold that Portland Harbour is a mere harbour of refuge. It is a dockyard harbour, but, notwithstanding this, it is admittedly a harbour in respect of which ships have the right of navigation and certain incidental rights, such as the right of anchoring and a right of mooring. A question has been raised as to the limits of these incidental rights. It is clear that all these rights are subject to the directions of the harbourmaster. This, indeed, is admitted by the plaintiffs, but subject to the regulations from time to time made by Order in Council the rights of all ships entering the harbour are equal. The regulations are general regulations binding all. I take it that the harbourmaster could not make a special order that no ships belonging to a particular owner should enter Portland Harbour or navigate in or anchor or moor there, but all ships entering the harbour would have to obey the particular directions of the harbourmaster given in respect of navigation, anchoring, and mooring. It is stated by A. T. Lawrence, J. in his judgment that before the arrival of the *Persia* there were ten coaling hulks for the use of merchant ships permanently moored within the merchants' shipping anchorage by the permission of the authorities. I do not quite know what "permanently moored" means. It is difficult to suppose that this permanence of mooring can override regulation 3 or 13 of the regulations for anchoring, berthing, mooring, and breaming in Portland Harbour. Regulation 3 runs thus: "Moorings for private vessels may be laid with the permission in writing of the King's Harbourmaster and in such positions as he shall deem fit, but such moorings shall not be laid without such permission, and shall be forthwith removed on the requisition of the King's Harbourmaster to that effect." Regulation 13 runs thus: "All merchant or other private vessels shall be subject to the direction of the King's Harbourmaster." If the coal hulks are really there otherwise than as private vessels subject to the general regulations, it follows that such privileged vessels are not exercising a public right but only enjoying a privilege. No such special privilege has been granted to the owners of the *Persia*, and it must, I think, on the finding of A. T. Lawrence, J., be accepted that there was no evidence before him that the ten coaling hulks for the use of merchant ships which were in Portland Harbour before the arrival of the *Persia* were not sufficient to meet the requirements of the port, and we ought to infer not only that the coaling hulks were sufficient to coal the average number of ships calling to coal, but also that Portland Harbour is a recognised harbour for the call of ships to take in from the coal hulks coal furnished not by the Crown but by the traders who are allowed the special privilege of maintaining a coal hulk. It may be that the Crown as conservator of the port grants these privileges through the agency of its officer, but we have not for the decision of the present case to decide what is the basis of such privileges. I also accept the finding of the learned judge that the addition of the *Persia* to the ten existing coaling hulks would unduly impede the navigation in and the purposes for which this harbour exists. The evidence of the harbourmaster supports this conclusion, and I think that *primâ facie* the decision of the harbourmaster should be regarded as conclusive in such a matter. This, indeed, was not denied by counsel for the plaintiffs. What was said was this: That the presence of the *Persia* as a coal hulk would have been no impediment unless the Admiralty had without any Order in Council excluded private ships and merchant vessels from a portion of the harbour in which by the first schedule of the Order in Council of the 16th Feb. 1903, clause 16, merchant and other private vessels may, subject to the directions of the harbourmaster, anchor. I do not think that it was denied by the Solicitor-General that merchant and other private vessels are excluded from a portion of the harbour defined by this Order in Council as anchorage within which, subject to the directions of the King's Harbourmaster, merchant and other private vessels may anchor. I think myself that such exclusion ought to have been preceded by an Order in Council authorising the same, but I do not think that the question of the legality of the action of the Admiralty in appropriating to State purposes a portion of Portland Harbour in which merchant and other private vessels may, subject to the regulations of the King's Harbourmaster, anchor, can be raised in this action. It can, in my opinion, only be raised by a petition of

right or in some action to which the Attorney-General is a party as plaintiff or defendant. I think that, so long as the exclusive occupation by the Crown of this portion of the anchorage for merchant vessels continues, the duty and right of the King's Harbourmaster is to regulate the shipping within the harbour subject to such occupation. I think therefore we must hold that the presence in the harbour of the *Persia* as a coal hulk would tend unduly to impede navigation in and the purposes for which Portland Harbour exists.

I do not think that it is really necessary to decide anything more to arrive at the conclusion that this action for an injunction to restrain the harbourmaster from removing the *Persia* fails and must be dismissed, but having regard to the terms of the defence and the observations of A. T. Lawrence, J., perhaps I ought to say something as to the right of navigation and its incidents. The right of navigation manifestly is not limited to the passage and repassage of ships with their goods, as to which right Lord Hale says the people have a public interest, a *jus publicum* (Hale de Jure Maris, 36), which must not be obstructed by nuisances or impeached by exactions. There are obviously, as is pointed out by A. T. Lawrence, J., incidental rights, such as the rights of stopping, anchoring, &c. Holroyd, J. in *Blundell* v. *Catterall* (5 B. & A., p. 268) says the right of passage is a right to be exercised for the purpose of navigation, trade, and intercourse. It was argued by Mr. Leslie Scott that in the present case the plaintiffs were entitled to their injunction on the ground that the presence of the *Persia* in that part of the harbour appropriated to merchant and private vessels was no obstruction to the harbour, because, although in a sense it abridged the right of passage, yet the *Persia* was there for a public purpose—namely, providing incoming steamers with coal, and produced a public benefit; the owners of the *Persia* could not be convicted of nuisance according to the decision in *Rex* v. *Russell* (6 B. & C. 566). It was answered, first, that *Rex* v. *Russell* had been overruled by the judgment of Sir George Jessel, M.R. in *Attorney-General* v. *Terry* (30 L. T. Rep. 215; 9 Ch. App. 423), affirmed by the Court of Appeal, which court, however, did not deal with the question of how far *Rex* v. *Russell* (*sup.*) still continued good law; and, secondly, even if the case of *Rex* v. *Russell* (*sup.*) had not been overruled, the presence of the *Persia* as a coal hulk in Portland Harbour was a mere piece of shopkeeping, which, while it obstructed the passage into and out of the harbour, conferred no benefit on ships calling at the harbour, because the existing hulks maintained in the harbour afforded ample supply of coal to such harbour. I think that this is a good answer, but I cannot agree that *Rex* v. *Russell* (*sup.*) has been overruled, it has been modified. Sir George Jessel in the report of his judgment in the note to the report of *Attorney-General* v. *Terry* (*sup.*) in 9 Ch. says: "I give those as illustrations, but I think it" (that is, the doctrine of *Rex* v. *Russell*) "must be confined, as put by Sir William Follett in his argument in *Rex* v. *Ward* (4 A. & E. 384), to cases of public benefit, and not used in too extended a sense." Again, in the case of *Rex* v. *Ward* (4 A. & E. 384), the judgment of Lord Denman, although it disapproves of the judgment of Bayley, J. in *Rex* v. *Russell* (*sup.*), yet plainly shows that he limited his disapproval to the summing up and judgment of Bayley, J., but in no way affirmed that every obstruction to free passage into, or out of, or within a port would constitute a nuisance if the obstruction made the harbour more convenient for the use of the public using the harbour, and in no way disapproves of the statements of Lord Tenterden, the dissentient judge in *Rex* v. *Russell* (*sup.*), that the question would properly be "whether the navigation and passage of vessels was injured by the obstruction." I wish, further, to say that I do not think that the rights of user by the public are substantially affected by the ownership of the soil of the harbour by the Crown. I should not, therefore, have based my judgment in this case on trespass. It is sufficient that the plaintiffs so conducted themselves in respect of the presence of the *Persia* in the harbour that the harbourmaster was entitled to remove the *Persia* under the harbour regulations made by Orders in Council pursuant to the Act of 1865, and that the authority and discretion of the harbourmaster are not suspended by reason of the fact that some portion of the anchorage within which merchant or other private vessels may, under regulation 16 of the regulations of the 16th Feb. 1903, subject to the direction of the King's Harbourmaster, anchor, has been occupied by the King's ships or for the purposes of the Royal Navy without any new Order in Council. I do not think that in this case any question is raised as to any right of the Crown through the Admiralty or the King's Harbourmaster to exclude the public or merchant or private vessels, or any particular vessel, from the harbour on the ground that the whole of it is required for the King's ships, or on any other ground. No such right was claimed by the Solicitor-General in his argument or by the pleadings. The sole question to be decided is whether, under the regulations, the harbourmaster had a right to remove the *Persia* from Portland Harbour for disobedience to the directions of the King's Harbourmaster. I think this appeal must be dismissed with costs.

Fletcher Moulton, L.J.—The argument of this appeal has occupied much time, and reference has been made to an exceptionally large number of authorities by counsel for the appellants. But in my opinion the only point to be decided is short and of no great difficulty, and I shall deal with it *in limine*, although, out of respect to the careful argument on behalf of the appellants and the possibility that the case may go to a higher tribunal, I shall subsequently notice some of the other points that have been raised before us on behalf of the appellants. Certain admissions by the appellants' counsel have materially circumscribed the matters in issue. In the first place, they have formally admitted on behalf of the appellants that the soil of the *locus in quo* is vested in the Crown. It is, therefore, unnecessary to examine the statutes which relate to the ownership of the soil, or discuss the general question of the proprietorship of soil situated within the three-mile limit and covered by water at all times. Further, it is not denied that the exercise of the rights of the Crown in connection with the *locus in quo* is vested in the Lords of the Admiralty, although

there is still some controversy between the parties as to the extent and meaning of the interference with their direct control by certain special Acts of Parliament relating to Portland Harbour. In the next place, counsel for the appellants have distinctly formulated the right which they allege to exist and which they seek to establish by the present suit, In the words of the leading counsel, it is the right of their ship, the *Persia*, to remain in the harbour of Portland for an indefinite period as a coal hulk in order to supply the appellants' coal from it to those who desire to buy it. The claim on the writ was for an injunction to restrain the defendants from seizing and removing from the harbour the plaintiffs' ship *Persia*. Had such an injunction remained the real subject of the controversy it would have entailed the examination into questions relating to the circumstances under which the *Persia* came to Portland Harbour, which would have been wholly useless for the purpose of settling the real matter in dispute between the parties. To avoid a costly litigation proving abortive for all useful purposes, the course which the case has taken is such that the issue between the parties is the existence of the right mentioned above. The claim of the plaintiffs that the *Persia* should enter the harbour is to be taken to be an assertion of the existence of that right. Hence, if the plaintiffs are wrong on this point, judgment must be given for the defendant in the action.

There is no doubt that the *Persia* is in a certain sense a ship and that when it arrived at Portland Harbour it was being navigated; but there is not, nor ever has been, any intention on the part of the defendant, the harbourmaster, to interfere with the free rights of navigation so possessed by it. Those are not the rights upon which the plaintiffs seek the decision of the court, and by the very sensible and legitimate admissions which have thus been made, the ambit of the controversy is confined to that upon which the parties desire to obtain an authoritative decision. In my opinion, the rights of the owner of soil covered either intermittently or permanently by the sea are well settled. They differ from those of the owner of soil not so covered in this respect only in that, while so covered, they are subject to the free exercise by the public and every member of it of the rights of fishing and navigation. The sole question, therefore, is whether the right claimed by the plaintiffs in this action to anchor their ship in the soil of the harbour so as to maintain her as a stationary coal hulk is a right of navigation, for it is needless to say it has nothing to do with any right of fishing. I am clearly of opinion that it is not a right of navigation, and that, therefore, the plaintiffs' claim cannot be supported in law. I will proceed to give my reasons for coming to this conclusion. That the public have a right to the free use of the sea for the purposes of navigation has been unchallenged law from the earliest times. It has frequently been enunciated in the form that the sea is a public highway, and that ships have the right *eundi redeundi et morandi* over every part of it, no matter to whom the soil lying thereunder may belong. This method of formulating the right is valuable inasmuch as the legal associations which the conception of a highway calls up are strikingly applicable. In some respects, perhaps, the public rights of user of the sea for navigation are from the nature of the case more extensive than in the analogous case of a highway. For instance, it is essential to navigation that there should be a free right of anchoring or otherwise securing in position the navigating vessel, and there is nothing strictly analogous to this in the case of a highway. But these and the like differences arise from differences in the circumstances of the case and not from fundamental differences in the nature of the right. In both cases there is the free right of passage which cannot be limited otherwise than by Act of Parliament or (in particular cases) by proof of immemorial user. Permanent occupation of any portion by any person to the exclusion of the public is a violation of their rights of free passage. Temporary occupation, excepting in the exercise of the right itself—that is to say, except in navigating or performing acts ancillary thereto (which are covered by the right of navigation possessed by the public)—is equally, *pro tanto*, an exclusion of the public. Neither can be justified by the existence of the right. They are in fact and in law violations of it. In the present case the plaintiffs claim the right of keeping their coal hulk moored in the harbour permanently. It is true that they admit that under the special Acts regulating the harbour the defendant, as harbourmaster, is entitled to require them to alter their position should it be advisable for the regulation and accommodation of the traffic of the harbour, but this admission does not, to my mind, affect in any way the nature of the right claimed. The coal hulk is to be there, not in the course of navigation, nor with the intention of its being navigated, but as a stationary structure to be used for the purpose of supplying the appellants' coals to vessels in the harbour. From a legal point of view the case would not be altered in anywise (so far as the right claimed is concerned) if the structure were a floating pier and it were permanently attached to piles driven in the soil. Its presence and attachments are not for the purpose of its navigation, but the opposite. It is a fixed floating shop for the purpose of selling the appellants' coals. This is admitted, but were it not it would be abundantly clear from the evidence. If I mistake not, the engines by which it was brought to Portland have been removed, and though in outward shape it still resembles a ship, I doubt whether it is even entitled now to be called a ship or vessel. Such a permanent occupation of the waters of the harbour of Portland is *pro tanto* an exclusion of the public, and so far from being the exercise of any public right, it would require some special defence to prevent its being unlawful and open to challenge, either by the Attorney-General on behalf of the public or by some individual specially affected thereby. Whether such justification could be found if the Lords of the Admiralty, as owners of the soil, gave their consent is immaterial to this case. It suffices to establish that it cannot be done as of right. The main argument on behalf of the appellants was that the presence of such a hulk in Portland Harbour for the purpose of supplying coal to steamers frequenting it was a convenience to those steamers, and thus an assistance to navigation. They claimed that it was therefore within the rights of the public to the free use of the water in question for the purposes of navigation. To my mind this is a complete fallacy.

The public have, no doubt, the free use of the waters for the purpose of navigation, and this includes the exercise of all rights ancillary thereto. But that means ancillary to that navigation—*i.e.*, to the navigation of the ship navigated. They have, for instance, the right of waiting in a place till the wind or the weather, and probably also the season, permits them to leave it, or until they have obtained a cargo or have completed repairs. In doing all these things they, no doubt, exclude the rest of the public from bringing their ships to the place where they are moored, just as a man who is lawfully standing on or moving along the public highway prevents any other member of the public being at that moment at the same place on the highway as he is. But all this is in the exercise of the rights of navigation of the ship itself. It is not an occupation of the waters for the purpose of making more convenient the navigation of other ships. I can illustrate the distinction by a parallel case in the use of a highway which to my mind represents accurately the point in issue in the present case. It is, no doubt, an advantage to travellers on the highway to be able to obtain refreshment; but that would not justify an enterprising caterer erecting a booth on the highway for the purpose of selling refreshment to travellers for profit to himself. If you add to the simile that the booth had been brought to the *locus in quo* on wheels which had been subsequently removed when it arrived at the place which it was intended permanently to occupy the analogy would be complete. No one would venture to contend that such a proceeding was a legitimate use of the highway, and the right claimed by the plaintiffs in this case seems to me to be an analogous use of the highway of the sea and equally unjustified by any rights possessed by the public. The difficulty of supporting the plaintiffs' claim by basing it on the recognised right of the public to use the waters of the sea as a highway induced the plaintiffs' counsel to put forward the contention that the rights of the public are more extensive than this. His argument, shortly stated, was as follows: Originally the lands flowed over by the sea belonged to the Crown, and were therefore lands held in trust for the benefit of the public. Navigation and fishing, he suggested, are only examples of the ways in which the public can use the sea, and the rights of the public freely to use them for these purposes are only examples of the general principle that they have a free right to use them for all purposes of utility, and that the property in the subjacent lands is subject to this general right. Placing coal hulks in harbours and supplying coal therefrom has, by reason of the introduction of steam traffic, become a convenience to a portion of the navigating public, and therefore the plaintiffs, as members of the public, have a right to put their coal hulk in Portland Harbour and to keep it permanently there for the purpose of thus selling their coal. I do not think that I have done injustice to the argument of the plaintiffs' counsel in thus expressing it. To my mind it would be difficult to find a worse collection of general propositions more completely without authority or more dangerous from their vagueness and uncertainty. In the first place, there is no authority whatever for the proposition that the lands under the sea are subject to any other public rights than those of navigation and fishing. It must be remembered that the right here claimed is one which directly affects the owner of the soil. The fact that it involves the permanent occupation of the water over it would be sufficient to establish this; but, in addition, it involves mooring or anchoring on the land itself, which is a right much of the same character as a right to drive piles into the land for the purpose of fixing the position of the coal hulk. The plaintiffs therefore set up that the public have a right to do this whenever it can be shown that a section of the public is benefited thereby. I cannot find any trace of any servitude of this wide description in any legal authority or decision, and a universal silence of this kind is the strongest proof that no such common law right exists. New common law rights cannot be made at the present day. They must *ex necessitate rei* be of ancient origin. Now, it must be remembered that a very large portion of the soil covered by the sea has passed out of the hands of the Crown into those of private persons. If there be any general common law right to use those lands for any purpose convenient to the public in the sense in which this phrase is used by the plaintiffs, it would follow that a third party might erect a jetty on a foreshore belonging to some other person and charge tolls for the use of it, and justify his action by evidence that such jetty was a convenience to some portion of the public. That private property could be held and could pass from hand to hand during centuries subject by common law to such a servitude as this without any trace of it being found in any authority is inconceivable. I have here taken the case of foreshore which has passed into the hands of private owners as contrasted with that in which the property still remains in the Crown. I do this because it is more likely that the strict rights of ownership would come into litigation in such a case, and not because I think that there is any difference whatever between the rights of the Crown in such matters and the rights of a grantee from the Crown. In both cases the servitude is and must be by common law, and if so, it is clear that it solely extends the rights of the public to the free exercise of navigation and fishing. But the fundamental fallacy in the argument is the suggestion that public lands are held in trust for the benefit of the public in any sense which would give to individual members of the public any other or different rights with respect to them than they have with respect to lands in private hands. The phrase "in trust for the benefit of the public" is a very misleading one. These lands actually belong to the nation, and the use to which they are to be put is decided by the authorities whom the nation has chosen—that is to say, the Government controlled by the Legislature. But this fact does not weaken in any way the rights of property in the lands which are possessed and used by the State, nor is a court justified in being less vigilant in maintaining and enforcing those rights of property in the case of public lands than in the case of those in the hands of private owners. Indeed, if there be any difference it is not unnatural that we should be disposed to exercise greater vigilance to prevent the filching by private individuals of property that should belong to all, because the danger is greater in such cases than in cases where individual owners are there to defend their own

property. I need scarcely point out that the suggestion of the plaintiffs that what they seek to do is to promote the interests of the public is a mere pretence. They are not proposing any philanthropic work, but are simply guided by a desire of gain, which is laudable so long as you do not appropriate other people's property for the purpose of attaining it. They are doing nothing more or less than seeking to get at the public expense a most suitable location for a coal depot, and that without paying for it. The evidence that they put forward to support their contention that what they seek to do is in the public interest is ludicrous. In substance it amounts to saying that if a coal hulk were there established it would be largely used by steamers frequenting the port. That it would be an excellent site for a coal store no one doubts, but if that establishes a right to appropriate public lands for private uses every successful shopkeeper could make out an equally good case. Exactly similar evidence could be obtained to justify a tobacconist in setting up a tobacco kiosk in front of the Mansion House. If the thing be lawful at all, and it be thought desirable to do it, the Crown might, no doubt, find willing tenants for the *locus in quo* at substantial rents and turn the possession of the soil into a source of public revenue.

As to whether it be lawful or not to set up permanent hulks in a port without Parliamentary authority I express no opinion. It probably depends on a question of fact such as that which decides the legality of the erection of piers on a foreshore—namely, whether the presence of such hulks is an impediment to navigation so as to constitute them a nuisance. But beyond all question there can be no right without the consent of the Crown, who are the owners of the land, to station a coal hulk in the harbour and fix it to the soil when *ex concessis* there is no intention to navigate, but to keep it stationary. The only case out of the many quoted in the argument by the appellants which can be said to give a countenance to this contention is the case of *Rex* v. *Russell* (*sup.*). In that case certain colliery owners having pits near the river Tyne erected staiths for the purpose of loading ships with their coal, which projected into the bed of the river, which was tidal and navigable. They were indicted for a nuisance, and in charging the jury the learned judge gave the following direction: "If you think this staith is placed not in a reasonable part of the river, that it does unnecessary damage to navigation, or that it is not of any public benefit, or that the public benefit resulting from it is not equal to the public inconvenience which arises from it, then you will find your verdict for the Crown. If on these points you are of a different opinion, then you will find your verdict for the defendants." The questions left to the jury were the following: Were the staiths erected in a reasonable place? Was there a reasonable space left for the public navigating the Tyne? Were the staiths a public benefit? Did the public benefit countervail the prejudice done to individuals? The jury said that in consequence of this direction they found the defendants not guilty. A rule *nisi* obtained to enter a verdict of guilty was discharged by the court, consisting of Bayley and Holroyd, JJ. and Lord Tenderden, C.J., the latter dissenting. The grounds upon which Holroyd, J. supported the direction throw little light on the matter. He bases his decision on the words being "a mere answer to an unfounded suggestion of the prosecution," and not part of the direction to the jury, and that they were qualified by other parts of the summing-up; but it cannot be denied that on the whole he treated the questions as proper ones. Bayley, J. strenuously defended his summing-up, and treated such matters as the fact that the coal could be got to the London market more cheaply as a specimen of the public benefit which he considered would be a justification for the erection of the staiths. It is clear that Lord Tenterden differed entirely from the view that the erection of the staiths could be defended on such grounds, and we know that Littledale, J., who heard the argument, but having been consulted in the case when at the Bar declined giving any opinion, agreed with Lord Tenterden, C.J. The authority of this case, which was in such striking contrast with other decisions, was not left long unchallenged. In the argument of *Rex* v. *Ward* (*sup.*) Lord Denman speaks of it as "a case the authority of which has been much doubted, and is perhaps likely to be more so as it is further examined," and in the judgment of the court, which he delivered, he decides in a manner directly contrary to the law as laid down in *Rex* v. *Russell* (*sup.*). So far as I know, *Rex* v. *Russell* (*sup.*) has never been acted upon, and in *Attorney-General* v. *Terry* (*sup.*) Sir George Jessel, M.R. says of it: "In my opinion that case is not law, and it is right to say so in the clearest terms; because it is not well that cases should continue to be cited which have been virtually overruled, although the judges have not said so in express terms." At this day, therefore, there can be no doubt that the decision of *Rex* v. *Russell* (*sup.*) cannot be regarded as good law. Indeed, it is difficult to understand the train of thought which led the eminent judge in that case to frame the questions which he put. For instance, one of the questions left to the jury was whether a reasonable space was left for the public navigating the Tyne. The public navigating the Tyne were entitled to the whole of the space afforded by the river, and such a question as "was there a reasonable space left for the public navigating the Tyne" is, in my opinion, unmeaning. But the fundamental error in that case, as in the argument for the plaintiffs in the present case, is the suggestion that you may balance against encroachments upon public rights real or supposed advantages accruing thereby to some section of the public. I agree entirely with the passage in the judgment of Lord Denman, C.J. in *Rex* v. *Ward* (*sup.*), where he says: "In the infinite variety of active operations always going forward in this industrious community, no greater evil can be conceived than the encouragement of capitalists and adventurers to interfere with known public rights, from motives of personal interest, on the speculation that the changes made may be rendered lawful by ultimately being thought to supply the public with something better than what they actually enjoy. There is no practical inconvenience in abiding by the opposite principle, for daily experience proves that great and acknowledged public improvement soons leads to a corresponding change in the law, accompanied, however, with the just condition of being compelled to com-

pensate any portion of the public which may suffer for their advantage."

It may be well to sum up the essentials of a justification for an interference with the shores of the sea or the superjacent waters. They are directly deducible from the legal position of those shores. The land is the subject of rights of property, but the public are entitled to the free exercise of the rights of navigation and fishing in the superjacent waters, and this includes the doing of acts ancillary thereto, such as anchoring, &c., even though they directly affect the soil. This being the legal position, it follows that no permanent occupation of the shore, or permanent occupation of the waters over it, can be lawful except by, or by the permission of, the owner of the soil, whether it be the Crown or a private individual. But that would not suffice as a justification if the act would interfere with these dominant rights of the public. This does not, however, carry with it as a legal conclusion that every interference with the soil which affects the navigation is unlawful. For instance, to blast away a dangerous rock does not injuriously affect the rights of the public. Similarly, the erection of a groyne which prevents the silting up of a useful channel, or the erection of a pier which gives shelter in rough weather, may benefit and not injure navigation. Hence from of old the question whether any interference with the foreshore is a nuisance—*i.e.*, an injury to the public—has always been treated as a question of fact, and the same principle must apply to lands permanently covered by water, such as the soil of this port. The issue to be decided in every case is whether the act done injures any right of the public. If it does so it is unlawful. You cannot lump together all the rights of the public and defend yourself by contending that on the whole you have been a benefactor. No balancing of benefit to one right against injury to another is permissible; the benefit and the injury must be to the same right, and the benefit must outweigh the injury. Each member of the public is entitled to enjoy to the full each of the rights of the public, and without legislative authority you can no more interfere with that right and justify the interference by alleging a benefit to another person in the case of rights vested in the public than in the case of rights vested in private individuals. To my mind in the present case every essential element of such a justification is absent. The unauthorised interference with the soil of the port alone would suffice to defeat the plaintiffs' claim. But there is also, in my opinion, an unjustified interference with the rights of navigation. To take up the position in the harbour that the *Persia* seeks to take would, under present circumstances, cause an obstruction to navigation, and, whether or not the other coal hulks are lawfully there, the plaintiffs can have no right to have them disturbed in order that their hulk may be introduced into the harbour for a like purpose and thereby, as the plaintiffs clearly hope, take away the trade of those at present there. If any such right of permanent occupation exists, as the plaintiffs seek to establish, it exists for those coal hulks already there, and as they have occupied the ground the introduction of the *Persia* cannot be justified, inasmuch as *rebus sic stantibus* it would admittedly be an obstruction to the navigation.

I do not propose to deal with any of the other cases which were quoted because I do not think they really bear upon the issue in this case. Nor do I think that any discussion as to the action of the defendant as harbourmaster, or the exact powers which he possessed as such, is material. Beyond question he was the accredited agent of the Board of Admiralty in whom the management of this portion of the rights of the Crown was vested; and if, as in my opinion is the case, the attempt to occupy a place in Portland Harbour with this coal hulk as a stationary storehouse and loading stage for coal was a trespass on the rights of the Crown, it is clear that he was justified in what he did apart from any special authorisation under the Act. But all these matters are beside the true question, and I shall not dwell on them; I agree with the very clear judgment of the learned judge in the court below with regard to them, but it is upon the ground that the right contended for by the appellants does not exist that I base my decision that the action was rightly dismissed by him, and that this appeal should be dismissed with costs.

Buckley, L.J.—Is a coal merchant entitled, in exercise of a public right, to introduce a floating structure into Portland Harbour, and there maintain her for the purpose of coaling steamships in the course of his trade? Can he justify his act as an act incidental to navigation? That is the question for decision in this case. I have not said "permanently maintain," because the appellants do not contend that they can maintain the coal hulk permanently, in the sense that they can insist upon a right to remain under all altered future circumstances. But they do assert a right to maintain their coal hulk there permanently in the sense that, so long as an altered state of circumstances does not justify their exclusion on the ground of the vessel becoming an obstruction to navigation, they are entitled to remain permanently not necessarily in the same place, but in that or some other place as directed by the harbourmaster. On the one hand the soil of Portland Harbour is in the Crown. This proposition the appellants do not dispute. On the other hand, the ownership of the Crown is for the benefit of the public, and cannot be used in any manner so as to derogate from, or interfere with, the right of navigation which belongs by law to the subjects of the realm. The right of the public freely to navigate in navigable waters is a right to which the right of the Crown in the soil is subservient. These propositions are not disputed by the respondent. In support of them I may refer to *Gann* v. *Free Fishers of Whitstable* (*ubi sup.*) and *Foreman* v. *Free Fishers of Whitstable* (21 L. T. Rep. 804; L. Rep. 4 H. L. 266, 283). These waters are navigable waters—Portland Harbour is a dockyard port within the Dockyard Ports Act 1865. It is in these waters that the appellants assert the right which they claim. The proposition which they put forward is that so long as they do not cause an obstruction in the port they as members of the public and in exercise of a public right are entitled to enter the harbour and maintain there permanently (subject to such qualifications as above stated), a coal hulk for the purpose of supplying coal. The contention may perhaps be stated thus: A coal

hulk is a 'vessel' both at common law and within the definition in the Dockyard Ports Act 1865." (The latter proposition the Solicitor-General for the purposes of this case does not contest in argument.) The appellants go on to say: "Portland Harbour is navigable water; our coal hulk is a vessel; she is entitled to enter navigable waters. The rights of a vessel in navigable waters are not confined to navigation. A vessel is entitled to use them *eundo et redeundo et morando* so far as necessary or reasonable. We can use them *morando* for the purposes of our trade. It is a trade useful to navigation. The right which we claim is a legal right." They say, and with truth, that legal principles are from time to time to be applied to altered circumstances, and that, although there is not to be found in the books any instance of such a claim as they here make, yet the extension of steamship navigation and the increasing necessity for obtaining supplies of coal justifies the application of an old principle to a new state of circumstances, and authorises the appellants to use these navigable waters *morando* for the purposes of supplying coal. This is the first and cardinal proposition in the case. It rests, in my opinion, upon a fallacious ground. I will assume for a moment, without staying to discuss it, that the increasing necessity for the supply of coal may give to the public who are engaged in navigation a right as against the Crown to assert that the Crown must allow the establishment of such a number of coal hulks as is reasonably necessary for the assistance of the navigating public in exercising rights of navigation. This right, if it exists, is a right in persons requiring coal to have depots established sufficient to meet their requirements. That is not the right which the appellants are asserting. They are asserting a right in the seller of the coal to maintain depots to give such a supply. Assume for the moment that it is the fact that the navigating public resorting to Portland Harbour do not find there sufficient coal hulks: who would be the suppliant upon a petition of right, or other process, to assert against the Crown that more coal hulks ought to be allowed to go there? Obviously the navigating public who want the coal. A coal merchant who wants to establish coal hulks to sell coal is not for that purpose a member of that public. I know of neither authority nor principle to support the contention that a trader who is desirous of extending his trade is entitled to appropriate a portion of navigable waters for the purpose of furthering that ambition. There is a passage in Lord Denman's judgment in *Rex* v. *Ward* (4 A. & E. 384, 404) so pertinent to this consideration that I cannot forbear from quoting it. "No greater evil" (says Lord Denman) "can be conceived than the encouragement of capitalists and adventurers to interfere with known public rights, from motives of personal interest, on the speculation that the changes made may be rendered lawful by ultimately being thought to supply the public with something better than what they actually enjoy." It would be easy to give illustrations of services useful to navigation which persons might for their own profit be desirous of establishing in navigable waters—say, depots for victualling ships, floating docks for refitting ships, naval schools for instructing persons in navigation. But nobody ever heard or could reasonably suggest that included in the public right of navigation is any right to establish any such depots as these because their turnout would be useful to navigation. The contention of the appellants in fact is as follows: True it is, they say, that we do not want to navigate. But others do. They want coal. We can supply it, and supply itmuch more efficiently than the coal hulks already in the harbour. We have a public right to go there and render a better service to the navigating public. An argument of this kind was in fact involved in *Rex* v. *Russell* (*sup.*), and was repudiated in *Rex* v. *Ward* (*sup.*) and *Attorney-General* v. *Terry* (*sup.*). The case of *Attorney-General* v. *Wright* (*sup.*), which the appellants sought to use in support of this contention, decides only that a right in the public, or a section of the public, to have in navigable waters a fixed mooring in the soil of another to which they may from time to time resort in exercise of rights of navigation is a right known to the law. I fail to see that it assists the appellants' contention. In the first place, the right claimed here is not a right to fixed moorings, as distinguished from moorings generally. The appellants do not assert that they are entitled to remain in a definite place. They claim the perpetual right to moor from time to time at some place within a defined area, and, secondly, the defendant does not deny that such a right as was successfully asserted in *Attorney-General* v. *Wright* (*sup.*) is known to the law, but says that the appellants are claiming to have this mooring, not in exercise of any rights of navigation of their own, but as incidental to the right of navigation of others. I agree that in the expression "rights of navigation" the word "navigation" is used in a wide sense, and includes a large number of acts incidental to navigation. But the right claimed must be a right incidental to the navigation of the party claiming the right and not a right incidental to the navigation of others. Here the appellants are claiming as an act incidental to navigation something which is not at all incidental to their own navigation, for they have none, but an act incidental to the navigation of others—namely, their customers for coal. Taking a supply of coal may be, but dealing in the sale of coal is not, an act incidental to navigation.

In my judgment the first and cardinal proposition with which the appellants start cannot be maintained. There is, I think, no right in a trader to establish himself in navigable waters for the purposes of his trade, whether there does or does not exist a right in the navigating public to have such a trader introduced for their advantage. I ought to add that upon the question of fact the learned judge states that there was no evidence before him that the ten coaling hulks already in the harbour were not sufficient to meet the requirements of the port, and that the defendant had received no complaint of their efficiency, and he came to the conclusion as a fact that the harbourmaster and the Admiralty had formed the opinion that the existing coal hulks were sufficient, and upon the evidence he agreed with them. The fact is that the decisions upon which the appellants rely to support this their main proposition were cases in nuisance and not in trespass. They decide nothing upon the contention that—nuisance or no nuisance—the coal hulk has no right to be

there—that the right she asserts is not a right of navigation. For the purposes of this judgment I am prepared to assume for the moment that the mooring of the *Persia* was not such an obstruction of the port as that the harbourmaster was entitled to call upon her to withdraw as being a nuisance to the public rights of navigation. The appellants made complaint of the extension of the torpedo range over part of the area in which merchant vessels might anchor, and of other acts which diminished the area available for vessels of that class. To my mind all this is immaterial. If the *Persia* had not the right which she claimed, it is not relevant to say that a larger area than remains devoted to merchant vessels ought to be so devoted. The *Persia* in fact entered the port under her own steam, but the appellants, rightly enough, do not contend that she entered it otherwise than for the purpose of establishing herself in the port as a coaling hulk. For the reasons which I have given her original entry was, in my judgment, wrongful; she did not enter in exercise of any right of navigation of her own, but in assertion of an alleged right arising from assistance given to the navigation of others. But if, contrary to my opinion, I assume that a coaling hulk might come into the port, it by no mean follows that the harbourmaster had not the right of calling upon her to leave. His powers under the Act of Parliament (see sect. 4) are not only of superintending the execution of the Act of 1865, but include the duty "otherwise to protect the port." The Act of 1865 does not, I think, limit the prerogative of the Crown, and that prerogative might, I think, in the facts of this case, be exercised by the harbourmaster, who plainly took his orders from and acted under the directions of the Admiralty. A material circumstance is that if larger provision were made for enabling steamships to bunker coals in Portland Harbour the result might be to create a demand which does not at present exist. That is, of course, the appellants' object. They are desirous of establishing themselves there because it is a good place for their trade. There are no harbour dues. Steamships in increased numbers may be, and they hope will be, attracted by the facilities for obtaining supplies, and thus they are going to use their establishment in the harbour to increase the flow of merchant and private vessels to that place. Regulations 13 and 16 in the 1st schedule to the Order in Council of the 16th Feb. 1903 have, I think, the following effect. There is no condition precedent to the right of merchant and private vessels to anchor in the merchant ship anchorage; in doing that act, however, they are subject to the directions of the harbourmaster. The language of these regulations differs significantly from that of regulations 14 and 15. Nos. 14 and 15 reserve exclusive use of certain portions of the harbour for His Majesty's ships, and for the torpedo range, unless the permission of the harbourmaster is given to other vessels. No similar right is given to merchant or private vessels, but they are allowed to come to the anchorage appropriated to them subject to the directions of the harbourmaster. Under these regulations the harbourmaster could not, I think, exclude generally merchant or private vessels, but he can, I think, exclude a particular ship under particular circumstances. He might, for instance, exclude a particular ship seeking to enter *bonâ fide* as a navigating vessel if the port was already full, and he may exclude a coal hulk seeking to enter as a coal hulk if there are already sufficient coal hulks. Whether in exercise of the prerogative of the Crown, or under his power derived from the Act and the Order in Council made under the Act, there resides, I think, in the harbourmaster a right which enables him, even if the coal hulk had, as I think she had not, a right to come in, to call upon her to go out again upon reasonable grounds, as, for instance, that there were already sufficient coaling hulks in the harbour, and that he would not have more. The claim which the appellants have made seems to me to be not only novel, but of a character which I will not go further than describe as courageous. It is an assertion of a right wholly unknown, I think, to the law. The appeal must be dismissed with costs.

Appeal dismissed.

Solicitors for the plaintiffs, *Lightbound, Owen, and Co.*

Solicitor for the defendant, *Treasury Solicitor.*

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Dec. 10 *and* 11, 1909.

(Before HAMILTON, J.)

THORMAN *v.* DOWGATE STEAMSHIP COMPANY LIMITED. (*a*)

Charter-party—Loading time—Colliery guarantee—Exceptions—"Any other cause beyond the charterer's control"—Ejusdem generis *principle.*

A ship was chartered to proceed to Hull and to load there a cargo of coal on conditions of usual colliery guarantee, which excepted from the loading time Sundays, Bank Holidays, strikes, frosts or storms, delays caused by stormy weather, accidents stopping the working, loading, or shipping of the cargo, restrictions or suspensions of labour, lock-outs, delay on the part of the railway either in supplying the waggons or loading the coals, or any other cause beyond the charterer's control.

On the 23rd July 1907 *the steamship arrived at the Alexandra Dock and gave notice of readiness to load, but owing to the presence of other vessels which had arrived before her, and were waiting in turn, she did not come under a loading tip until the* 1st *Aug. In a claim by the owners against the charterers for demurrage:*

Held, that the lay days commenced to run on the ship's arrival in dock; that the words "any other cause beyond my control" must be construed ejusdem generis *with the foregoing exceptions; and that, as the cause of the delay was not a matter* ejusdem generis *with those exceptions, the charterer was not protected by the exceptions clause, and was therefore liable.*

Monsen *v.* Macfarlane (8 *Asp. Mar. Law Cas.* 93; 73 *L. T. Rep.* 548; (1895) 2 *Q. B.* 562) *and* Re Richardsons and Samuel (8 *Asp. Mar. Law Cas.*

(*a*) Reported by LEONARD C. THOMAS, Esq., Barrister-at-Law.

330; 77 *L. T. Rep.* 479; (1898) 1 *Q. B.* 261) *followed.*

Larsen *v.* Sylvester (11 *Asp. Mar. Law Cas.* 78; 99 *L. T. Rep.* 94; (1908) *A. C.* 295) *distinguished.*

COMMERCIAL COURT.

Action tried by Hamilton, J., sitting without a jury.

The plaintiff claimed 177*l.* 14*s.* 4*d.* moneys disbursed and commission earned in respect of the steamship *Aldgate* at Hull by the plaintiff acting for and on behalf of the defendants. The defendants admitted indebtedness to the extent of 176*l.* 13*s.* 4*d.* subject to a counter-claim for a like amount in respect of demurrage.

The charter-party, dated the 19th July 1907, provided that:

> The *Aldgate* . . . now at Rotterdam . . . shall, with all convenient speed, proceed to Hull (Alexandra Dock) as ordered by charterer, and there take on board as tendered in the usual manner, according to the custom of the place, as per colliery guarantee, which the owner agrees to accept, a full and complete cargo of coal not exceeding 5200 tons. . . . Demurrage after the rate of 16*s.* 8*d.* per hour. . . . Steamer to be loaded in 120 hours on conditions of usual colliery guarantee.

The colliery guarantee contained (*inter alia*) the following terms:

> I guarantee to load the steamship *Aldgate* with about tons (cargo only) of coals in hours (Sundays, Bank Holidays, cavilling days, and colliery holidays excepted). Time not to count until after the said steamer is wholly unballasted and ready in dock to receive her entire cargo. Strikes of pitmen or workmen, frosts or storms, and delays at spouts caused by stormy weather, and any accidents stopping the working, leading, or shipping of the said cargo, also restrictions or suspensions of labour, lock-outs, delay on the part of the railway either in supplying waggons or leading the coals, or any other cause beyond my control, such stoppage occurring any time between the present date and actual completion of loading, always excepted. . . . Time to count from 6 a.m. following the receipt of notice (in writing) of readiness by Robert Thorman, if the steamer is actually ready as above stipulated, and not before. . . . Should the colliery be off work through any cause whatever, time not to count.

The *Aldgate* arrived at Hull, was admitted to the Alexandra Dock, and had given the necessary notice by 9 a.m. on the 23rd July 1907. Owing to the presence of other vessels which had previously arrived, she was not allowed by the ordinary regulations of the dock to go under the loading spout, where alone coal could be loaded, until midnight on the 1st Aug. She was thereafter loaded and got away on the 7th Aug.

Bailhache, K.C. and *Noad* for the defendants.—The vessel was an arrived ship on the 23rd July at 9 a.m., and the lay hours commenced to run:

Monsen v. *Macfarlane* (*sup.*).

The delay was owing to the vessel having to wait her turn with previously arrived ships, which is not a cause *ejusdem generis* with the specific exceptions in the colliery guarantee:

Re Richardsons and Samuel (*sup.*).

Scrutton, K.C. and *Roche* for the plaintiff.—The lay hours did not begin until the ship got under the loading tip:

Shamrock Steamship Company v. *Storey*, 8 Asp. Mar. Law Cas. 590; 81 L. T. Rep. 413.

In any case the charterer is protected by the exceptions in the colliery guarantee. The presence of other ships was a cause beyond the charterer's control within the general words of the colliery guarantee, and the application of the *ejusdem generis* rule is thereby excluded:

Larsen v. *Sylvester* (*sup.*).

They also referred to

Steamship Knutsford Limited v. *Tillmanns*, 99 L. T. Rep. 399; (1908) A. C. 406.

Bailhache, K.C. in reply.—The reason for the exclusion of the *ejusdem generis* rule in *Larsen* v. *Sylvester* (*sup.*) was the use of the wider expression "of what kind soever." He also referred to

Leonis Steamship Company v. *Rank*, 11 Asp. Mar. Law Cas. 142; (1908) 1 K. B. 499.

HAMILTON, J.—This is an action brought by Mr. Robert Thorman, who, I understand, carries on business in various places—Glasgow, Newcastle, Sunderland, as well as Hull—for 177*l.* 14*s.* 4*d.* commission and moneys disbursed in respect of the defendants' vessel the *Aldgate* at Hull, the fact having been that Mr. Kirk, who is the agent for Mr. Thorman at Hull, as his agent, had the defendants' vessel consigned to him at the time in question. The defence admits 176*l.* 13*s.* 4*d.*, subject to a claim which is set up for a like sum for demurrage, which it is said the plaintiff is liable for under a charter-party dated the 19th July 1907. As regards the one guinea difference between these two sums no evidence has been given, and that part of the claim has not been proceeded with; and the question, therefore, arises whether the defendants make out or not their claim for demurrage against Mr. Thorman in respect of their vessel, the *Aldgate*. The contract is contained first of all in a charter dated at Newcastle, effected with Mr. Thorman by Messrs. Stephens, Sutton, and Stephens, agents for the owners of the vessel. It is effected on a charter-party form of Mr. Thorman's own. It contains among other terms this clause: "Steamer to be loaded in 120 hours on condition of usual colliery guarantee, handed." The word "handed" in the printed form is deleted under circumstances which appear in a letter dated the 29th Aug. 1907 of Messrs. Stephens, Sutton, and Stephens, to Mr. Dillon, the managing owner of the vessel. In that they say: "When we fixed your vessel we asked Mr. Thorman for a colliery guarantee, and he stated he had no Hull guarantee, but would agree to the usual colliery guarantee in use on the Tyne, to which we replied that it must be clearly understood that the conditions must be nothing worse than the usual Tyne guarantee; knowing the terms of this we let the matter rest where it was, and Thorman did not make out a guarantee for your vessel." And as a matter of fact, although a form of guarantee was in the possession of Messrs. Stephens, Sutton, and Stephens on the 29th Aug., that was after the dispute and the matters in question had arisen. I think it is clear from that that the parties contemplated that in the first instance Mr. Thorman should put forward the colliery guarantee. I think it is impossible to infer from that letter that anything passed when the charter was entered into that can be treated as either a contract supplemental to the charter-party in the nature of a warranty that the colliery guarantee should

not be anything worse than the usual Tyne guarantee, or any arrangement which in itself bound the parties. In fact, Mr. Thorman had a printed form of guarantee bearing his name not specially applicable to any particular port, and, in fact, he not only handed this to Messrs. Stephens, Sutton, and Stephens, but when, after the dispute had arisen, he was asked by Messrs. Charles Taylor and Co., the managers of the association in which the ship was entered, to forward a copy of the guarantee which they understood he intended to rely upon, he did, in fact, forward on the 30th Aug. a *pro forma* copy of the usual coasting guarantee; and being asked on the 31st if it was the actual form used in the case of the *Aldgate*, he replied that it was "the usual colliery guarantee, and same taken in conjunction with the charter-party gives the conditions of the loading of this steamer," and that was accepted by Messrs. Taylor and Co., representing, for this purpose, the defendants. I think that this charter-party contemplates that the parties may designate what the conditions of the usual guarantee may be. Had they not done so it would have been a question of evidence, and then the question would have been: What terms are usual, because this is not the usual colliery guarantee, but simply on condition of usual guarantee. But I have come to the conclusion that the parties have in fact designated the condition of colliery guarantee for themselves, and by mutual accord at the instance of Mr. Thorman, and with the assent of those representing the defendants they have designated Mr. Thorman's form as the one which contains the terms which are to be incorporated into the charter-party. Now the charter-party provides that the vessel, which was then at Rotterdam at the date of the charter, "shall with all convenient speed proceed to Hull (Alexandra Dock) as ordered by charterer and there take on board as tendered in the usual manner, according to the custom of the place as per colliery guarantee, which owner agrees to accept, a full and complete cargo of coal, not exceeding 5200 tons." No point is now taken as to the performance of conditions precedent to the vessel's right to treat herself as ready to load, namely, the giving of telegraphic advice and the actual being ready at the time when she gives the notice which she is obliged by the terms of the charter to give, and in point of fact the vessel was arrived at Hull, admitted to the Alexandra Dock, and had given a notice by the 23rd July 1907 at 9 a.m. In fact, she was not allowed by the ordinary regulations of the dock to go under the loading spout, where alone coal could be loaded, until midnight of the night between the 1st and 2nd Aug. She was thereafter loaded, not without some delay and stoppage, but relatively small, and got away on the 7th Aug., and the effect of those dates is this, that if the vessel was entitled to claim that her lay days or lay hours commenced on the 23rd July, at 9 a.m., she was on demurrage before she got under the spout and could be loaded at all; whereas, on the other hand, if her laying time did not commence until she got under the spout, then having regard to the interposition of sundry excepted days, namely, Sunday and Bank Holiday, she would not have got upon demurrage.

The circumstances under which she came to the port appear to have been that Hull was at that time busy with coal. Mr. Thorman says that there were a good many ships, but not more than the railway and dock could have dealt with if properly organised; Hull could have dealt with much more coal. Then Mr. Parkinson, agent at Hull for the Denaby and Cadeby Main Colliery, which was the colliery whose coals were designated for the ship's cargo, describes the course of business, and says that at this time there were difficulties arising from the condition of traffic on the railway. The course of business seems to have been that the colliery was turning out sufficient coal for the daily loading of such ships as could be loaded; that the colliery had difficulty in leading the coal down from the colliery to Hull; that the difficulty arose, as it is described, from being short of engine power. There was a suggestion that there had been an accident to some engine, but there is no evidence to connect that in any way with the difficulties arising in this case; and the fact that the railway was short of engine power, due to some extent to engines requiring repairs, and constituting, in the language of Mr. Parkinson, the crux of the whole situation to some extent, is, as I understand the evidence, one of those things that happens to railways from time to time when their business is flourishing, and the provision of engine power has not been kept up in advance so as to deal with the traffic coming in. When the coal was consigned from the collieries it was consigned to the collieries agent's office at Hull, not ticketed or labelled or consigned to any particular ship, but consigned to Mr. Parkinson generally, so that he could direct it to be tipped into whatever ship happened to be under the tip at the time. The regulations of the dock, as at many other docks, almost necessarily require that ships which have to be loaded under a particular appliance shall be loaded in their turn of arrival, and I do not think any difference is made by the fact that in this case the Denaby and Cadeby Main had a preference at two of the hoists of the tips in the dock as well as the right to supply coals in their turn at the other tips. It is said in terms, by Mr. Parkinson, if the *Aldgate* had got under the tip earlier she would then have got the coal which came down earlier. There was coal at the tip subject to casual delays there; there was coal coming down by the railway to the tip adequate for the supply of the vessels that got to the tip in their turn, and the conclusion of fact, therefore, at which I arrive upon that evidence is that what prevented the vessel from getting to the tip any earlier than the night of the 1st and 2nd Aug. was the fact that there were other vessels in turn of arrival before her at Hull, and I accept also the evidence of Mr. Thorman, that although there were many ships there there were not more than the railway and dock could have dealt with if they had been properly organised. I think, therefore, that the conclusion is that in the ordinary course of the business at the Hull dock, the vessel took her turn, and, there happening to be other vessels in turn before her, she was thereby and not otherwise prevented from getting to the tip where she had to take her cargo any earlier than she did. In that state of the facts, how did the obligations under this contract arise? It is contended by the defendants that their vessel was what is called an arrived vessel on the 23rd July at 9 a.m., that her lay hours ran out before any coal was put on

board, that after that she was loaded while she was on demurrage, that no exceptions in the contract prevent or suspend the running of the lay hours from the 23rd July, at 9 a.m., and that if any matters within those exceptions arose after the loading began, as the vessel was already on demurrage, those exceptions do not avail to protect the charterer. On the other hand, the charterer says, first of all, she was not an arrived vessel until she got under the tip, and the risk of delay between arrival in dock and arrival under the tip is, under these two instruments, upon the ship; and, secondly, it is said that the delay which occurred after the vessel arrived in dock is within the exceptions which prevent the lay hours from running, and, therefore, the running is suspended, and the charterer is not liable during that time, and that when she did begin to load she was then loaded with dispatch and within her own time; and that, furthermore, there were some delays, comparatively small which would be in themselves excepted under the same exceptions in the charter-party. Take first the question: When was she an arrived vessel? The charter-party provides that she is to proceed to Hull, Alexandra Dock, as ordered by charterer; and the charterer selected Denaby and Cadeby Colliery as the one whose coals were to be loaded. The colliery guarantee says: "Time not to count until after the said steamer is wholly unballasted and ready in dock to receive her entire cargo"—various matters—"or any other cause beyond my control always excepted." Then: "Time to count from 6 a.m. following the receipt of notice (in writing) of readiness by Robert Thorman if the steamer is actually ready as above stipulated, and not before." I think that the effect of those provisions must be, as a matter of construction, that the time is to count when the vessel is wholly unballasted and ready in dock to receive her entire cargo, subject to the other stipulations as to notice in writing of readiness, and so forth. The charter-party itself is a charter to proceed to a named dock in a named port, and, unless the words "as ordered by charterer" alter it, under the ordinary rule applicable to charter-parties, she would be arrived at her destination when she was in the dock; but even if the words "as ordered by charterer," which are only in the printed form, are to be treated as though they bound the vessel to tender herself at the spot alone ordered by the charterer—even if that were so I am still of opinion that the words in the guarantee fixing when time is to count, and fixing it negatively by a provision as to what is to happen before time is to count, would cause the time to run from the moment when she was wholly unballasted and ready in dock. It appears to me that that point is covered by the case of *Monson* v. *Macfarlane* (*sup.*), although I think the same conclusion would be justly drawn from the expressed terms of the instrument. In *Monson* v. *Macfarlane* the point turned upon a charter-party and a colliery guarantee incorporated with it indistinguishable on this point from the present case, except that there the designation of the spot to be selected by the charterer in the dock is much more distinct; and it was held that the time began to run as per colliery guarantee after the said ship is wholly unballasted and ready in dock at Grimsby, although the charter-party had only stipulated that she was to proceed to a customary loading place in the Royal Dock, Grimsby, as required by charterers. It seems to me, therefore, that that case, which is stronger than the present one, would show that effect must be given to the direct words of the colliery guarantee The contention was advanced, however, that there was authority for saying that upon the construction of the charter-party itself the ship was not an arrived ship until she got under the tip, and the authority for that proposition is the decision of Bigham, J. in the case of *Shamrock Steamship Company* v. *Storey*, in which Bigham, J. held in 1898 that, having regard to the words in the charter, to load in the usual manner according to the custom of the place, and to load from such colliery or collieries as charterers may direct, showed that the time for loading is not to be be deemed to run until the vessel is under the tip. It appears to me to be evident from the learned judge's observation "Whether my reading of the charter-party, without the words as to the guarantee, be right or wrong, the defendants are entitled to succeed," that that view of his was, and was intended to be, an *obiter dictum*, and as a matter of fact the terms of the usual guarantee are not set out in the report; the only guide to that is the learned judge's finding on the evidence that the usual guarantee form provides that the time for loading is not to begin to run until after the vessel is under the tip. If that were so, of course the decision that the time would only begin to run after the vessel was under the tip would govern the case, and would decide the matter in a way different from the present case; and, therefore, I think that the *Shamrock* case is no authority touching the present case at all.

The next point made by the charterer is: Assuming the time begins to run, as I am now assuming it does begin to run, when the ship was wholly unballasted and ready in dock, that provision that time is so to count is subject to the exception of a number of matters set out in the guarantee in the following terms: "Strikes of pitmen or workmen, frosts or storms, and delays at spouts caused by stormy weather, and any accidents stopping the working, leading, or shipping of the said cargo, also restrictions or suspensions of labour, lock-outs, delay on the part of the railway company either in supplying waggons or leading the coals, or any other cause beyond my control, such stoppage occurring any time between the present date and actual completion of loading," prevented the time from running, and, therefore, were effectual to relieve the charterer in the present case. Reading that clause as a matter of construction, it is obvious that one has to ask oneself first of all whether it is subject to the application of the canon of construction which is known as the *ejusdem generis* rule, and, if so, how is it to be construed, or whether there is anything in it which prevents the application of that canon of construction. One must, of course, bear in mind that it is a canon of construction only. My object is to find out the intention of the parties. The instrument, the nature of the transaction, and the language, must all have due regard given to them, and the intention of the parties is to be ascertained by the consideration

of their language in accordance with its ordinary and natural meaning. Now, I think, although it is commonplace to observe it, it is important to bear in mind first of all that this is a clause of a kind very familiar in ordinary contracts of carriage or contracts connected with the carriage of cargoes; secondly, to remember that this is a charter which is of that class where the lay days are fixed lay days, or calculable as distinguished from the class where the obligation is to load in a reasonable time under the circumstances, using due diligence to obtain dispatch; and although, if the parties use language appropriate to the purpose, it is perfectly open to them to contract for that provision and to take a charter which provides for fixed lay days and convert it by other language in this connection into a charter to load in a reasonable time, still when you are considering what the instrument is it has to be borne in mind that the charter is of the type which is favourable to the ship, by fixing the lay days; and that the interpretation of these exceptions upon that provision for fixed lay days as allowing any cause beyond the charterer's control to excuse him would eventually convert it into a charter of the opposite type which is favourable to the charterer and less favourable to the ship. Apart from authority it seems to me that the mere consideration that so many matters have been carefully enumerated, and quite superfluously, unless you restrict the subsequent words "any other cause beyond my control," would lead one to construe that clause according to the *ejusdem generis* rule, and to say that it was intended by the parties that the time should not count only if various matters specifically enumerated, or if any other cause similar to them and beyond the charterer's control, interfered with the loading. This point, the defendants say, is not a mere matter of construction, but is covered by authority, the authority being the case of *Re Richardsons* v. *Samuel* (*sup.*). That is a decision of the Court of Appeal. It has been cited in the more recent cases, which I will come to in a moment, and it appears to me that, apart from the conclusion which I have arrived at according to the construction of the words, the authority of this is binding because it is said at p. 267 in the first judgment of Smith, L.J. and in no way qualified or departed from in the subsequent judgments: "The contention that because the delay arose from the loading of the ships in the port in the order of their arrival the charterer is exempt cannot prevail, for it is impossible to treat delay arising from such a cause as due to accident to the railway, or as coming within the term 'other causes beyond charterer's control.'" Even if that were a dictum unnecessary for this decision I should have hesitated long before refusing to follow it; but it appears to me that it was necessary for determining an argument which it was proper for the court to determine, and as both the subsequent judgments begin by saying that they agree alike in the conclusion and reasoning of the first judgment, I must treat that as a decision of the court. It is true that it is a decision upon words and also on facts to some extent different from the present case, but it appears to me to be as close to the present case as one could expect the language of a different instrument to be, and to decide that where there are some accidental matters followed by the words "other causes beyond charterer's control excepted," the other causes beyond the charterer's control must be construed in a limited sense with reference to the particular matter specified before, and that that being so the mere loading of the ship in the port in the order of its arrival, and, therefore, of necessity waiting its turn, although no doubt beyond the charterer's control, cannot be said to be within those words in the contract itself. Now, the argument which has been advanced by Mr. Scrutton is that two subsequent cases — both of them decisions of the House of Lords — the case of *Larsen* v. *Sylvester* (*sup*.) and *Steamship Knutsford Limited* v. *Tillmanns* (*sup.*) both govern this case in favour of his client, and have in fact altered the state of the mercantile law with regard to the construction of mercantile instruments according to the canon of *ejusdem generis*, and it is said these words in the present clause are not for any useful purpose distinguishable from *Larsen* v. *Sylvester*, and that a rule was laid down in *Knutsford* v. *Tillmanns* for the interpretation of such a clause as this, which requires the discovery of some all-embracing genus that will take in all the matters specifically enumerated under one category as a condition of the general words at the end being construed as referring only to such category or such genus; and that unless you can form one common category of all the preceding specific matters and introduce the general words into them, the general words must be treated as detached from the previous specific matters, and be of a generality limited only by the actual language of the general words themselves. I think those are the two ways in which *Larsen* v. *Sylvester* and *Steamship Knutsford Limited* v. *Tillmanns* are sought to be applied. It is true that *Larsen* v. *Sylvester* is like in its circumstances both as to date, and as to cargo, and as to locality, to the present case; but the resemblance must turn upon the interpretation put upon the words of the particular instrument. It is noticeable in *Larsen* v. *Sylvester* that Lord Robertson having been careful to state what no other member of the House had in any way expressly thrown doubt upon, that the *ejusdem generis* doctrine of construction was both sound and valuable, and must be maintained, at the conclusion of the judgment the Lord Chancellor was also quoted as stating his concurrence in what Lord Robertson had said; and I think, therefore, that it is quite clear that the principle upon which the House of Lords proceeded, following in that respect the decision below in the case of *Larsen* v. *Sylvester*, was that they sought to make no change in the accepted rule of construction—they sought to cast no doubt upon either its utility or its application; but they desired to recall that, contrary perhaps to what had been argued in that case and some others, the rule of construction is subject to the real meaning of the parties, and not to the meaning of the parties subject to some rule of construction; that is to say, that the canon of construction is not the instrument for getting at the meaning of the parties, and that the parties, if they use language intimating such intention, may exclude the operation of this or, I suppose, any other canon of construction; and they found in the words which existed in that case, "Any other unavoidable accidents or hindrances of what kind soever," an

attempt as strenuous as language could make it to indicate that the *ejusdem generis* rule, with which I dare say the parties were familiar, was not to be applied in that present case. It may well be that the result of that was that there were two or three lines of surplusage in the charter-party, but the House of Lords came to the conclusion that when the parties said that "any other unavoidable accidents or hindrances of what kind soever beyond their control" were to be excepted, it was impossible to suppose that they had meant that some unavoidable accident or hindrances, although beyond their control, should still impose liability. The only question, therefore, in applying *Larsen* v. *Sylvester* to the present case is to inquire whether there is any language in Mr. Thorman's guarantee of such length and effect as that, and I think there is not. Lower down in his guarantee there is the expression, "Should the colliery be off work for any cause whatever, time not to count." In the form of guarantee which I understand is generally used, at any rate on the Tyne, and as provided by the North of England United Coal Trade Association, the word "whatever" is imported into a clause corresponding with the clause in question, and I think it is quite reasonable to suppose that the parties entering into this guarantee were fully aware, having a command of the English language, that they might carry the matter considerably further if they used the word "whatever" (I express no opinion as to how far that would have carried it), and if they chose to use the expression in *Larsen* v. *Sylvester* apart altogether from the decision in that case which had not then taken place, as "of what kind soever," it would pass the wit of man to find any language more express or emphatic to indicate the utmost possible generality; but when they confine themselves to words of specific enumeration, like "any other cause beyond my control," I see nothing inserted here to derogate from the ordinary canon of construction that those words are subject to a limitation—namely, that of the genus or category which the previous words have indicated. Now the other case is *Steamship Knutsford Limited* v. *Tillmanns* (*sup.*). As to that, it is to be observed that, after a long and careful discussion as to how the *ejusdem generis* rule is to apply to various classes of instruments, the court did come to the conclusion that there was quite a sufficient category contained in clause 4 of the bill of lading in question, and a common element applying to all the specific matters enumerated to enable the words "any other cause" to be brought within that category, although whether you call it a category, as Farwell, L.J. called it, or a genus, as the other Lords Justices called it, no doubt it was a category or a genus lacking in scientific precision, but they found a common element in the references to "ice, blockade, interdict, war, disturblances," and so forth, sufficient to enable them to construe the words "any other cause" as referable to the category so expressed. Considerable discussion arose there as to whether the presumption of law is that general words are general until they can be shown to be particular, or whether general words are *ejusdem generis* with the particular words until they can be shown to be general without any limitation. I do not think it is in the least necessary to embark upon that discussion. It was a discussion that arose from the citation of a case relating, I think, to an ante-nuptial settlement. When the case was taken to the House of Lords I find that Lord Macnaghten, at p. 409, says that the rule of *ejusdem generis* applies as laid down in *Thames and Mersey Marine Insurance Company* v. *Hamilton* (12 App. Cas. 484). "I prefer to take the rule on a point of that sort from a case which did deal with bills of lading and shipping documents, rather than from cases that dealt with real property and settlements," and in effect the rule referred to is in 12 Appeal Cases, p. 490, in the judgment of Lord Halsbury: "Two rules of construction now firmly established as part of our law may be considered as limiting those words. One is that words however general may be limited with respect to the subject-matter in relation to which they are used"—that, of course, covers the observations which I ventured to make that this is a charter-party with fixed lay days—"the other is that general words may be restricted to the same genus as the specific words that precede them." The third construction is that "where the same words have for many years received a judicial construction it is not unreasonable to suppose that parties have contracted upon the belief that their words will be understood in what I will call the accepted sense." As to that, I may observe that *Re Richardsons and Samuels* is a case which is long known to shipping lawyers, and that in my experience the mercantile gentlemen who prepare these documents have a very competent knowledge of what the decisions of the courts have been in recent years. Then, at p. 501 in the same case, Lord Macnaghten says: "According to the ordinary rules of construction these words must be interpreted with reference to the words which immediately precede them. They were, no doubt, inserted in order to prevent disputes founded on nice distinctions." That object of the insertion of such words I am afraid has not been always successfully maintained. "Their office is to cover in terms whatever may be within the spirit of the cases previously enumerated"; and then a little lower down: "If, on the other hand, that expression is to receive a limited construction, as apparently it did in *Cullen* v. *Butler*, and loss by perils of the seas is to be confined to loss *ex marinæ tempestatis discrimine*, the general words become most important. But still, ever since the case of *Cullen* v. *Butler*, when they first became the subject of judicial construction, they have always been held or assumed to be restricted to cases 'akin to,' or 'resembling,' or 'of the same kind,' as those specially mentioned." Now, following those observations, bearing in mind that when you are dealing with bills of lading and shipping documents it is better to apply cases upon bills of lading and shipping documents, and that, although you may refer to a case of an ante-nuptial settlement for a definition, doctrine is better derived from cases on charter-parties it seems to me there is nothing in *Steamship Knutsford Limited* v. *Tillmanns* to raise any difficulty in the present case, except this—that one has now to look to see, if there be a genus, what that genus is. Here Mr. Scrutton says it must be a genus which is inclusive, and into which all the previous specifically enumerated

matters will enter, and suggested that the expression of Collins, L.J., in *Richardson's* case at the end of his judgment had been modified in consequence of the decision in *Tillmanns* v. *Knutsford*. The expression in question is at the end of the judgment on p. 268. It does not appear to me that that is at all necessarily so. I do not understand that anything is laid down in *Tillmanns* v. *Steamship Knutsford Limited* which determines that in all instruments and under all circumstances the general words are referable to one category into which all the previously enumerated words must enter as component species, and I see no reason why either the nature of the instrument or the language used, or any other proof of the intention of the parties, might not cause the specific matters to be read *ejusdem generis*, so that the general words might be attracted either to them individually or to them in groups according to the intention of the parties; but it does not appear to me to be a matter of great difficulty to find a common category which will cover all the matters specifically inserted in the present case. Mr. Bailhache offered as the distinction which would constitute a common category, but, as I stated before, it is not necessary that this genus and differentia should be of extreme scientific precision, that the clause referred to hindrances on the landward side and not on the seaward side. That test is attractive because it is terse and pointed, but I think Mr. Scrutton pointed out with justice that, although it might be relatively unlikely in fact, hindrances which would come within this clause might arise on the seaward side, as, for example, if frosts or storms obstructed the passage of the ship from the dock to the tip, or if a strike of dock employees prevented the sluices or dock gates from being worked which had to be worked; or if an accident occurred, say the sinking of a vessel at the tip, stopped the shipping of the cargo that was there. But it appears to me that the common category which covers all this is to be found in the circumstance that they clearly all refer to something extraordinary—something in the nature of a casualty, something accidental or abnormal; not in the ordinary course of a flourishing business, but detrimental to the ordinary course of business; a common feature quite as precise as the common feature which sufficed in *Tillmanns'* case; a common feature, which I think it is, of an effective business object; and a common feature which excludes the cause of the detention of this vessel upon the evidence of Mr. Thorman himself, because what, as I find as a fact, prevented the vessel from getting to the tip was that she had to wait her turn. What obliged her to wait her turn was the fact that other vessels had come in before her, and I find as a fact that other vessels had come in before her in the ordinary course of the trade of the port, not that there were not more vessels coming in that summer than usual, but it was in the ordinary course of the trade of a port which must have its fluctuations, and which was at that time in an exceptional and flourishing condition; that the other vessels had come in in the ordinary course of trade, and would have been dealt with without delay in the ordinary course of trade if the railway and the dock, which means the railway lines and appliances coming down to the tip, had been properly organised and managed, and although there was congestion and delay on the part of the railway company during this period, that was not the cause of the vessel not getting to the tip, because if it had not been that there had been other vessels in turn before her she would have got straight to the tip, and then would have found coal available for her, the railway congestion notwithstanding. It seems to me, therefore, that reliance cannot be placed in aid of the charterer upon the exceptions in the colliery guarantee, and, that being so, I do not think it necessary to consider the length of time during which it is said that after loading began there was delay on the part of the railway company in supplying waggons or loading the coal, because, as a matter of fact, those times could be easily ascertained from the log, which is the best, although not very clear, record of the length of time of stoppage; and it does not appear to me that they are of any significance, the conclusion having been arrived at that the vessel was already on demurrage before any coal was put on board at all. The result of that is that there must be judgment for the defendants upon the counterclaim.

Solicitors for the plaintiff, *Maples, Teesdale, and Co.*, for *Bramwell, Bell,* and *Clayton,* Newcastle-on-Tyne.

Solicitors for the defendants, *William A. Crump* and *Son,* for *A. M. Jackson* and *Co.*, Hull.

Friday, March 4, 1910.

(Before BRAY, J.)

MERCHISTON STEAMSHIP COMPANY LIMITED (apps.) *v.* TURNER (resp.) (*a*).

Revenue—Income tax—Single ship limited company—Ship lost—Power to acquire another ship—Continuity of business.

A limited company was formed to purchase and trade with a steamship, and, in the event of her loss or sale, to acquire some other steamship, "but so that the company shall not own at any one time more than one ship."

The company purchased one ship and traded with her from the 14th Oct. 1901 *to the 1st April* 1906, *when she was lost at sea. With the insurance moneys the company purchased another, and she commenced her voyages on the 17th Oct.* 1906 *and so continued over the period of assessment to income tax.*

Held, that the company were carrying on one business throughout, and that a new business was not started when the one was lost and the other was acquired.

CASE stated by the Commissioners for the General Purposes of the Income Tax Acts for the Division of Stockton Ward, Durham, on an appeal by the Merchiston Steamship Company Limited, hereinafter called the "company," against an assessment of 2045*l.*, less an allowance of 1036*l.* for depreciation in accordance with the provisions of sect. 12 of 41 & 42 Vict. c. 15, made in respect of the profits of the steamship *Veraston* for the year ended the 5th April 1908.

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

The appellant company was a limited liability company registered under the Companies Acts 1862 to 1900 on the 25th June 1901.

By the memorandum of association the objects (*inter alia*) for which the company was formed were as follows :—

(*a*) To adopt and carry out without modification, or with such alterations, if any, as may be agreed upon, an agreement dated the 8th day of May 1901 and made between Messrs. Wm. Gray and Co. Limited, of West Hartlepool, of the one part and Messrs. Walter Scott and Co., of the same place, of the other part.

(N.B.—This was an agreement that the parties of the first part should build and sell and the parties of the second part purchase a steamer, details of which were embodied therein.)

(*b*) To purchase or otherwise acquire, charter or otherwise hire, contract for the building of, equip, sell, repair, let out to hire, and trade with the said steamship referred to in the said agreement.

(*c*) In the event of the loss, sale, or disposition of the said vessel or of any vessel subsequently acquired, to acquire from time to time some other steamship, but so that the company shall not own at any one time more than one ship.

(*d*) To carry on the business of shipowners in all its branches with respect to such steamship and any other business connected therewith, or which may for the time being be expedient to be carried on therewith.

(*e*) To employ as ship's husband, managers, and general agents of and for such steamship any person, firm, or company, and that although he or they may or may not be entitled to any share or interest in the company.

By the articles of association it was provided (*inter alia*) as follows :—

45. General meetings shall be held once in every year after the year in which the company is incorporated at such time and place as may be prescribed by the company in general meeting, and, if no time and place is so prescribed, as may be determined upon by the manager.

69. There shall be a manager of the company in lieu of directors.

70. The first manager shall be Walter Scott, of West Hartlepool aforesaid, shipowner, carrying on business under the style or firm of "Walter Scott and Co.," or other the person or persons for the time being constituting the firm of "Walter Scott and Co.," who shall receive for his services as such manager the commission of five pounds per centum on the gross earnings of the company, which shall be credited with all brokerages, discounts, allowances, and drawbacks of every description. The said manager shall pay for clerks and office rent out of the remuneration aforesaid.

75. (*l*) He may insure the steamship for the time being owned by the company and the freights thereof in such manner and for such amounts as he may consider reasonable and proper, and he may, in addition, cover the said ship against ownership, collision, and other risks in such manner and to such an extent as he may consider proper. (*m*) He may, in the event of the loss of the said steamship for the time being owned by the company, with the approval of the shareholders in general meeting, buy another steamship by and out of the proceeds of the insurances of the said ship so lost, or he shall divide and pay the net proceeds of such insurances rateably amongst the shareholders in the company and wind the company up.

The company rented no office of its own, had no secretary, clerks, or staff, but all business connected with and the managing of any ships owned by the company was carried on by the manager in his own office with his own staff of clerks, his remuneration being 5 per cent. on the profits of each voyage of the ship.

In accordance with art. (*b*) of the memorandum of association the company purchased the steamship *Merchiston*, which was registered at the port of West Hartlepool on the 16th Oct. 1901 and commenced her first voyage on the 14th Oct. 1901. For the years 1901-2 to 1905-6 inclusive the company was duly assessed to income tax in respect of the profits of the steamship *Merchiston*, such assessment being based upon the audited voyage accounts of that ship, which were duly embodied in the printed balance-sheets of the company.

On the 1st April 1906 the steamship *Merchiston* was lost in a collision at sea, and the Shipping Registry was closed on the 19th April 1906. The sole income of the company for the period from the 14th Oct. 1901 to the 1st April 1906, as shown by the voyage accounts and balance-sheets in the first six annual reports and accounts of the company which were annexed and formed part of the case, consisted of the profits derived from the trading of the steamship *Merchiston*, the whole of the sixty-four shares of which were owned by the company.

In May 1906 the manager of the company, with the approval of the shareholders in general meeting, contracted for the building of a steamship, the *Veraston*, out of the proceeds of the insurance moneys of the steamship *Merchiston*, which were, as soon as collected, at various dates paid in advance to the builders of the *Veraston*, interest at the rate of 4 per cent. per annum being allowed by the builders on such payments made in advance, and such steamship was duly delivered, was registered at the port of West Hartlepool on the 16th Oct. 1906, the whole of the sixty-four shares being owned by the company, and commenced her first voyage on the 17th Oct. 1906. The company was not wound-up, nor was any alteration made in the capital of the company.

The *Merchiston* and the *Veraston* did not trade between any definite ports or upon any definite route, nor were either of the vessels engaged in any definite trade, but carried whatever freights were likely to be remunerative, going from port to port in all parts of the world and carrying any description of cargo. Both steamers were what is commonly known as "tramp" steamers.

For the year 1906-7, commencing the 6th April 1906, the company was not assessed in respect of any of the profits of the steamship *Merchiston*. This vessel was, as above stated, lost on the 1st April 1906, and the company was without a vessel until the *Veraston* was ready on the 17th Oct.

The company was assessed in the year 1906-7 in the sum of 965*l.* (less 518*l.* proportional allowance for depreciation) in respect of the profits of the steamship *Veraston* for the 171 days from the 17th Oct. 1906 to the 5th April 1907, and in respect of the interest on prepayments to the shipbuilders. This assessment, computed according to the rule in the fifth case of sched. D, as provided for by the first rule in the first case of sched. D, sect. 100, of the Income Tax Act 1842, was agreed to by the manager, who, with regard to the basis on which the profits for assessment

should be computed, wrote to the Surveyor of Taxes at West Hartlepool, as follows:—

West Hartlepool,
20th Aug. 1907.

. . . As the steamship *Veraston* only came out on the 17th Oct. last, we presume we will only have income tax to pay up to the 5th April this year, otherwise the income tax paid now for that period would overlap, and we would be paying for it again on the 1st Jan. next.

We inclose a statement showing the amount that we think is due on these lines, and should be glad if you will kindly correct or corroborate same, and let us have the figures back for our information.

Statement Referred to.

Merchiston was lost 1st April 1906, therefore no profits till *Veraston* commenced 17th Oct. 1906			
Profit on first voyage from 17th Oct. 1906 to 7th May 1907 = 203 days	£916	3	3
Therefore to 5th April 1907 = ...	771	15	0
Less depreciation on 25,909*l.* (@ 4 per cent. for 171 days—about	458	13	3
	£286	1	9

Income tax at 1/- in the £ = 14*l.* 6*s.* 0*d.*

The Surveyor of Taxes,
West Hartlepool.

The assessment in 1906-7 was made on this basis accordingly.

The assessment for 1907-8, which forms the subject of this appeal, was based upon the voyage accounts of the steamer *Veraston* from the 17th Oct. 1906, which showed a profit equivalent to 2045*l.* for the year, from which an allowance of 1036*l.*, based upon the cost price of the steamship *Veraston*, has been made for depreciation, giving a net assessment of 1009*l.*

The company appealed against the assessment and contended:—

(1) That the company is assessed as a company in respect of the profits of the company, and that the assessment should be based under the first rule of the first case of sched. D, sect. 100, of the Income Tax Act 1842 (5 & 6 Vict. c. 35) upon the average profits of the company for the three years preceding the year of assessment as shown by the published accounts of the company for the period from the 12th Dec. 1903 to the 20th Dec. 1906. They claimed that the assessment should be reduced to one-third of the actual profits of the three preceding years ending the 20th Dec. 1906. They contended that the company never did in fact cease to carry on business; that the company had power to do as it liked with the vessel, including power to sell her and purchase another vessel, or, as actually happened on the loss of the vessel, to purchase another vessel. The company never for a moment ceased to act under the memorandum of association. The vessel was lost, and the manager at once set about collecting the insurance moneys and arranging for the purchase of another ship, the contract for building being dated the 17th May 1906, and the insurance money as received was paid over to the builders of the new vessel.

(2) That the case of *Watson Brothers* v. *Lothian* (4 Tax Cas. 441) decided that the purchaser of a ship does not acquire a business or concern, but machinery or plant to carry on a business or concern; that the case is precisely similar to that of a mill or manufactory having temporarily to close its works owing to the breakdown or destruction of machinery which has to be replaced; and that hence when the steamship *Merchiston* was lost the company lost its plant and had to replace it or wind-up the business. The business was not wound-up, but the plant was replaced.

(3) That in the case of a limited company which owns several steamers, where one steamer is lost and another purchased to replace it, a new assessment would not be made, and that the same rule should apply to a single ship limited company.

(4) That on the loss of the steamer no shareholder has a right to demand repayment of his capital. The latter remains with the company, which is a continuing concern.

The appellant company admitted that the assessment would have been correct if the ship in respect of which the assessment was made had been a steamer divided into sixty-four shares owned by various persons and managed by a ship's husband or managing owner, on the ground that in the instance cited the assessment would be on the profits of the steamer, and that on the loss of the steamer the individual shareholders would be entitled to demand from the managing owners repayment of their share of the insurance recovered, but that this does not apply to a limited company.

Under the Income Tax Act 1842, s. 100, the duties under sched. D are to be assessed and charged under the rules there set out, and the first case under that section applies to duties to be charged in respect of any trade, manufacture, adventure, or concern in the nature of a trade.

The first rule under that first case provides:

First.—The duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the balance of the profits or gains of such trade, manufacture, adventure, or concern upon a fair and just average of three years ending on such day of the year immediately preceding the year of assessment on which the accounts of the said trade, manufacture, adventure, or concern shall have been usually made up, or on the 5th day of April preceding the year of assessment, and shall be assessed, charged, and paid without other deduction than is hereinafter allowed; Provided always that in cases where the trade, manufacture, adventure, or concern shall have been set up and commenced within the said period of three years the computation shall be made for one year on the average of the balance of the profits and gains from the period of first setting up the same: Provided also that in case where the trade, manufacture, adventure, or concern shall have been set up and commenced within the year of assessment the computation shall be made according to the rule in the sixth case of this schedule.

The third rule of cases 1 and 2 provides:

Third.—The computation of duty arising in respect of any trade, manufacture, adventure, or concern, or any profession carried on by two or more persons jointly, shall be made and stated jointly and in one sum, and separately and distinctly from any other duty chargeable on the same persons, or either or any of them.

The third case relates to profits of an uncertain annual value and charged in sched. A, and the sixth case applies to the duties to be charged in respect of any annual profits or gains not falling

under any of the foregoing rules, and not charged by virtue of any of the other schedules contained in this Act.

The rule in the sixth case is as follows:

The nature of such profits or gains and the grounds on which the amount thereof shall have been computed and the average taken thereon (if any) shall be stated to the commissioners, and the computation shall be made either on the amount of the full value of the profits and gains received annually or according to an average of such period greater or less than one year as the case may require, and as shall be directed by the said commissioners, and such statement and computation shall be made to the best of the knowledge and belief of the person in receipt of the same or entitled thereto.

The surveyor of taxes, in support of the assessment, contended that the assessment was correctly made. He submitted (*inter alia*) that the company was formed for the purpose of carrying on "adventures" by means of ships, and that the company was limited by its memorandum of association to carry on only one such adventure at any one time; that the adventure carried on in respect of the steamship *Merchiston* ceased altogether on the day that the steamship *Merchiston* was lost at sea; that, as admitted by the company for the purpose of their assessment in 1906-7, no adventure or concern was carried on by the company between the 1st April 1906 and the 16th Oct. 1906; and that a new adventure or concern was started by means of the steamship *Veraston* on the 17th Oct. 1906; and that there is no connection whatever between the adventure of the steamship *Merchiston* and the adventure of the steamship *Veraston*. Had the memorandum of association allowed, the two adventures might have been carried on independently and concurrently, and, as it was, there was an interval of over six months between the cessation of one adventure and the commencement of the next. Further, that, even assuming the total profits in the three preceding years ending the 20th Dec. 1906 were to be introduced into the computation, the period when no trading was carried on must be eliminated from such calculation, and accordingly the assessment would not be one-third of such profits, but two-fifths of that amount.

If the assessment was to be calculated on the last-mentioned basis—viz., on two-fifths of the total amount of profits—such assessment would be in excess of the amount as contended for by the appellants.

The commissioners on the facts before them were of opinion that the case required that the assessment should be based upon the accounts of the steamship *Veraston* only on the ground that the adventure carried on by means of the *Veraston*, although similar to that of the *Merchiston*, was not a "succession" within the meaning of the 4th rule of cases 1 and 2 of sect. 100 of the Income Tax Act 1842, and confirmed the assessment.

A. A. Roche for the appellants.

The *Attorney-General* (Sir W. S. Robson, K.C.) and *William Finlay* for the respondent.

BRAY, J.—I think the appellants are entitled to succeed here. I think the commissioners were wrong. The question is this: Whether a new business was started when the first ship was lost and the second ship was built. I do not think a new business was started. I think it was from beginning to end one business—that is, to carry on the business of steamship owners with this limitation, that there should never be more than one steamship owned by them at the same time. I think that appears from the memorandum of association, of which the first object (*a*) is: To adopt and carry out a certain agreement—namely, an agreement to purchase the ship. The second object (*b*) is to trade with that steamship. If it had stopped there, then it would be one business with that steamship, and as soon as that steamship came to an end or was lost, and so on, the business would come to an end. But it provides for what is to happen otherwise. It is not left to the company to form a new company. The old company is to do something else. It is to go on with its business, and "In the event of the loss, sale, or disposition of the said vessel or of any vessel subsequently acquired, to acquire from time to time some other steamship, but so that the company shall not own at any one time more than one ship." I think that is the key to the whole thing. It is to carry on a continuous business. When you have bought that one ship you are to carry on business with that one ship, but when that ship comes to an end you may acquire another and go on with the same business, but with that other ship. In other words, the steamship is only part, though, of course, the most essential part, of the plant with which the business is to be carried on. Then (*d*) says: "To carry on the business of shipowners in all its branches with respect to such steamship"—that means the steamship which they may from time to time own. Then (*e*) is "To employ as ship's husband, managers, and general agents," and so on. I do not think there is anything more material except art. 75 (*m*) of the articles of association, which is merely dealing with the question as to what are the powers of the general manager — that is all. It says: "He may in the event of the loss of the said steamship for the time being owned by the company, with the approval of the shareholders in general meeting, buy another steamship by and out of the proceeds of the insurances of the said ship so lost"—that is to say, he may do that with the approval of the shareholders—"or he shall divide and pay the net proceeds of such insurances rateably amongst the shareholders in the company and wind the company up." In other words, no doubt there is a provision that in a certain event the company may wind-up. But the company did not wind-up. Therefore it seems to me they were carrying on one business from beginning to end, and, that being so, they are entitled to succeed here. I only say with regard to the finding of the commissioners that it seems to be based entirely upon a misapprehension, and therefore I cannot look upon their finding as a distinct finding upon a question of fact upon which there is no appeal. I think I have all the facts before me and can determine what is the proper conclusion of law to be drawn from them.

Appeal allowed.

Solicitors: *Botterell, Roche,* and *Temperley,* West Hartlepool; *Solicitor of Inland Revenue.*

Wednesday, June 15, 1910.

(Before BRAY, J.)

WILSON AND COVENTRY LIMITED *v.* OTTO THORESEN'S LINIE. (*a*)

Charter-party—Demurrage clause—No fixed time for demurrage—Obligation on ship to wait a reasonable time after expiration of lay days.

A charter-party provided that a ship should load 350 *to* 400 *tons of cargo as "fast as ship could receive as customary during customary working hours." The charter-party also provided for demurrage, but not for any fixed time. The usual time occupied for loading a cargo of this kind and quantity was two and a half days, but before the expiration of that period the ship left the port of loading without her full cargo, although had she been kept one day on demurrage the full cargo might have been loaded. In an action by the charterers for damages in consequence of the ship sailing before she had loaded a complete cargo :*

Held, that they were entitled to recover, as where a charter-party provides for demurrage, but not for any fixed time, it is the duty of the ship, if she has not loaded her full cargo, to wait a reasonable time beyond the allowed time.

COMMERCIAL COURT.

Action tried by Bray, J., sitting without a jury.

The plaintiffs who were the charterers, claimed from the defendants who were the owners of the steamship *Salerno*, damages for breach of charter-party.

By the charter-party, which was dated the 10th Aug. 1909, it was provided *inter alia*, that the steamship *Salerno* should with all convenient speed sail to Calais and there load, as customary, from the factors of the plaintiffs, a full and complete cargo of straw under deck, say, about 350 to 400 tons, and being so loaded therewith proceed to Las Palmas or Santa Cruz (Teneriffe) in charterers' option as ordered on signing bills of lading, and there deliver the same on payment of 18*s.* per ton freight; the said cargo to be loaded and discharged as fast as the ship could receive and deliver as customary during customary working hours, Sundays, holidays and strikes excepted, and, if vessel should be detained longer, demurrage to be paid at the rate of 4*d.* per gross register ton per day.

On the 28th Dec. 1909 the *Salerno* arrived at Calais and commenced to load, but, after loading only 209 tons, sailed for the port of discharge on the 30th Dec. 1909.

Greer appeared for the plaintiffs.

Roche appeared for the defendants.

Cur. adv. vult.

BRAY, J. read the following judgment:—In this case the plaintiffs were the charterers and the defendants were the owners of the vessel called *Salerno*. The charter-party was dated the 10th Aug. 1909, and it provided that the vessel should proceed to Calais, and there load a cargo of 350 to 400 tons of straw. The plaintiffs alleged that the ship sailed from Calais before the proper time, and that in consequence she was not fully loaded, and they thereby lost the profit which they would have made in respect of the carriage of the straw from Calais to the Canary Islands. The defendants counter-claimed damages for dead freight. The evidence was in conflict on several points; it is necessary, therefore, that I should state the material facts as I find them. Prior to the 10th Aug. 1909, the date of the charter-party, I find that the usual time occupied in loading a vessel with 400 tons of straw was three days, and the shipowner was content to accept this as a reasonable time, knowing probably the delays on the part of the railway company in getting the trucks down; but if the trucks were sent down by the company so that the straw could be loaded as fast as the ship could receive it, I find that the 400 tons could be loaded in less than three days. I do not think they could be loaded in two days, except under great pressure. I think the normal time in the circumstances would have been two and a half days. When the ship left at 4.30 p.m. on the 30th that time had not expired, and I find as a fact that the ship did leave before the time allowed by the charter-party for loading had expired. I find that two waggons, containing about twenty-three tons, arrived in time to be loaded that night, or, at all events, before the time expired. I find, further, that waggons containing seventy tons arrived that night and that forty-three tons were on the way, and would have arrived early on the morning of the 31st, and that, if the ship had stayed till 5 p.m. on the 31st, she could have loaded 136 tons at least beyond what she actually took, but that that would have entitled the ship to one day's demurrage, which, at 4*d.* per ton, as provided by the charter-party, would have amounted to 25*l.* 17*s.* 4*d.* I also find that the damages sustained by the charterers in respect of the straw which the ship ought to have loaded, and did not, would amount to 8*s.* per ton. I am satisfied by the plaintiffs' evidence that they could not have sent the straw by another ship.

I now have to consider the rights and liabilities of the parties having regard to the above findings. First, it is plain that the defendants broke their contract by the ship sailing before the loading time expired, and the plaintiffs are entitled to some damages. I think these damages partly depend on whether the ship was entitled to leave immediately the time expired without waiting on demurrage. It was contended on behalf of the defendants that the ship was entitled to leave even if not fully loaded at the expiration of the time allowed for loading. It is curious that there is so little authority on the point. If their contention is sound it entails a very heavy penalty on the charterer; he will lose his profit on the carriage of part of his cargo, and, in addition, he may have to pay a large sum to the shipowner for dead freight, whereas, if the ship is detained in order to finish the loading, all he has to pay is either an agreed sum or a reasonable sum to compensate the shipowner for the delay, and the ship receives the agreed or a proper compensation. In my experience it is quite contrary to practice for the ship to leave when by waiting a short time she can get her full cargo. However, I must see what authority there is. I think it must be taken as settled since *Dimech* v. *Corlett*

(*a*) Reported by LEONARD C. THOMAS, Esq., Barrister-at-Law.

(12 Moo. P. C. 199) that if the charter-party provides for a fixed number of demurrage days the ship must wait for those days if the charterer requires it, and there is ground for believing that further cargo will be loaded. In this charter demurrage is provided for, but not for any fixed time. It seemed to me, and I so suggested during the argument, that in such a case it is the duty of the ship to wait for a reasonable time. I am glad to find that Mr. Carver takes the same view. He says in art. 609 of his Carriage of Goods by Sea: "In such cases (*i.e.*, when the days are not fixed) the true view seems to be that the charterers are entitled to keep the ship on demurrage for a reasonable time." For that proposition he cites *Lilly* v. *Stevenson* (22 Sess. Cas., 4th series, 278), where Lord Trayner says: "Days stipulated for by the merchant, on demurrage, are just lay days, but lay days that have to be paid for. If a charter-party provides that the charterers shall have ten days to load cargo, and ten days further on demurrage at a certain rate per day, the shipper has twenty days to load, although he pays something extra for the last ten. Loading within twenty days is fulfilment of the obligation to load. . . . Where the days on demurrage are not limited by the contract, they will be limited by law to what is reasonable in the circumstances." There is also a decision in the American courts—viz., *Western Transportation Company* v. *Barber* (56 N. Y. 544) to the same effect. I shall adopt that view, and, in my opinion, taking all the circumstances into consideration, including the fact that the vessel was advertised to leave Las Palmas on the 6th Jan., the charterers were entitled to keep the ship at least till 5 p.m. on the 31st, by which time I find that 136 tons would have been loaded. It is probable that more would have arrived, and would have been loaded, but the evidence was not sufficiently precise on this point to enable me to be certain. It is to be observed that I have decided this case on the footing that there was a demurrage clause. It is unnecessary to decide, and I do not decide whether, if there had been no such clause, the ship could have left at the expiration of the two and a half days, which I have found to be the time allowed for loading. Inasmuch, however, as in order to get his 136 tons loaded the charterer would have had to pay one day's demurrage, I must deduct this. It was argued that I ought not make this deduction; I think I must. I have no right to put the charterer in a better position or the shipowner in a worse position than if the ship had waited. The plaintiffs must recover the 25*l.* from their seller if their contract with their seller makes the seller responsible for the delay. I therefore give judgment for the plaintiffs on the claim for 28*l.* 10*s.* 8*d.*, being 54*l.* 8*s.* less 25*l.* 17*s.* 4*d.* I must also, of course, give judgment for the plaintiffs on the counter-claim, because the ship left before she was entitled to leave. I think in any case I should have refused to give the defendants any damages on their counter-claim, because, in my opinion, having regard to all the circumstances, their conduct in not waiting was quite unreasonable. I do not at all accept their version that any serious consequences would have arisen at the Canaries if the ship had been detained another twenty-four hours. They could have recovered their 25*l.* for demurrage, which, in my opinion, would have fully compensated them.

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

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

Supreme Court of Judicature.

COURT OF APPEAL.

Monday, July 11, 1910.

(Before VAUGHAN WILLIAMS and BUCKLEY, L.JJ., and Sir S. EVANS, President, sitting with Nautical Assessors.)

THE PORT HUNTER. (*a*)

Salvage—Appeal—Principles on which award may be reduced.

A steamship fell in with another steamship which had broken down in the Red Sea. The damage could not be repaired at sea. The injured vessel was towed into Suez Roads, the towage lasting six days and the distance covered being about 830 *miles. The weather at the time was moderate. The value of the salved vessel was* 40,000*l.*, *of her cargo* 215,237*l.*, *and of her freight* 14,468*l.*, *making a total of* 269,705*l. The value of the salving vessel was* 36,250*l.*, *of her cargo* 45,375*l.*, *and of her freight* 6375*l.*, *making a total of* 88,000*l. The salvors instituted proceedings to recover salvage, and they were awarded* 10,000*l.*

The owners of the salved vessel appealed, alleging that the award was so excessive that it was unjust.

Held, that as there was no great danger to the salvors or salved vessel, and as the award was so great that it left no margin for increase if real danger had been present, it was excessive and should be reduced from 10,000*l. to* 6000*l.*

SALVAGE SUIT.

Appeal by the owners of the *Port Hunter*, her cargo, and freight from a decision of Bargrave Deane, J. by which he awarded the owners, master, and crew of the steamship *Ambon* 10,000*l.* for salvage services rendered to the *Port Hunter*, her cargo, and freight between the 16th and 22nd Dec. 1909 in the Red Sea.

The *Ambon* is a steel screw steamship of 3597 tons gross and 2806 tons net register, and at the time she rendered the services was on a voyage from Java to Amsterdam with a general cargo, manned by a crew of forty-two hands. The value of the *Ambon* was 36,250*l.*, of her cargo 45,375*l.*, and of her freight 6375*l.*, making in all 88,000*l.*

The *Port Hunter* is a steel screw steamship of 4062 tons gross and 2589 tons net register, and at the time the services were rendered to her was on a voyage from Adelaide to London with a general cargo. The value of the *Port Hunter* was 40,000*l.*, of her cargo 215,237*l.*, and of her freight 14,468*l.*, making in all 269,705*l.*

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

Early on the morning of the 16th Dec. 1909 when the *Port Hunter* was in the Red Sea her engines were stopped as her propeller had ceased to work, and on examination it was found that the propeller nut was missing, that the boss was fractured, and the propeller was jammed against the stern post. About 5 30 a.m. the same morning the *Ambon* came up, and the masters of the two vessels entered into a salvage agreement which is set out in the judgment of Vaughan Williams, L.J. The vessels were made fast, and the towage began about 10.15 a.m. and continued till about 8.42 a.m. on the 17th Dec., when one of the hawsers connecting the vessels parted. Another hawser was at once passed between the vessels, but just as the *Ambon* began towing again at 11.45 a.m. both hawsers parted. Two further ropes were passed, and the towage was resumed about 4.50 p.m. on the 17th Dec. and continued until 11.15 a.m. on the 22nd Dec., when the *Port Hunter* was safely anchored in Suez Roads.

During the 19th and the 22nd Dec. there was some wind and sea. The distance towed was about 830 miles, and the plaintiffs alleged that the *Port Hunter* was rescued from a position in which she might have become a total loss.

The defendants admitted that salvage services had been rendered, but denied that their vessel was in any danger of becoming a total loss. They alleged that she was always in the track of steamships which could have rendered efficient service, and that the weather, with the exception of a few hours in the Gulf of Suez, was fine.

Aspinall, K.C. and *A. D. Bateson* for the plaintiffs, the owners of the *Ambon*.

Laing, K.C. and *Lewis Noad* for the defendants, the owners of the *Port Hunter*, her cargo, and freight.

The following judgment was delivered by Bargrave Deane, J. :—

March 5.—BARGRAVE DEANE, J.—This is a salvage service rendered in the Red Sea last winter in the month of December, and it is a service rendered by a vessel representing a total value of 88,000*l.* to another vessel representing a total value of 269,700*l.*, and therefore the values are very large. Although I quite accept the suggestion and the ruling of the Privy Council on this question, that large values must not be taken too much into account, yet still you are entitled to take them into account in a fair way. Something has been said about the current in the Red Sea. I have tried one or two cases of this sort in the Red Sea, and that question of current is always one that is dealt with, but the result in my mind, from what I have heard to-day and on other occasions, is this, that the current depends a good deal on the state of the wind, and after it has been setting for a certain time in one direction, whether it is that the water having reached its boundary is set back again so as to cause a set of current in the opposite direction, or not, I do not know, but it looks very much as though that was the fact, and that the currents, although they do set one way and then another, very often counteract one another. Still, it is an unknown quantity, and an unknown danger, and I am entitled to take it into account, to a great extent, in dealing with the question of salvage. The towage lasted over six days and nights; it was rendered by a vessel which fortunately had a very good supply of coal on board, and it was rendered to a vessel which was hopelessly broken down. There are some vessels which break down which are capable of repairing their own damage, but this is not a case of that sort. The propeller was damaged by reason of the nut and key pin of the propeller dropping off, fracturing the boss, and the propeller itself had got adrift, and there were no means of putting it right. Therefore it was essential that she should be towed to some place where the damage could be repaired, or she could lay up, until that part of the machinery was sent out to her, as in this case, so as to make the vessel capable of proceeding on her voyage. I do not lay very much stress on the evidence of either side, beyond the fact of the time occupied, the position of the vessels when they started towing, and the fact that when you get up on the northern end of the Red Sea you invariably meet with a northerly wind, as is shown in the log in this case, and then a certain amount of sea, making the towage rather more difficult in this sense that it was harder, and the fact is shown in the log by reason of the reduction in speed. I have got to deal as best I can with the question of the amount of the award, which is always a difficult one, and the best decision that I can arrive at is that I award the sum of 10,000*l.*

On the 21st March 1910 the owners of the *Port Hunter* served a notice of appeal praying that the award should be reduced, alleging that it was excessive.

Laing, K.C. and *Lewis Noad* for the appellants, the owners of the *Port Hunter*.—The award in this case is much too large. The salvors only lost three days in performing the services, and towed the *Port Hunter* six days. The towage was done at the rate of about six knots an hour, which shows that it was not difficult. The award is so large that it is unjust. The learned judge has taken the value of the vessel too much into account. The principle on which this court proceeds in determining whether it will interfere with an award is laid down in

> *The Accomac*, 66 L. T. Rep. 335; 7 Asp. Mar. Law Cas. 153; (1891) P. 352.

An award will be altered if it is so large or so small as to be unjust, and of course the pecuniary loss to the salvor is considered :

> *The City of Chester*, 51 L. T. Rep. 485; 5 Asp. Mar. Law Cas. 311 (1884); 9 P. Div. 182.

The error in the judgment is that too great weight has been attached to the value of the salved vessel. They referred to *The Amerique* (31 L. T. Rep. 499; 2 Asp. Mar. Law Cas. 460 (1874); L. Rep. 6 P. C. 468). [BUCKLEY, L J.—I suppose you must be generous and look at the dangers.] The *Port Hunter* was in no serious danger in this case.

Aspinall, K.C. and *A. D. Bateson* for the respondents, the owners of *The Ambon*.—Salvage awards are so much a matter of discretion that appeals are rarely successful. To succeed, the appellants must show that the learned judge has gone wrong in principle (*The Accomac, ubi sup.*), or that he has left out of consideration some fact to which weight ought to have been given : (*The Clan Macpherson, Shipping Gazette*, July 1, 1909).

The amount will not be reduced unless it appears to be grossly in excess of what is right:

The Baku Standard, 84 L. T. Rep. 788; 9 Asp. Mar. Law Cas. 197; (1901) A. C. 544.

[Buckley, L.J.—You must say that the judge has gone wrong in principle. What is the principle?] It is very difficult to state a principle which will cover every case. [Vaughan Williams, L.J.—Judgment must be given on some principle.] In Kennedy on Civil Salvage, 2nd edit., p. 264, there are a list of salvage awards which show what kind of award the courts have given. [Vaughan Williams, L.J.—For myself I do not think one can derive any help from that list; the particulars given there are not sufficient; one has to look at every fact.] The appellants cannot say that the learned judge has found any facts wrongly. In awarding salvage, the value of the property salved and the perils from which it has been saved must be considered:

The Werra, 56 L. T. Rep. 580; 6 Asp. Mar. Law Cas. 115 (1886); 12 P. Div. 52.

It is important to encourage vessels like the *Ambon* to undertake these services. [Vaughan Williams, L.J.—If you make the value of the salved ship the dominant feature, you leave no margin for increasing the award where there is risk. Should you give such a sum as leaves no margin for increase if there had been danger.] There was some danger; the currents are irregular; the weather was not good; the salvors might have exhausted their coal, and there was in fact a collision between the vessels.

Laing, K.C. in reply.—The collision was a very slight one. This court reduced the award in *The Toscana* (93 L. T. Rep. 362; 10 Asp. Mar. Law Cas. 108; (1905) P. 148). The facts to be considered in arriving at a salvage award are well stated in Lindley, L.J.'s judgment in *The City of Chester* (*ubi sup.*).

Vaughan Williams, L.J.—There is no real dispute in this case as to a proposition which seems at one time to have been a doubtful proposition. It is plain now, and both sides assume it is plain, that we can review the amount which has been ascertained by the court of first instance. In the case of *The Accomac* (1891) P. 349) I find the following statement at p. 354, and at p. 153 of 7 Asp. Mar. Law Cas.: "It seems to have been urged that we are to act in these salvage appeals in accordance with the same rule that we act upon with regard to setting aside the verdict of a jury on a question of fact, namely, that we are not to interfere with it unless the amount is so large or so small that no reasonable person could fairly arrive at that sum. That is not the rule. If after carefully considering the facts and after giving every possible weight to the view of the judge we think it greatly in excess, and so greatly as to be unjust to the owners of the ship which had been in distress, we are bound to alter the amount by lessening it. In the same way if, after having given that consideration to it which I have mentioned in the other case, and after giving all the weight which we think we can to the opinion of the judge who tried the case, we think the amount awarded to the salvors is so small as really to be unjust to them, we are bound to alter the amount." Starting from that point we have to consider whether the amount arrived at in the court below was or is an amount which can be supported without doing any injustice to those whose property was salved. I shall now try, as far as it is possible, to arrive first at the principle which has been acted upon heretofore. I agree—and I think both counsel said the same thing—that it is very difficult to lay down an affirmative rule as to how you are to arrive at the amount of salvage. There are a good many rules laid down which do enable you to say that you are to take this or that and the other matter into consideration. There is ample authority to show you that you must take the value of the salved vessel into consideration. It is something that you really have to start with, but you have also to take into consideration a number of other matters. You have to take into consideration first the danger in which the salved ship was at the moment when the salvage took place. That seems to have been laid down with tolerable certainty. Again, you have obviously to take into consideration the danger which was incurred by the salving ship through rendering these services. You have, of course, to take into consideration a number of other matters which I do not propose to be rash enough to try and catalogue; but I think one may safely lay down that there are certain matters which, if the evidence shows that they were present, ought to be taken into consideration in arriving at the amount of compensation; and if you find that there has been an omission to take such matters into consideration—an omission which has either increased or diminished the salvage award—then you are able to say that here is a case in which no difficulty has ever arisen as to the question whether the Court of Appeal may review the salvage or not, because you have a case where there is a departure in the judgment from recognised principles as to this or that matter being a matter which can or cannot be properly taken into consideration. I ventured to suggest, in the course of the argument, to counsel for the respondents, who, as I understand, assented to the proposition which I put forward, that in a case where matters which ought to be taken into consideration one way or the other, like the danger to the salved ship and the danger to the salving ship, or the risk to the master and crew, are matters which are rather negative, you will not give so large an amount of compensation as to leave no margin whatever for an increase of compensation in a case where matters like danger to the salving vessel and her master and crew have been proved. You must make your total amount such a sum that it would leave a margin which you would have given in case these matters had been proved.

I propose to say very few words about the facts of this particular case, because they are so little in dispute. I should like to refer to the fact that an agreement was made between the two masters. This was the agreement: "The undersigned G. P. Baum, master of the Dutch steamship *Ambon*, 3598 tons gross register, 249 n.h.p., owners Stoomvaart Maatschappij Nederland, and R. Whitehead, master of the English steamship *Port Hunter*, 2589 tons net, gross register 4062, n.h.p. 475, being in this moment in distress under the following circumstances: nut of propeller dropped off and propeller laying up

against stern post; propeller disabled, agree about the following: That the former shall tow the latter up to Suez Roads, weather and circumstances permitting. The remuneration of the said service shall be arranged in Holland between the owners or other parties whom it may concern." That is an item of evidence which would lead me to what I believe is the same conclusion as that which was arrived at by the learned judge—namely, that there was no serious danger in this case, either to the salving or to the salved vessel; and when I come to look at the judgment—it is a very short judgment—it begins with dealing with the current in the Red Sea, and although the learned judge recognises the fact that there are such currents, and that they may cause a certain amount of danger, according to the circumstances, he says: "Still, it is an unknown quantity and an unknown danger, and I am entitled to take it into account, to a certain extent." He has taken it into account to a certain extent, and no doubt it has to a certain extent increased the award. Then he deals with the towage, and says it lasted over six days and nights; and after referring to the damage says: "Therefore it was essential that she should be towed to some place where the damage could be repaired, or she could lay up, until that part of the machinery was sent out to her, as in this case, so as to make the vessel capable of proceeding on her voyage. I do not lay very much stress on the evidence of either side, beyond the fact of the time occupied, the position of the vessels when they started towing, and the fact that when you get up on the northern end of the Red Sea you invariably meet with a northerly wind, as is shown in the log in this case, and then a certain amount of sea, making the towage rather more difficult in this sense that it was harder, and the fact is shown in the log by reason of the reduction in speed." Now, I take it from that judgment that the learned judge himself was of opinion that this was a case in which there was no considerable danger at all in the matter, making it very nearly a question of a towage, causing delay to the towing steamer, plus expense. If you start with the value of the vessel, and then make deductions by leaving out these things, which I say are not proved in this case, and which the decided cases show if proved would materially increase the salvage, one obviously has a great deal to deduct in a case where there was really no danger to either ship or to the master and crew. In these circumstances I think, with all respect to the learned judge, that he has failed to make those deductions which one ought to make when one starts with the value of the salved ship as the main consideration. The value of the ship was agreed. In these circumstances we think the salvage award ought to be reduced to 6000*l.*, and the appellants will be entitled to the costs of the appeal.

Buckley, L.J.—There are many orders which come before this court on appeal, in which this court refuses to interfere on the ground that they are orders in the discretion of the judge, and unless the judge has gone wrong on a question of principle this court will not interfere. The present case is one where the matter to be determined is whether this is the proper amount to be allowed for salvage services, and such an order is, I think, comparable to those of which I have spoken. This court will not interfere unless it be shown in some way that the judge has gone wrong on a matter of principle, so far as any principle can be laid down in a salvage case. It is not impossible, I think, to lay down certain general principles. I should state them thus: In the first place the court is generous in these matters, for this reason, that it is desirable to encourage salvage services. Secondly, in order to estimate the amount which is to be awarded you are not to consider simply, as regards the value of the services rendered, the price at which you could have bought these services in the market. Thirdly, you must have regard both to the value of the ship that is salved and to the value of the salving ship. Here you have a chattel which was worth 37,000*l.*, and was employed for six days, or, if you take it that she lost only three days in towing, which was employed for three days in doing services. Certainly it strikes one as a very large sum to get—namely, 25 per cent. on her own value—for the amount of the services. To stop there, however, would be wrong. You have to regard also the value of the ship that was salved. Again, if you find the judge has simply said, without discussing the amount of danger and so on, "I shall give so much per cent. for the salvage," he would have gone wrong. You have to consider the amount of danger in which the two ships lay; what probability there was that the vessel salving would be lost if she rendered the services; and what chance there was that the vessel salved would be lost if she did not receive assistance. All these things you have to consider. Lastly, you have to consider that the salving vessel has to accept a position of responsibility, because she will get something if successful, but nothing if she fails; and therefore she is not likely to enter upon these services unless she is generously treated. Those being the sort of principles, all I can get out of the judgment is this—that it commences by saying that the vessel salved is of very large value, and then it goes on to discuss the question of danger, and, as I understand, it does not attribute much, but some, importance to the question of danger. In the concluding sentence of his judgment the learned judge simply, as it seems to me, is finding that it is a towage contract, and he attributes, importance to the time occupied and the fact that when you get up on the northern end of the Red Sea you invariably meet with a northerly wind, and then a certain amount of sea, making the towage rather more difficult in this sense, that it was harder, as was shown in the log, by reason of the reduction of speed. Out of that judgment I can only get this, that there was a towage contract performed under circumstances of more or less difficulty to a vessel of very large value, and I think the learned judge has attributed too much importance to the question of the value of the ship salved, and has not paid sufficient attention to the fact that the services were rendered under circumstances of really no great danger. He would have gone wrong, I think, in the matter of principle if he had said, "Well, there being no danger and only a towage contract, I shall give only the market price for towage." Here he has gone wrong in the other direction, because he has said, "Although this was a mere towage contract, inasmuch as the vessel is of very large value I shall give a large award." I think the award which he

has made is too large, and should be reduced to 6000*l.*

Sir S. EVANS.—I agree with the learned Lords Justices. I think the learned judge of the court below must have given undue weight to the value of the vessel salved in arriving at the very large sum of 10,000*l.* as the salvage award. I think it is very important, on the ground of public policy, that the Admiralty Court should be generous in its awards. The rendering of such services should not be discouraged, but encouraged and greatly encouraged. I only wish to add that apart altogether from the well-known willingness, courage, and devotion of our seafaring men in helping others in difficulties, I have no fear that the amount which we are now allowing—6000*l.* for six days—will in any way discourage the rendering of salvage services in the future.

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

Solicitors for the respondents, *Clarkson and Co.*

HIGH COURT OF JUSTICE.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Tuesday, July 19, 1910.

(Before Sir S. EVANS, President, and BARGRAVE DEANE, J.)

THE DAWLISH. (*a*)

Berth note — Arbitration clause — "Dispute" — "Arising at loading ports"—Stay of proceedings —Arbitration Act 1889 (52 *&* 53 *Vict. c.* 49), *s.* 4.

By the terms of a berth note relating to the loading of grain in a port in the Sea of Azof it was provided that "in case of any dispute arising at loading ports" it was "to be submitted to the Rostoff-on-Don Bourse Court of Arbitration." The stevedores, who were the freighters, sent in their account to the shipowners, who in London objected to the charges as being excessive, and instituted legal proceedings to recover the alleged overcharges.

Held, that the proceedings must be stayed and the matter referred to arbitration, because the "dispute" meant matter in dispute, and it arose, not in London, but at the port of loading.

APPEAL from a decision of His Honour Judge Hill Kelly sitting in Admiralty at the County Court of Glamorgan holden at Cardiff ordering that an action should be stayed on the ground that the matter in dispute came within the terms of a submission to arbitration contained in a berth note entered into by the plaintiffs, the owners of the steamship *Dawlish*, and the defendants Louis Dreyfus and Co., grain merchants in London.

The appellants (plaintiffs below) were Messrs. Anning Brothers, the owners of the steamship *Dawlish*; the respondents (defendants below) were Louis Dreyfus and Co., grain merchants, carrying on business in London and places abroad.

On the 5th Aug. 1909 the plaintiffs and defendants entered into a berth note under which the owners agreed to send the steamship to Kertch and there load as ordered by N. Methinity at one or two safe ports in the Sea of Azof a full cargo of grain. The cargo was to be discharged in the United Kingdom or on the Continent between Havre and Hamburg. The material clauses of the berth note with regard to the dispute which arose were:

3. . . . The master is to apply to Louis Dreyfus and Co. at loading port for cargo and for customs business, at a fee of 8*l.* 8*s.* if loaded at one port, 5*l.* 5*s.* each port if more than one port, and they are to do stevedoring at rates as per margin.

In the margin appeared a list of places with the rates at which the loading would be done. Among them was "Marioupol, at Roubles 40, all per 1000 chetwerts."

10. In case of any dispute arising at loading ports under this berth note, it is to be submitted to the Rostoff-on-Don Bourse Court of Arbitration, whose decision is to be final.

12. The freighters' liability under this contract ceases when the cargo is shipped, provided the difference of freight, dead freight (if any), and demurrage in loading (if any) are paid.

The *Dawlish* was ordered to Marioupol and there loaded a cargo of wheat, barley, and rye, and on the 16th Sept. 1909 N. Methinity, who had done the stevedoring of the *Dawlish*, delivered an account to the master which contained the following items:

Loading and trimming wheat ...	2,812
Barley, 294 400 at 8	36,800
Rye, 6300 at 9	700
	40,312

At 40 Rs. per 1000 ch. = 1612.48

The master did not pay the account, but signed it, and the amount was deducted from the advance freight due to the shipowners at Marioupol. The *Dawlish* left Marioupol on the 17th Sept.

On the 26th Nov. the owners of the *Dawlish* wrote to Louis Dreyfus and Co., the freighters in London, saying that they found it was customary in converting poods into chetwerts to do so at the rate of ten poods for all grain. Upon looking into the accounts for the *Dawlish* at Marioupol they found that the freighters' stevedores at that port had converted the poods of barley into chetwerts at the rate of eight poods per chetwert, thereby considerably overcharging them. They then gave particulars of the overcharge, and asked that the amount of it should be refunded.

On the 27th Nov. the freighters replied saying that the stevedoring was payable per 1000 chetwerts, for the simple reason that the chetwert was a measurement as well as a weight. A chetwert was filled up by ten poods of wheat, nine poods of rye, and eight poods of barley, and the workmen demanded the same wages whether they handled a chetwert of wheat, rye, or barley, and the stevedores had to charge in accordance with that.

On the 29th Nov. the owners of the *Dawlish* again wrote asking for a cheque, and, as neither party would give way, on the 21st April 1910 the *Dawlish* Steamship Company, as owners of the *Dawlish*, took out a summons on the Admiralty side of the County Court against Louis Dreyfus and Co. for damages for breach of duty arising out of an agreement made in relation to the use

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

or hire of the plaintiffs' steamship *Dawlish* claiming 36*l.* 5*s.* 1*d.*

On the 29th April the solicitors for the defendants gave the plaintiffs notice that they intended to apply under sect. 4 of the Arbitration Act for an order that all proceedings in the action should be stayed. Both parties filed affidavits setting out the facts and their submissions.

The plaintiffs submitted that the dispute between the parties did not arise at the loading port, but at London, and so it was within the terms of the submission in clause 10 of the berth note. They further submitted that only such disputes as arose at the loading port between owners and defendants *quâ* charterers came within the clause, and that it had no application to disputes arising out of the employment of the defendants as ship's agents and stevedores. They also submitted that as the contract was made in London and the parties were in this country and no evidence from Azof would be required as shipowners and merchants in this country who had traded at Marioupol knew what the proper charges should be, the matter in dispute should not be referred to arbitration in Azof.

The defendants submitted that as they were to do the stevedoring, and the dispute arose out of the rate charged for stevedoring the dispute clearly arose under the berth note. Further, that as the dispute was as to the customary method of reckoning chetwerts of grain at Azof, it was one which could be more conveniently dealt with at Azof, as if it was tried in this country it would be necessary to call evidence of custom from the Azof ports.

On the 5th May 1909 the learned County Court judge made an order that all proceedings in the action should be stayed pursuant to sect. 4 of the Arbitration Act 1889.

On the 14th May 1909 the solicitors for the plaintiffs gave notice of appeal from the order of the judge staying the action.

Sect. 4 of the Arbitration Act 1889 is as follows:

> Sect. 4. If any party to a submission, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings, and that court or a judge thereof if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.

The case was heard on appeal on the 19th July.

Laing, K.C. and *Norman Raeburn* for the appellants, the owners of the *Dawlish*.—This is not a "dispute arising" at the loading port. A dispute is an argument, and the argument arose in London.

Leslie Scott, K.C. and *A. D. Bateson* for the respondents.—In Murray's New English Dictionary "arise" means "to spring, originate, or result from." The dispute originated at a loading port. The master had all the facts before him. The question whether a "dispute arises" at the loading port does not depend upon when the argument begins in London or at Azof. If that is correct, a dispute as to representations made on signing of the berth note in London might arise at the loading port, and a party could always prevent a dispute arising at a loading port by saying nothing till he got to London. The dispute here is how many poods go to a chetwert. The arbitration clause is inserted so that questions of this sort may be settled on the spot where the evidence is. Further, the defendants' liability ceased when the cargo was loaded.

Laing, K.C. in reply.—Clause 12, the cesser clause, does not touch this point. The plaintiffs have a right of action, and, if the arbitration clause does not clearly cover the dispute, the action should not be stayed. The clause says "dispute," not "cause of dispute." It would be most inconvenient for the plaintiffs to send their witnesses back to the loading port.

THE PRESIDENT.—This is a very short point. The question is, What is the meaning of clause 10 in this berth note? On one side it is said that the word "dispute" means "contention," and that therefore it arises where the contention is made. On the other hand, it is said that "dispute" means the matter or question in dispute. If the latter be the right meaning, the matter in dispute arose here at the port of loading. Now, I put to myself two questions, and the answers, in my view, determine the construction to be placed on clause 10. The first is, What is in dispute? It is this—and therefore the dispute is this—"What are the proper charges for stevedoring at Marioupol"? If that be the dispute, where does it arise? It arises, in my opinion, where the stevedoring work is done and where the charges which are in dispute are made. If that be so, clause 10 applies in this case, and there must be arbitration. Putting it in one word, in my view "dispute" in clause 10 means, not disputation, but matter in dispute. We see no reason to interfere with the exercise of his discretion by the learned judge, and the appeal therefore fails.

BARGRAVE DEANE, J.—I agree.

Solicitors for the appellants, *Botterell* and *Roche*, agents for *Vaughan* and *Roche*, Cardiff.

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

HOUSE OF LORDS.

Tuesday, Dec. 13, 1910.

(Before the LORD CHANCELLOR (Loreburn) Lords MACNAGHTEN, ATKINSON, SHAW, and ROBSON with Nautical Assessors.)

OWNERS, MASTER, AND CREW OF THE LIGHTSHIP COMET *v* OWNERS OF HOPPER BARGE W. H. No. 1. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Collision — Tug and tow — Negligence of tug — Liability of tow.

A barge, with a rudder but no motive power, collided, while in tow of a tug, with a lightship in a narrow channel. In the Admiralty Court

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

both tug and tow were held to blame. The Court of Appeal reversed that finding, and pronounced the tug alone to blame for not keeping a proper course. There was evidence that the barge might have avoided the collision by altering her helm sooner than she in fact did.

Held, that though it is the duty of a tow to do her best under all circumstances to avoid collision, yet in this case the barge was not to blame for the collision, as those on board were entitled to assume that the tug would set a proper course, and would not act in a negligent manner.

Judgment of the court below affirmed, Lord Robson dissenting.

Appeal from a judgment of the Court of Appeal, consisting of the Earl of Halsbury, Fletcher Moulton, and Farwell, L.JJ. with Nautical Assessors, who had varied a judgment of the President of the Admiralty Division (Sir J. Bigham), with Nautical Assessors, by which he found the tug *Knight Errant* and the hopper barge *W. H. No.* 1 both to blame for a collision which took place between the barge, while she was in tow of the tug, and the *Comet*, a lightship in the Crosby Channel of the river Mersey. The case is reported 11 Asp. Mar. Law Cas. 407; 102 L. T. Rep. 643; (1910) P. 199. The Court of Appeal found the tug alone to blame. The owners of the lightship appealed.

Bailhache, K.C. and *Bateson*, K.C., for the appellants, argued that the tug went wrong by keeping too much over to the starboard side of the Channel, and the barge, when she saw that the tug was going wrong, ought to have ported her helm and followed in the wake of the tug, instead of keeping on her port quarter. The tug and tow each expected the other to do something to avoid the collision, and the barge did not port her helm till too late. As a matter of law, the negligence of the tug is the negligence of the tow, which is responsible in damages. [The Lord Chancellor —This point does not appear to have been raised in the court below, and this House, sitting as a Court of Appeal, cannot hear it now.] The tow was not justified in assuming that the tug was going to do the right thing. Those on board her knew what was the proper course, and when they saw that the tug was going wrong they ought to have taken steps to avoid the consequences before it was too late.

Laing, K.C. and *Robertson Dunlop*, for the respondents, supported the judgment of the Court of Appeal.

Bailhache, K.C. was heard in reply.

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

The Lord Chancellor (Loreburn). — My Lords; I propose to deal only with the facts of the case, and not with the question of law which was adumbrated, but was not argued in the Court of Appeal. It is a question purely of fact. This barge was towed by a tug, and it is said that the tow, which had no motive power, is jointly responsible for the collision. I do not differ from the President as to any question of fact, but I do differ as to the inference to be drawn from the facts, and as to the duty incumbent upon those on board the barge. If the tug had hard-a-ported after passing buoy C 3, even when half-way, could she have avoided this collision? It was admitted that she could have avoided it. She had a tug's duty to do, and if she got too far to the eastward when half-way between the buoy and the lightship, it was admitted that it was her duty to have ported if she had not done it before. No doubt she ought to have kept to the westward immediately she passed the buoy, but, still, when she went half-way across she could have retrieved her position. If so, was the barge entitled to expect that the tug would navigate with reasonable care? She was entitled to expect that the tug would be reasonably and properly navigated and to act upon that expectation. Was the barge bound to take the step of hard-a-porting immediately she passed the buoy, a step which would have been quite unnecessary if the tug had done her duty? I do not think that there was any such obligation upon the barge. It is the duty of a tow to do her best under all circumstances to avoid collision, but she cannot be held blameworthy because she did not anticipate a thoroughly bad piece of seamanship on the part of the tug which had her in tow. The fact is, it was a dark though not a bad night. The barge could only see the stern light of the tug. She had only one minute to make up her mind that the tug was pursuing an improper course. She was bound to act reasonably. I think upon the whole evidence that it is clear that as soon as she saw that the tug was doing something to bring her into danger she proceeded to hard-a-port her helm, which was the right thing to do. I think that the barge is free from all kind of blame, and I may say that the nautical assessors, from the point of view of seamanship, entirely share that opinion.

Lord Macnaghten and Lord Atkinson concurred.

Lord Shaw.—My Lords: I have a difficulty in this case, owing to a passage in the judgment of the President. "I am advised," that is to say that he was advised by his assessors, "that the master of the tow ought, under the circumstances, to have put his helm hard-a-port before he got into the position midway between buoy C 3 and the lightship. It was said that the head of the tow failed to answer her helm, but he ought to have foreseen that and put himself hard-a-port long before he did." My difficulty is that this proceeded from the President on the advice of his assessors. In this House we have been differently advised, and under those circumstances I am not prepared to differ from the judgment which has been proposed.

Lord Robson.—My Lords: I am of opinion that the President and those who advised him were correct in the decision to which they came. Upon the evidence it seems to me that this case is perfectly clear. What was the duty of the tug and the tow? What were the conditions? Both vessels when they rounded buoy C 3 would have the wind on their broadside. It was their duty to have anticipated this. What, under these circumstances, was the duty of the tow? The duty of the tow was to anticipate that what had happened to the tug would happen in a still greater degree to herself. The tow ought to have kept on the safe side of the tug. The safe side would be on the starboard quarter. Instead of that, throughout the whole course the tow consistently kept on the port quarter instead of on the starboard quarter.

The Court of Appeal has said that the tow is entitled to assume that the tug would do her duty. Of course she is. But it was also her duty to have kept to the starboard side under the circumstances, and that she did not do. When midway between buoys C 3 and 4 she ported her helm, but never answered it. That was not the wind. The moment she came into danger it was the duty of the barge to take steps to avoid it by keeping on the safe side of the tug. It seems to me that she failed in her duty because from beginning to end she was always on the wrong side of the tug. Therefore, I am sorry to say that I feel it my duty to disagree with your Lordships, and i seems to me that those who advised the Presi dent were right.

Judgment appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellants, *Rawle, Johnstone, Gregory, Rowcliffe,* and *Rawle,* for *W. Calthrop Thorne,* Liverpool.

Solicitors for the respondents, *Thomas Cooper* and *Co.,* for *Hill, Dickinson,* and *Co.,* Liverpool.

Supreme Court of Judicature.

COURT OF APPEAL.

Oct. 14, 15, 17, *and* 18, 1910.

(Before VAUGHAN WILLIAMS, BUCKLEY, and KENNEDY, L.JJ.)

CORY AND SONS LIMITED *v.* FRANCE, FENWICK, AND CO. LIMITED. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Employer and workman — Accident—Compensation — Liability of third parties—Action for indemnity—Workmen's Compensation Act 1906 (6 *Edw.* 7, *c.* 58), *s.* 6.

Where an accident is caused by the combined negligence of the servants of an employer and another person not his servant, the employer cannot succeed in an action for indemnity against that other person under sect. 6 *of the Workmen's Compensation Act* 1906, *even though he has been compelled to pay compensation for the accident under the Act.*

Decision of Mr. Commissioner Scrutton (now Scrutton, J.) affirmed.

APPEAL by the plaintiffs from the judgment of Mr. Commissioner Scrutton at the trial of an action without a jury at Durham Assizes.

The plaintiffs' claim was for 202*l.* 11*s.* 7*d.* under sect. 6 of the Workmen's Compensation Act 1906 in respect of the death of James Marshall Tinmouth as the result of injuries sustained by him on the 13th Jan 1909, and in respect of injuries sustained by George Edward Bennett on the same date, which injuries were caused under circumstances creating a legal liability on the defendants to pay damages in respect thereof. The statement of claim was as follows:

1. The plaintiffs, who are the owners of the steamship *Highgate,* have under the circumstances hereinafter described become liable to pay, and have paid, compensation under the Workmen's Compensation Act 1906 in respect of certain injuries caused to workmen employed by the plaintiffs by the negligence of the defendants or their servants, and the plaintiffs claim an indemnity from the defendants pursuant to the provisions of the said Act.

2. On the 13th Jan. 1909 the *Highgate* was in the river Wear, off the Wearmouth Coal Company's staiths, and was being berthed there under the direction and control of the staithmaster, Robert Mitchell, who is a servant of the defendants. Two foy boatmen, George Edward Bennett and James Marshall Tinmouth, employed by the plaintiffs to attend on the *Highgate,* were in their boat attending on the *Highgate* pursuant to such employment.

3. It was the duty of the defendants' said servant Robert Mitchell, to exercise all proper care in the direction and control of the said operation of berthing the *Highgate,* but negligently and in breach of his said duty the said Robert Mitchell hailed to those in charge of the *Highgate* to go ahead with her engines at a time when the foy boat was in too close proximity to the propeller of the *Highgate,* and without giving any warning to those in charge of the *Highgate* of such proximity, or to the foy boatmen of the intended order to go ahead. The engines were set ahead in accordance with the said direction of the said Robert Mitchell, the propeller struck the foy boat, and as a result the said James Marshall Tinmouth was killed, and the said George Edward Bennett was injured.

4. Proceedings were taken by the representatives of the said James Marshall Tinmouth and by the said George Edward Bennett under the Workmen's Compensation Act in the County Court of Durham holden at Sunderland against the plaintiffs, and in these proceedings the defendants were joined as third parties, and by awards dated the 19th May 1909 the plaintiffs were ordered to pay the compensation specified in the awards with costs, and the defendants as third parties were ordered to be bound by the awards. The amount paid under the said awards is 202*l.* 11*s.* 7*d.*

Particulars.

	£	s.	d.	£	s.	d.
James Marshall Tinmouth's case.						
Amount of compensation ...	150	0	0			
Costs	11	10	0			
				161	10	0
George Edward Bennett's case.						
Amount of compensation: 17*s.* 3*d.* per week for twenty-nine weeks from the 13th Jan. to the 4th Aug.... ...	25	3	0			
Costs	16	1	4			
				41	1	7
Total				£202	11	7

The plaintiffs claim: (1) A declaration that they are entitled to be indemnified by the defendants in respect of the plaintiffs' liabilities in connection with the said accident and injuries mentioned in the statement of claim. (2) Payment of the sum of 202*l.* 11*s.* 7*d.* paid by the plaintiffs pursuant to the said awards.

The defence was as follows:

1. The defendants deny that the injuries mentioned in the statement of claim were caused by the negligence of the defendants or their servants as alleged or at all, and that the plaintiffs are entitled to any indemnity.

2. Save that when the *Highgate* was in the river Wear off the Wearmouth Coal Company's staiths the said boatmen were employed by the plaintiffs to attend and were attending on the *Highgate,* and that the *Highgate's* propeller struck the boat and that the said J. M. Tinmouth was killed and the said G. E. Bennett injured,

(*a*) Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.

none of the allegations of par. 2, 3, and 4 of the statement of claim are admitted.

3. It is denied that the *Highgate* was being berthed under the direction or control of the said Robert Mitchell as servant or with the authority of the defendants, or at all, and that the said Robert Mitchell was, as servant of the defendants or at all, under any duty as alleged, and that the said Robert Mitchell, as servant of the defendants, or at all, gave any orders as alleged. The said Robert Mitchell was not guilty of negligence or breach of duty as alleged or at all, and was not in any of the matters alleged acting as servant or with the authority of the defendants.

4. The defendants never were under any legal liability to the said boatmen or either of them.

5. The defendants further say that if the engines were put ahead when the boat was in too close proximity to the propeller of the *Highgate*, and if the said accident was caused by negligence, it was the negligence of the plaintiffs' servants and agents on board the *Highgate* in putting the engines ahead at a time when they knew or ought to have known that the boat was in too close proximity and without giving the men in the boat warning and (or) was caused by the negligence of the men in the boat in failing to let go a hawser they were taking in from the *Highgate*, and in bringing the boat too close to the propeller and not keeping the boat clear of the propeller.

6. The awards are referred to for their terms. The amounts of costs are not admitted.

The material facts, as stated in the judgment of the learned commissioner, were substantially as follows:—

The ship *Highgate*, belonging to the plaintiffs, was coming up to the Wearmouth staiths, of which the defendants had control, in ballast, to take on board a cargo of coal. When she got opposite the staiths, coming up the river stern first with a tug ahead of her and a tug astern of her, near the tug astern there was waiting a foy boat, to take the ropes from the ship to the wharf, with two men in it. It appeared to be the practice on the Wear that when a vessel got off the wharf the staith foreman should indicate to what spout she was to go, and should then proceed to give directions as to mooring and directions as to which spout the ship should proceed to. The staith foreman at the Wearmouth staiths was a man named Robert Mitchell, who was admitted to be a servant of the defendants. The foy boat left the tug and came on to the port quarter of the *Highgate*, somewhere under the counter, and was receiving a steel rope from those on board the *Highgate* aft, and she was close to the propeller. While in that position Mitchell gave the order: "Slow ahead, helm a-port." The pilot passed the order on to the captain, but neither pilot nor captain inquired whether the propeller was clear. The second mate, who was aft, for the ordinary purpose of seeing after the ropes aft, and seeing that the propeller was clear, while he thought there was danger, did not signal to the captain that the propeller was not clear, because, as he said, he deferred to Mitchell, who, he thought, could see more about it than he could. The engines were started, the boat was sucked on to the propeller and was sunk, one man, James Marshall Tinmouth, was killed, and the other, George Edward Bennett, was injured.

Mr. Commissioner Scrutton held that there was negligence on the part both of Mitchell and of the officers of the ship, and he held that while there was a legal liability on persons other than the employers under the second part of sect. 6, such other persons were entitled to raise the contractual defence, and therefore the right which the plaintiffs sought to establish could not be sustained, and he gave judgment for the defendants.

The plaintiffs appealed.

The Workmen's Compensation Act 1906 (6 Edw. 7, c. 58) provides:

Sect. 6. Where the injury for which compensation is payable under this Act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof (1) the workman may take proceedings both against that person to recover damages and against any person liable to pay compensation under this Act for such compensation, but shall not be entitled to recover both damages and compensation; and (2) if the workman has recovered compensation under this Act, the person by whom the compensation was paid, and any person who has been called on to pay an indemnity under the section of this Act relating to sub-contracting, shall be entitled to be indemnified by the person so liable to pay damages as aforesaid, and all questions as to the right to and amount of any such indemnity shall, in default of agreement, be settled by action, or by consent of the parties, by arbitration under this Act.

J. R. Atkin, K.C. and *A. Adair Roche* for the appellants.—By sect. 6 of the Workmen's Compensation Act 1906 there is given to the employer, against whom compensation has been recovered under the Act, a statutory right of indemnity as soon as it is found that the injury to the workman was caused under circumstances creating a legal liability in some other person to pay damages in respect of that injury. That right to be indemnified by the person so liable to pay damages is given to the employer absolutely and unconditionally, and it is not material to consider whether the employer was himself guilty of any negligence. When once it is shown that the workman had a cause of action against a third person in respect of the injury, an absolute liability to indemnify the employer is by the statute imposed upon that third person. The statutory right to an indemnity being absolute and unconditional, it cannot be affected or taken away by any contributory negligence on the part of the employer. They referred to

Mills v. *Armstrong and another; The Bernina*, 6 Asp. Mar. Law Cas. 257 (1888); 58 L. T. Rep. 423; 13 App. Cas. 1;
Hedley v. *Pinkney and Sons Steamship Company Limited*, 7 Asp. Mar. Law Cas. 482 (1894); 70 L. T. Rep. 630; (1894) A. C. 222;
Addison on Torts, 8th edit., p. 772.

Scott Fox, K.C. and *M. P. Griffith Jones* for the defendants.—In this case on the evidence judgment must be in favour of the defendants. In point of fact what happened was an accident and nobody is to blame; if, however, there is any negligence to be found it is that of the captain and second officer, and the immediate cause of the disaster was the action of the second officer. Mitchell was only bound to use ordinary care and skill. Assuming, however, that the court is of opinion that the moving of the propeller implied negligence, the cause of the disaster was not a single act, but a combination of acts—namely, of Mitchell, the second officer, and the

captain of the ship—Mitchell's action would have been innocuous but for the action of the second officer. It would thus have been a joint tort. The question then arises whether in construing the section regard has to be had to the relations existing between the employer and third parties. It is submitted on behalf of the defendants that sect. 6 does not apply, it requires some limitation. The words "someone other than the employer" do not contemplate the joint act of employer and third party; they mean some person who is not concerned in the transaction. They referred to

Tredegar Iron Company v. *Owners of the Calliope; The Calliope*, 6 Asp. Mar. Law Cas. 585 (1890); 63 L. T. Rep. 781; (1891) A. C. 11;

Heaven v. *Pender*, 49 L. T. Rep. 357; 11 Q. B. Div. 503;

Maxwell on the Interpretation of Statutes, 4th edit., 121, 285, 344;

River Wear Commissioners v. *Adamson and others*, 2 Asp. Mar. Law Cas. 145 (1873); 35 L. T. Rep. 118; 1 Q. B. Div. 546; 37 L. T. Rep. 543; 2 App. Cas. 743;

Attorney-General of Hong Kong v. *Kwok-a-ting*, 29 L. T. Rep. 114; L. Rep. 5 P. C. 179.

A. Adair Roche, in reply, referred to

Rency v. *Magistrates of Kirkcudbright*, 7 Asp. Mar. Law Cas. 221 (1892); 67 L. T. Rep. 474; (1892) A. C. 264;

Engelhardt v. *Farrant and Co. and Lipton*, 23 C. C. C. Rep. 27; 75 L. T. Rep. 617; (1897) 1 Q. B. 240;

Hughes v. *Macfie*; *Abbott* v. *Same*, 9 L. T. Rep. 513; 2 H. & C. 744.

Vaughan Williams, L.J.—I think we ought to affirm the decision of Mr. Commissioner Scrutton and dismiss this appeal. I do not mean, by saying that, that I agree in every argument that has been used by the learned commissioner, nor do I think that in certain circumstances I should have come to the same conclusion as to the inferences to be drawn from the facts. Of course, as to the facts I entirely agree with him. I think, in order to make the case easily intelligible, it is convenient that I should state the facts shortly, and I have, therefore, briefly sketched out the facts as follows: In this case the plaintiffs are the owners of the steamship *Highgate* which, on the 13th Jan. 1909, was being berthed at a private staith on the river Wear belonging to the defendants. The action is brought under the provisions of the Workmen's Compensation Act 1906 by the plaintiffs, who are employers, against whom compensation has been recovered in respect of injuries sustained by two foy boatmen who were workmen in the employment of the plaintiffs, to obtain from the defendant company indemnity against the compensation which the plaintiffs have had to pay, on the ground that the defendant company is a person other than the employer in whom the circumstances under which the compensation has become payable created a legal liability in respect of the accident. The learned commissioner has given judgment in favour of the defendants, although he has found as a fact that Mitchell, a servant of the defendants, was guilty of negligence, in giving orders, the result of which caused the damage which the workmen suffered, one of whom was killed and the other injured; and he has further found that there was, in the words of the 6th section of the statute, "a legal liability in some person other than the employer"—namely, the defendant company—"to pay damages in respect thereof," and, that being so, there was a good cause of action against the defendants in respect of the accident. The learned commissioner, however, has further found that the officers of the ship were negligent. He says there is evidence, and it is common knowledge, that the second officer is aft for the very purpose of seeing that the propeller is clear before it is started. There is evidence and it is common knowledge that the captain and the pilot on the bridge should get a hail from aft that all is clear before they start the propeller. He says, in this case the officers started the propeller without taking any steps on their own account to ascertain whether the propeller was clear, although the captain and the pilot could not see the propeller or the foy boat, and the second officer seeing it thought it was in some danger but did not mention it. Mr. Commissioner Scrutton says: "I think that they were guilty of negligence contributory to the accident, and I therefore think that if the shipowners had sued the wharfingers alleging negligence on the part of their servant, Mitchell, in the performance of a contract between them and claimed the damages that they had to pay to third parties in consequence of that negligence, it would have been an answer on the part of the wharfingers to say: Your own negligence contributed to the damage." He says: "I have considered whether the argument of Mr. Scott Fox was right, that this was no order by Mitchell but a suggestion or information, to use the language in the *Calliope* case, in which the master must use his own judgment. I think that it does amount to an order." Those are the words of Mr. Commissioner Scrutton. On this finding of fact, that both the shipowners and the wharfingers were guilty of negligence contributing to the accident as proximate cause thereof, the learned commissioner exonerates the defendants from liability. On the construction of the statute it is open for a person when the employer sues him to say: "No, you cannot sue me, because the relations between us are such that I am not liable to you for this amount."

Now all that I have been reading is the judgment of the learned commissioner. With regard to the construction of the statute I entirely agree with the learned commissioner. I think he selected rather an unfortunate example in taking the case of a contract between a shipowner and the staithowners exonerating the latter in case of future accident, but, apart from that, I agree in the conclusion, that the plaintiffs here are not entitled to take advantage of the section which enables them, to use a convenient word, to stand in the shoes of the injured workmen in respect of the recovery of damages from some third person. I shall have a word or two to say about my reasons presently, but I wish in the first instance to deal with the questions independently of the construction of sect 6 (2). In my judgment, where a plaintiff is seeking to recover—which is not this case—against two people for a joint tort, it is not sufficient for him to prove that there has been negligence on the part of either of the defendants in order to succeed in the action. In my judgment, he has always to prove that the negligence which the defendant is proved to have been guilty of was a proximate cause of the injury which is

complained of in the action. Now, when you have to consider what is a proximate cause, you may very often have to ask yourself a question which was asked in the two cases of *Rigby* v. *Hewitt* (15 L. T. Rep. O. S. 185; 5 Ex. 240) and *Greenland* v. *Chaplin* (15 L. T. Rep. O. S. 185; 5 Ex. 243)—namely, was the negligence which was proved against the defendant of such a character that the consequences which followed might reasonably be expected to result under ordinary circumstances from such misconduct? I am quoting from the words of Pollock, C.B. in the former case. He says: "I am, however, not disposed quite to acquiesce to the full extent in the proposition that a person is responsible for all the possible consequences of his negligence. I wish to guard against laying down a proposition so universal, but of this I am quite clear, that every person who does a wrong is at least responsible for all the mischievous consequences that may reasonably be expected to result under ordinary circumstances from such misconduct." And when the learned Chief Baron delivers his judgment in *Greenland* v. *Chaplin* (*sup.*), a judgment which was delivered on the same day as that in *Rigby* v. *Hewitt* (*sup.*), he says: "I am desirous that it may be understood that I entertain considerable doubt whether a person who is guilty of negligence is responsible for all the consequences which may under ordinary circumstances arise in respect of mischief which could by no possibility have been foreseen and which no reasonable person would have anticipated." I do not myself suppose that, although when these propositions were originally laid down they were laid down not as positive judgments, but as opinions of the learned judge, there would be any doubt nowadays as to their accuracy. When I look at the edition of Addison on Torts, which was edited by the late Cave, J., I see that he adopts in the text (7th edit., p. 55) of his work these two cases that I have just cited as laying down the law.

In the present case I have already read the statement of facts and the view that Mr. Commissioner Scrutton took of the duties of these people. When he deals with the ship's officer, he makes it plain that in carrying out the directions, or orders, or wishes—I do not care which you call it—expressed by Mitchell, the servant of the staithowners, there was a course of business laid down for the very purpose of avoiding accidents. There is a second officer, and he is placed where he is for the very purpose of seeing as far as he can whether it is safe, and then his directions are passed through the pilot to the captain. Each one of these people has a duty to perform. In my view, Mitchell had a right to suppose, and it was really his duty to suppose, that the order which he was giving was not an order which would be carried out unless the officers of the ship, acting according to the practice in question, had first satisfied themselves, either by communication with the second officer or otherwise, that it was safe to carry out the order. In my opinion, under these circumstances, an action brought by the foy boatmen against the owners of the ship would have been a successful action as far the ship was concerned. I think the shipowners by their negligence, that is to say, the negligence of the officers of the ship, were the primary or proximate cause of the accident. I think, but for their misconduct, the mistake, if it was a mistake, of Mitchell in giving the direction he did, would not have given the foy boatmen a good cause of action against the staithowners; in other words, I think that under these circumstances it would not create a legal liability in the staithowners, the wharfingers, as being within the words of sub-sect. 1 of sect. 6 of the Workmen's Compensation Act 1906. We can also, in my judgment, look at this case from the same point of view that the court looked at in the case of *Tredegar Iron Company* v. *Owners of the Calliope*; *The Calliope* (*sup.*). Consequently, in my judgment, the act which Mitchell did here was a direction, or whatever you like to call it—an order, if you please—of such a character that he had a right to suppose that it would not be carried out without the ship's officers first ascertaining that it was safe to carry it out. In my opinion, the ship's officers did not do so, and this direction given by Mitchell was not the proximate cause of the injury which was sustained by these two unfortunate men in the foy boat, one of whom was killed. I do not think I need say any more on the facts. Of course, if my judgment of the facts is right, it absolutely disposes of this case.

I have already referred to the construction of the words of this section, but I wish to say a word or two as to why my views agree with those of the learned commissioner as to that construction. I take the view, at all events myself, that in the preliminary part of this section, where the Legislature is speaking of a "legal liability to pay damages in respect thereof," that is in respect of the injury which is the subject of the compensation, it is speaking of the circumstances which would give a good cause of action by the workman against the wrongdoer. As I read the statute, it is quite plain that in providing first for the workman not being able to recover both compensation and damages the Legislature is anxious and thinks it just that the wrongdoer who has by his wrong action, or by his negligence, as the case may be, brought about the result, shall not get off scot free, and I think that the test to apply is *primâ facie* the answer to the question: "Would the workman have had a good cause of action against this person other than his employer?" But the section does not go on to say that the remedy shall be the trial of an issue: Aye or No, do these circumstances disclose a good cause of action by the workman as against a third person? It goes on to say in the second sub-section of sect. 6, which makes it clear: "If the workman has recovered compensation under this Act, the person by whom the compensation was paid, and any person who has been called on to pay an indemnity under the section of this Act relating to sub-contracting, shall be entitled to be indemnified by the person so liable to pay damages as aforesaid, and all questions as to the right to and amount of any such indemnity shall, in default of agreement, be settled by action or, by consent of the parties, by arbitration under this Act." It seems to me that the use of that word "action" in defining how the final remedy of the employer who has been compelled to pay compensation is to be enforced, is that he may set up matters which would be no answer to the workman if he sued, but are an answer to the employer who is trying to enforce his remedy over—they are an answer to him, notwithstanding the fact

that they would be no answer to the workman. In my judgment, one may deal with the construction on this limited ground. We have had cited to us by Mr. Scott Fox a number of passages from Maxwell on the Interpretation of Statutes, and I will not go through those again; but I do not think that the principles which were there laid down show that the intention of the legislature in using these general words could have been to give a right of action to an employer who has been a party to, and may have been the principal party to, the negligence which brought about the injury to the workman. I do not think it was intended that he should have a cause of action for indemnity against the person whom, for convenience, I will call his joint tortfeasor. I think, upon all these grounds, whether on the issue of fact or upon the construction of the section, the judgment of Mr. Commissioner Scrutton is right. I do think the servant of the defendants was not guilty of negligence which was the proximate cause of this accident, and I do not think, on the proper construction of this section of the statute, that we ought to hold that one of two joint wrongdoers has a right of action against the other wrongdoer for an indemnity. Under those circumstances, I am of opinion that this appeal should be dismissed with costs.

Buckley, L J.—I also am of opinion that this appeal should be dismissed. For the purpose of the first part of my judgment, I will assume that the facts are that both the plaintiffs, the shipowners, and the staithmasters, the defendants, were guilty of negligence so as to create in them a legal liability to pay damages for the accident. Making that hypothesis, I am going in the first instance to see whether sect. 6 of the Workmen's Compensation Act 1906 applies or not; in my opinion, it does not. The section uses the words: "Some person other than the employer"; for brevity, I am going to call that person "a stranger." The first question for consideration, I think, is whether the section is to be read as if it were: "Circumstances creating a legal liability in a stranger," or "in the employer and a stranger." I think that the construction does not extend so as to include the latter case, and for these reasons. The section goes on in sub-sect. 1 to provide that in the state of facts mentioned in the preliminary words: "The workmen may take proceedings both against that person to recover damages." That person means the person whom I have called "the stranger." If the preliminary words bear the meaning which I think they do not bear, you would expect to find there "the workman may take proceedings both against that person," or "against that person or his employer to recover damages"; but you do not find those words. All that is contemplated as the result which is to be dealt with if the preliminary words apply—namely, that there is to be in the servant a right to take proceedings for damages against the stranger and for compensation against the person liable to pay it under the Act.

Now, the history of sect. 6 of the Act of 1906 is this. By sect. 6 of the Workmen's Compensation Act 1897 it was provided that under circumstances such as are mentioned in each section "the workman may have his option to proceed either at law against that person to recover damages or against his employer for compensation under this Act, but not against both," and the object of the Act of 1906 was to alter that statutory law, and to provide that he may take proceedings against both, subject to the provision that he shall not recover both damages and compensation. Looking back, then, at sect. 6 of the Act of 1897, the workman is entitled to sue for either one or the other, but not for both. That section went on: "And if compensation be paid under this Act the employer shall be entitled to be indemnified by the said other person." It seems to me impossible to suppose that the Act of 1897 had intended to provide that if there was a legal liability both in the stranger and in the employer, there should be a right in the employer to call upon the stranger to indemnify him for consequences which were due as much to the act of the one as to the act of the other. Now, the same consideration arises with regard to the Act of 1906. The second reason why I think this case is not within the section is as follows. If the preliminary words of the section are satisfied, then the person by whom the compensation was paid shall be entitled to be indemnified by the person so liable to pay damages as aforesaid. So that if a case where there is a legal liability in the employer and the stranger does fall within the section, then the Act provides, as far as the preliminary words are concerned, that as between those two parties, both of whom are to blame, that the one shall bear the whole of the onus to the indemnity of the other. That is a construction which I think is highly improbable. Upon these grounds I think the section is confined to the case where there is a legal liability in the stranger to pay damages to the exclusion of the case where there is a legal liability in the stranger and the employer himself to pay damages. But, further, for the purpose of construing the section, I am going now to assume that this is wrong and that the preliminary words of the section are satisfied, that there is a legal liability in this stranger and the employer to pay damages. In these circumstances, sub-sect. 2 provides this, that the person called upon to pay the compensation, the employer, "shall be entitled to be indemnified by the person so liable to pay damages as aforesaid"—that is to say, indemnified by the stranger—then there follow the words "and all questions as to the right to and amount of any such indemnity shall" be determined in a particular way. So that, assuming the preliminary words of the section are satisfied, sub-sect. 2 contemplates that there still remains a question whether there is any right to indemnity. Now, suppose the facts are that both parties, the stranger and the employer, have been negligent, and are liable at law for damages, these words seem to me to contemplate that there still remains a question whether there is or is not a statutory right of indemnity. The statutory right of indemnity is not to be enforceable in every case. It was conceded in argument, and in fact the contrary could scarcely have been contended, that if by contract that right of indemnity has been abandoned, it cannot be enforced. Equally it seems to me that if the facts are such that as between these two parties it is not just that the one should be called upon to indemnify the other, then that question as to the right of indemnity is a question which is preserved by the last words of sub-sect. 2. For these reasons, therefore, upon

the construction of the section, I arrive at the conclusion, that even if there was legal liability in both the parties, the shipowners cannot sue the staithmasters for an indemnity in pursuance of any statutory right to indemnity.

Upon totally different grounds, it seems to me the appeal equally fails. The facts were, that the ship approaching the staith did a particular act—namely, set the propeller in motion—with the result that one man unfortunately was killed and another was injured. In respect of that, compensation was payable, and has been paid, and the question is whether there is an indemnity in respect of that compensation. Now, whose act of negligence was it that caused the accident? Mitchell, the staithmaster, was the person who, I have no doubt, was in a position to give orders in the sense that he was there for the purpose of saying, "If you are going to ship coals"—I think it was—"you will have to put yourself under spout A and not under spout B; you are to go here and not to go there." It was for him to say where the ship was to lie, but it was not for him to say, I think, what acts of navigation the ship was to execute for the purposeof obeying that which was in a sense his order. At this stage I asked myself in whom lay the authority, and who exercised the authority, of causing the propeller to to be set in motion? Could Mitchell give the order which would physically cause the engine man to pull the lever and turn the propeller? Was it Mitchell's order which did it? I answer: No; it was not. Mitchell's order was, "Do such acts as are required for the ship to come to this place," and then those who were in control of the navigation of the vessel, the pilot or master, or whoever it was—I do not discriminate between those parties at all—having received that which in a sense was an order, owed, I think, themselves the duty as navigating officers to say whether or not the circumstances were such as that they could set the propeller in motion without doing injury. The cause of the accident was not Mitchell's order, but the course which the navigating officers took consequent upon Mitchell's order. What happened was this: The second officer at the stern of the vessel of course could not see the propeller actually from the position in which he stood; he could see the foy boat lying over the quarter, and it was perfectly competent to him and it was his duty to form the best of his judgment as to whether the foy boat lay in such a position as that the propellor could be started without injury. He seems to me upon his own evidence to have surrendered his judgment to that of Mitchell, and Mitchell took the view that there was no danger likely to be incurred. The second officer was not entitled to rely upon that, or, if he did rely upon it, still the responsibility was with him, and if there was negligence at all the negligence was that of the person who had the duty to see whether the foy boat was clear of the propeller. He did not see to it, with this unfortunate result, that the accident happened. As between Mitchell and the persons controlling the navigation of the ship, therefore, it was the latter and not the former who, I think, were responsible. Apart from this altogether—it is not necessary to decide it—Mr. Scott Fox addressed to us an argument which, I think, was largely suggested by myself, that this accident was not due really to the neglect of anybody, that the circumstances were such from the evidence of witnesses that everybody had good reason to believe that the foy boat lay at such a distance away as that there really was no danger. I do not decide it on that. It seems to me the negligence, if there was negligence, was not that of Mitchell, but that of the ship. If it was not that of Mitchell, then sect. 6 does not apply, for a totally different reason. It does not apply because the words "legal liability in some person other than the employer" are not satisfied. For these grounds, therefore, I think the appeal fails and should be dismissed with costs.

KENNEDY, L.J.—In this case Mr. Commissioner Scrutton came to certain conclusions of fact and certain conclusions of law. With regard to his conclusions of fact, the evidence being oral, I should be extremely slow to come to any conclusion by reading the evidence, which differed from his. My view is as regards judges sitting alone—as I think the present Lord Chancellor has himself pointed out—that under the present system of hearing oral evidence I ought to act as I should with regard to the finding of a jury against whom no bias or mistake is alleged, and respect the finding unless I can see that there was some mistake or error or misunderstanding which relieves me from following that conclusion. Had I been free in that way, I think there is a great deal to be said, as Buckley, L.J. a moment or two ago intimated, for the view that on the evidence nobody might be held to blame for this affair. I think there was a good deal which no doubt was urged by Mr. Scott Fox, though unsuccessfully, for that view, but the learned judge has come to the conclusion that there was both actionable negligence on the part of the staithmaster, Mitchell, and actionable negligence on the part of one or more or all of the servants on board the ship which was then being navigated to take a place at the staith, and I do not see any sufficient ground to justify me in coming to a different conclusion either as regards the negligence of Mitchell or as regards the negligence of the officers of the ship. To my mind, it is my duty, as I do not find clear ground for so doing, not to differ from the learned commissioner as regards his findings of fact or his inferences from them, and also because, to my view, the law of negligence does not admit a doubt, although it is difficult, of course, in certain circumstances to apply unquestionable propositions to the facts of a particular case. Now I will just say this. I think it is due to the care with which the learned counsel on both sides have assisted us in this case to say what my view in accordance with the learned commissioner's view is as regards the negligence of Mitchell. He was not a statutory harbour master; he was not clothed with statutory authority; he was the servant of the defendants, but a servant who, according to the well-known unquestionable contract between the parties, would have the right to say where the ship should be brought to for the purpose of using the staith for which a fee was to be paid. But when we are dealing with questions of negligence, it becomes important not to spoil one's mental vision by using the word "duty," except in relation to the person to whom it may be that obedience or care is due. The staithmaster, like anybody else under contract with the shipowner, has his duties of contract, the master, the pilot, the mates have

their duty to the shipowner as navigating officers. We must not confuse those duties with the general duty which rests upon everybody, whether using a river or using a road, to take care that nothing they do shall be omitted so as reasonably to protect others, and that they shall do nothing which will, because of a want of care, inflict injury upon others. Mitchell, as both the men, the poor people who were injured, and those on board the ship knew, and as is common ground on the evidence, did in fact do a great deal more than give an order as to where the ship should go. That is to say, he did in this particular case not give a general order as to where the ship should go, but did give an order detailing the how as well as the whither, because the order that he gave was, "Hard a-port and slow ahead"; in other words, orders to the engine-room and orders to the helmsman. He says, and I think he gave his evidence fairly, "I did expect that under such circumstances as existed in that case the master and pilot, or whoever it was in charge of the navigation of the ship, would do as I told them to do," giving the best care and judgment at the moment. He says himself in examination-in-chief, "If the ship is getting off from the quay on an ebb tide, I should give orders for the engines to go ahead on the port helm"; in other words, "I should give orders not as to the place, but for the engines to go ahead on the port helm." Then: "Q. What does the master do then?—A. The master sometimes carries the orders out, and sometimes not. Q. How does he decide as to what action he shall take upon your orders or your directions?—A. He would naturally think that in the place where I am standing I would see the propeller and everything was all clear." Now, that is his own statement given to Mr. Scott Fox as counsel for his employers, and given with a fairness which, I think, does the man great credit under the circumstances. But if he had not said so it would have been in conflict with the whole of the evidence of the rest of the competent persons in the case. Two pilots were called, a man named Gibbins and a man named Meynell, and their evidence was given in the case. Meynell was examined by the other side. "Q. Who tells you where you are to put the ships on the staiths?—A. The berthing master. The Commissioner: If he tells you to go ahead if there is a barge or anything in front of you, do you go ahead?—A. No; not if I thought I was going to do any damage." Then he describes what he did, which is in accordance with the well-known practice governing the duties of a pilot, as has been laid down in many of the earlier cases: (see *The Christiana*; *Hammond* v. *Rogers*, 7 Moore P. C. 160, approved in *The City of Cambridge*; *Wood* v. *Smith*, 2 Asp. Mar. Law Cas. 239 (1874); 30 L. T. Rep. 439; L. Rep. 5 P. C. 451). He is the pilot to advise; he is not a compulsory pilot, but it is his duty to advise the captain, and the captain's duty *primâ facie* to take his orders. He is asked: "Was Mitchell in a position to see anything in the vicinity of the propeller?" and then he is interrupted by Mr. Scott Fox, counsel for the defendants, who says, "Everybody knows he was." In other words, there was Mitchell, who, in fact, does give the orders, because there is another witness, Gibbins, who says the same thing in regard to it. The harbourmaster is not a man of experience, but he has been there some years; and he says: "Q. When you get up to the staiths Mr. Mitchell looks after what is done then?—A. He gives orders for the ropes to be taken ashore. Q. Who does?—A. Mr. Mitchell. Q. Supposing the ship has to be moved or manœuvred, who gives the order?—A. Mitchell, also with the tugs—he has the ordering of the tugs as well. Q. Do you carry out his orders?—A. Yes. Q. Of course, if you see there is no danger?—A. Of course I would not if I saw danger in it." Therefore I should think he is a person accustomed to the working of a place of this kind in a narrow river, and it is only right and proper that you should carry out the order of the staithmaster except where you see, or have reason to believe, that he cannot be aware of the facts which will create danger, and that they ought therefore to modify his order. You have no right, nobody has a right, captain or pilot, under any circumstances, even when ordered by a harbourmaster with statutory authority, in my view, blindly to do something when he knows the order is given in ignorance of a danger of which he is cognisant. But short of that he cannot be said to be otherwise than reasonably careful if he obeys the order given by the person conversant with the place, responsible for the care of the staith, and responsible for seeing if people like these foy boatmen might be in a position of danger. Now put the converse case: Supposing a pilot, captain, or second officer in this case had refused to obey the order and not carried it out and an accident had happened, would it not have been said: "Can anything be more negligent than not to carry out the orders of the man who had the best opportunity of seeing what was the proper order to give? It seems to me that the view which the learned commissioner has taken is unanswerably right.

But then it is said that, although he did give this order, yet it was not the proximate cause of the accident; it was not the effective cause of the accident. Different views, of course, were expressed about that, and as Vaughan Williams, L.J. expressed a different view, I am very likely wrong, but to my mind it was a proximate cause and an effective cause. In using the word "proximate," one must be careful not to mix up the question of time with the question of causation. You may have a proximate cause although something has happened after the act which causes the mischief. There are plenty of examples to show that. Further than that, in my judgment, it does not rest with the person who cannot deny that he was the effective cause to say that there were other effective causes. I am not going to refer in detail to the case of *Greenland* v. *Chaplin* (*sup.*), which has been already referred to, but it is one which is not only settled law, but has been more than once recognised, nowhere more than in the case which showed its proper modifications—I mean in the judgment of Cockburn, C.J. in *Clark* v. *Chambers* (38 L. T. Rep. 454; 3 Q. B. Div. 327). He refers to the passage already cited in *Greenland* v. *Chaplin* (*sup.*), and also to the similar decision in *Sharp* v. *Powell* (26 L. T. Rep. 436; L. Rep. 7 C. P. 253). The Chief Baron says, at p. 248 of 5 Ex. Rep.: "I entertain considerable doubt whether a person who is guilty of negligence is responsible for all the con-

sequences which may, under ordinary circumstances, arise in respect of mischief which could by no possibility have been foreseen, and which no reasonable person would anticipate." With that view of the law nobody would venture to quarrel, but can a man who admits in his own language "I expected that the captain naturally would carry out this order," say, I could not, by any possibility, have foreseen obedience to my direction, and I could not as a reasonable person have anticipated that it would be done? I am not going into the matter in detail, but that is my own view, and that is why I think the learned commissioner's conclusions were right. I do not think I can find the law for my point of view better stated than as summed up by Beven in his work on Negligence (3rd edit., vol. 1, p. 77). "Again, one person may be negligent, and, by the negligence or wilful act of another, the negligent act of the first may cause injury to the third; then a distinction is to be taken. If the first negligent act is not in its nature such that the second might be looked for, as a natural and probable sequence, then the first negligent person is not responsible. If the subsequent negligence"—mark you, "negligence"—"is likely to follow from the antecedent negligence, then the first negligent person is liable; and the question must be left to the jury whether the first wrongdoer's act was the proximate cause of the plaintiff's injury. Even though the first wrongdoer may be liable, the second is not therefore discharged, since each is liable for the total results of the joint wrong—that is, where the consequences are not referable to a separate agency of each in their just proportions"; and at p. 78, referring to the judgment of Cresswell, J. in *Thorogood* v. *Bryan* (13 L. T. Rep. O. S. 284; 8 C. B. 115) and Maule, J. in the case of *Reg.* v. *Haines* (2 Car. & K. 368), he says, quoting, first, Maule, J. (I omit the reference to *Thorogood* v. *Bryan* (*sup.*): "It is no defence for one who was negligent to say that another was negligent also, and thus, as it were, to try to divide the negligence among them." "The distinction has been already indicated; it is between a cause and a condition," and I think myself that is a very good statement. "If the conduct impugned is a cause, even though not the cause—in the sense of the sole cause of the accident—the author of it continues liable. But if the first negligence has, so to speak, fallen dead and is inoperative without the second agency working, the first negligence has ceased to be a cause; it has become a condition—the material with which the second chooses to work." I could not put the thing, from my point of view, better. You have the principal witness whose conduct is in question, Mitchell, saying: "I expected the captain"—that is what it is in substance when he uses the word "naturally"—"to assume I was giving a right direction; I agree I was in the best position to see." Then it becomes a question of fact whether he could see what the danger was as well as, or better than, anybody else. Therefore, for these reasons, both legal and on the facts, I should not differ from the learned commissioner in the conclusion to which he came. If I were to differ, it would be rather with regard to the other witnesses, because when you speak of the duty of the second officer to see all is clear, and the duty of the captain to wait for the signal from aft, and the duty of the pilot to do the same thing, you are using the word "duty" there in a sense, as it seems to me, which may be misleading. They had those duties as navigating officers towards the shipowner. As regards these foy boatmen, they had the special duty of persons who have to take care that they were not injured in circumstances where they might be injured by their carelessness; and it is exactly the same class of duty as Mitchell had. He had a duty to everybody to see what the reasonable consequences of his order would be. Mitchell here was in this position, and, as he says, he had as good a view as anybody else; and if he said "It is quite safe; go on," I should hesitate myself before I found any of these officers guilty of negligence. The only one who appears to me to have been negligent is the second officer, who says unquestionably that he had some doubts as to whether it was safe or not, but he says that he had not quite such a good view as Mitchell had of the propeller.

Now, accepting the findings as against both, it still remains a difficult question with regard to the law. Upon the whole, I think, in spite of the very able argument that has been addressed to us on behalf of the plaintiffs, that I have come to the conclusion that the defendants on the question of law are right. It seems to me that when you find a section such as this section is, which in effect, so far as it deals with the present case, gives a right of indemnity, if I can adopt any reasonable construction that will prevent a man getting indemnity for what he had himself materially contributed to produce, I ought to adopt that construction. Here the plaintiffs are suing the owners of the staith. They have been found by Mr. Commissioner Scrutton, through their servants, to have been the effective, though not the actual cause, as Mitchell was another, of this accident. They claim to be indemnified for what they have paid under this Act by way of compensation to these poor people who were injured, and it seems to me this section cannot have intended, and nobody who helped to pass this Act of Parliament could have thought that where an employer who by the Act becomes liable, apart from all questions of negligence, to compensate for injuries or accidents which arise out of and in the course of the employment, that though he could have been sued independently of that Act, and could have been sued, it may be, under the common law, or under the Employer's Liability Act of 1880, that he should be able to go to another person, whose servant has been in common fault with his own, and say: "Pay me an indemnity; pay me all, even possibly my costs if I have defended the other action reasonably; pay me that, although I myself might have been sued; I myself, so far as there was negligence, was also, through my servants, equally to blame." There is nothing in the Act which is opposed to this view. I rather think myself, if I were driven to it, that I should say this, that it was not unreasonable as a consequence of any other interpretation to say that "creating a legal liability in some person other than the employer" meant a legal liability which as between the employer and the third person is the sole legal liability. I think it has been pointed out by both the other members of the court that when you come to sub-sect. 2 and find the words as to amount and right to any such indemnity the

fair inference includes the consideration of the question: Am I one who has myself been equally with you legally liable for this mischief? If so, I cannot claim just as in the case put by Mr. Commissioner Scrutton of a contract by which the right to indemnity was excluded. I would rather treat the section as applying only to cases in which an employer is liable only in fact as an employer coming under the liabilities of the Act, and not as applying to cases where he is himself through his servants or his own negligence responsible outside the Act jointly with the person from whom he claims indemnity as having to some extent contributed to the injury to the compensated workman. For those reasons I agree with the judgment pronounced below on the questions of fact or inferences of fact, and in substance I agree with the reasoning which has excluded the man who has paid from succeeding in the claim which he seeks to enforce.

Appeal dismissed.

Solicitors for the plaintiffs, *Botterell* and *Roche*, agents for *Botterell* and *Roche*, Sunderland.

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

June 8, 9, *and July* 23, 1910.

(Before VAUGHAN WILLIAMS, FLETCHER MOULTON, and BUCKLEY, L.JJ.)

WHINNEY *v.* MOSS STEAMSHIP COMPANY LIMITED. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Bill of lading—Lien—Unsatisfied freight due by limited company — Shipment by receiver and manager—Right of shipowners to exercise lien as against receiver and manager.

A limited company had for a number of years shipped ale to their agents at Malta by the defendants' line under a bill of lading which contained a clause giving the shipowners a lien not only for freight due thereon, but also for any previously unsatisfied freight due from shippers or consignees.

The plaintiff, who had been appointed by the court receiver and manager of the company, gave the defendants instructions to ship a further quantity of ale to Malta as follows:

"Please deliver ale as below, charging to yours respectfully, Ind, Coope, and Co. Limited. By Arthur F. Whinney, Receiver and Manager, C.C.C."

The address given for the delivery of the ale was "Ind, Coope, and Co. Limited, care of Turnbull, jun., and Somerville, Strada Reale, Valetta, Malta."

The defendants, in reply, notified the plaintiff of the amount of freight, and inclosed a bill of lading in the same form as that used on previous shipments by Ind, Coope, and Co. Limited.

On arrival of the ale at Malta, the defendants claimed to exercise a lien on the particular shipment in respect of previously unsatisfied freight.

Held (Fletcher Moulton, L.J. dissenting), that the defendants were not entitled to exercise a lien on the particular shipment in respect of previously unsatisfied freight, because (a) *the shippers and the consignees were the same person and that person was not the mortgagor company, but the mortgagees by their receiver dealing with the assets of the company; and* (b) *the plaintiff as receiver neither could nor did create in favour of the defendants any lien by contract extending to the unsatisfied debt of the mortgagor company.*

Held, also, that even if the transaction was one which would create a security, it could not do so in law, because the leave of the court had not been obtained.

Decision of Hamilton, J. (11 *Asp. Mar. Law Cas.* 381 (1910); 102 *L. T. Rep.* 177) *reversed.*

APPEAL by the plaintiff from a decision of Hamilton, J. in an action tried by him without a jury in Middlesex.

The plaintiff, who was receiver and manager of the firm of Ind, Coope, and Co. Limited, claimed the sum of 171*l.* 19*s.* 10*d.* as money had and received by the defendants to the use of the plaintiff.

The plaintiff was appointed receiver and manager on the 5th Jan. 1909 by an order of the court on the application of the debenture-holders.

On the 13th Jan. 1909, a quantity of ale having to be sent out to Malta, he sent the following letter to Messrs. James Moss and Co., the managers of the defendant company:

The Brewery, Burton-on-Trent, Jan. 13, 1909.—Please deliver ale as below, charging to yours respectfully, Ind, Coope, and Co. Limited. By Arthur F Whinney, Receiver and Manager, C.C.C. Ind, Coope, and Co. Limited, care of Turnbull, jun., and Somerville, Strada Reale, Valetta, Malta.

In their reply the defendants said:

Please check the enclosed bill of lading, and, if found incorrect, please return to us immediately, as otherwise we can take no responsibility.

The bill of lading accompanying the letter contained the following clause:

3. That the shipowner, his managers, servants, and agents shall have a lien and right of sale by public auction over the goods shipped hereunder, not only for the freight and charges due thereon, whether payable in advance or not, but also for all amounts in anywise to become payable to them under the provisions of this bill of lading, although the same may not then be ascertained. And also in respect of any previously unsatisfied freight, inland or forwarding charges, primage, porterage, fines, costs, and other charges or amounts due either from shippers or consignees to the shipowner, or to the owners of any steamers of the Moss Line, or to their Liverpool agents, and also for the costs and expenses (if any) of exercising any such lien, and to deduct from the proceeds of any sale the costs of and incidental thereto, or to the exercise of any such lien as aforesaid.

The ale was duly shipped under that bill of lading, and, as the defendants had a claim against Messrs. Ind, Coope, and Co. amounting to 171*l.* 19*s.* 10*d.* for unpaid freight in respect of former shipments, they claimed to exercise a lien for it upon the particular shipment, and refused to deliver the ale unless the amount due was paid.

The plaintiff, having paid the amount under protest, claimed to recover it back.

Hamilton, J. held that the defendants were entitled to exercise a lien on the particular shipment in respect of the previously unsatisfied freight.

The plaintiff appealed.

Leck for the plaintiff.—The question in this case is whether the defendants are entitled to a

(*a*) Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.

lien for the previous freights which still remain unsatisfied. The receiver and manager is in possession of the beer which he ships to Malta free from any lien. The contract between the parties is really contained in the letters and is not made by the bill of lading at all, but, even if the bill of lading governs the contract, the shipper of the beer was in fact the plaintiff, who was in possession of the goods, and the plaintiff was also the person to whom the goods were deliverable at Malta. It is not denied that the plaintiff made himself personally responsible

English Electro-Metallurgical Company v. *Glasdir Copper Mines Limited*, 94 L. T. Rep. 8; (1906) 1 Ch. 365, 378.

Apart from clause 3 of the bill of lading there cannot possibly be any lien, but that clause, it is submitted, forms no part of the contract. [Vaughan Williams, L.J.—Ind, Coope, and Co. as mortgagors are clearly not entitled to receive the goods.] The shipper here is entitled to require delivery to himself or his agent, and the defendants refused to make delivery to the plaintiff or his agent. Ind, Coope, and Co. could have no rights as consignees adverse to the plaintiff. He also referred to:

Crooks and Co. v. *Allen and another*, 4 Asp. Mar. Law Cas. 216 (1879); 41 L. T. Rep. 800; 5 Q. B. Div. 38, 40;
Plumpton and another v. *Burkinshaw*, 99 L. T. Rep. 415; (1908) 2 K. B. 572;
Owen v. *Cronk*, (1895) 1 Q. B. 265;
Ex parte Sacker; Re Sacker, 60 L. T. Rep. 344; 22 Q. B. Div. 179;
Burt and others v. *Bull and another*, 71 L. T. Rep. 810; (1895) 1 Q. B. 276.

Leslie Scott, K.C. and *Robertson Dunlop* for the defendants.—The first question is, Who is the consignee of the shipment of beer? Obviously Ind, Coope, and Co. on the face of the bill of lading. In *Wolff* v. *Horncastle* (1 B. & P. 316, 322) a consignee is defined as the person residing at the port of delivery to whom the goods are to be delivered when they arrive there. The plaintiff cannot be heard to say that he had no authority to make the contract. The defendants did not know whether he had obtained the leave of the court to enter into that contract. It is quite plain that the plaintiff invites the defendants to treat Ind, Coope, and Co. as consignees as well as shippers. The words "Receiver and Manager" do not in themselves show how the office has been created. On the face of the pleadings the plaintiff sues on a contract made by himself, and he cannot both approbate and reprobate. The defence sets up the particular term in the contract of carriage. There ought to have been a declaration in the statement of claim that the defendants knew what the capacity of the plaintiff was, and that he had no power to enter into the agreement. They also referred to

Rushforth v. *Hadfield*, 7 East, 224;
Lipton v. *Jescott Steamers*, 1 Com. Cas. 32;
Brogden v. *Metropolitan Railway Company*, 2 App. Cas. 691.

Leck in reply.

Cur. adv. vult.

July 23.—Vaughan Williams, L.J.—I have read the judgments of Fletcher Moulton, L.J. and Buckley, L.J., and I concur in the judgment of Buckley, L.J., which expresses much better than I can the views I expressed during the argument.

Fletcher Moulton, L.J. read the following judgment:—The facts in this case are uncontested and simple. In the year 1908 the well-known brewing company, Ind, Coope, and Co. Limited, got into financial difficulties, and towards the end of that year the debenture-holders took steps to enforce their security, and on the 5th Jan. 1909, on their application, Mr. Arthur F. Whinney was appointed receiver and manager in the usual way. The debentures constituted a floating charge upon the undertaking of the company as well as on its assets, and as the connection of this well-known company must be almost world-wide, it was evidently thought to be a valuable part of the security, for no steps were taken to wind-up the company, and, indeed, it is still a going concern. The policy adopted by the receiver and manager is well expressed by the earliest telegram in the case, where, when telegraphing to the agents of the company at Malta, he says, "We continue to do business as hitherto." At this time, and for many years before, the company had a number of foreign agents to whom it sent out beer for sale. Among these was a firm of Turnbull, jun., and Somerville, at Malta, who were appointed to act as such agents originally by an agreement made in 1901, which had in 1908 been extended for a further term of seven years. It would seem that on hearing of the appointment of Mr. Whinney, their agents made some inquiry of him as to its effect on their position, and received in answer the telegram to which I have referred, which accurately describes the situation. I should judge from the telegrams that were put in evidence in the court below that it was customary for the agents to report weekly to the company the stock in their hands. Be that as it may, Messrs. Turnbull, jun., and Somerville sent to the manager a telegram of the 9th Jan. which showed a substantial decrease in the stock in their hands on that date as compared with the week before. Accordingly the manager determined to send out further beer to replenish the stock, employing for this purpose the shipping agents, Messrs. James Moss and Co., of Liverpool, the representatives there of the defendants, the Moss Steamship Company Limited, who own (amongst other lines) a line of steamships trading between Liverpool and Malta. In this also he was following the usual practice of Ind, Coope, and Co. Limited. The letter sent to James Moss and Co. on the occasion of the consignment of their goods was as follows: "Messrs. James Moss and Co., Liverpool. Please deliver ale as below, charging to yours respectfully, Ind, Coope, and Co. By Arthur F. Whinney, Receiver and Manager, C.C.C." Here come the marks and description of the goods. "Ind, Coope, and Co. Limited, care of Turnbull, jun., and Somerville, Strada Reale, Valetta, Malta." In consequence of the receipt of this letter and the consignment to which it refers, Messrs. James Moss and Co. sent to Ind, Coope, and Co. Limited the bill of lading for the goods with the following letter: "Messrs. Ind, Coope, and Co., Burton-on-Trent. Sirs,—We beg to enclose herein shipping documents for your goods forwarded according to your instructions per *Rameses* for Malta. We

place to your debit the amount of our expenses thereon as per statement at foot.—Yours respectfully, James Moss and Co. Note.—One bill of lading sent to consignee. Please check the inclosed bills of lading, and, if found incorrect, return immediately, as otherwise we can take no responsibility." Here follow description and marks on goods. The bill of lading in question contains the names of Messrs. Ind, Coope, and Co. Limited, care of Messrs. Turnbull, jun., and Somerville, as consignees. In the usual way various conditions appear therein which show the terms on which the goods are received for carriage. The only material one is No. 3, which reads as follows: "That the shipowner, his managers, servants, and agents, shall have a lien and right of sale by public auction over the goods shipped hereunder, not only for the freight and charges due thereon, whether payable in advance or not, but also for all amounts in anywise to become payable to them under the provisions of this bill of lading, although the same may not then be ascertained. And also in respect of any previously unsatisfied freight, inland or forwarding charges, primage, porterage, fines, costs, and other charges or amounts due either from shippers or consignees to the shipowner, or to the owners of any steamers of the Moss Line, or to their Liverpool agents, and also for the costs and expenses (if any) of exercising any such lien, and to deduct from the proceeds of any sale the costs of and incidental thereto, or to the exercise of any such lien, as aforesaid." After the goods had been shipped under this bill of lading, and while they were still in transit, James Moss and Co. applied to Ind, Coope, and Co. for payment of their account for freight, which amounted to 228*l.* 13*s.* 6*d.*, of which 56*l.* 13*s.* 8*d.* was in respect of the above consignment and the balance, 171*l.* 19*s.* 10*d.*, was in respect of previous consignments the freight upon which remained unpaid. Mr. Whinney refused to pay the latter item on the ground that the shipowners were only in the position of unsecured creditors with regard to it. Thereupon the shipowners threatened to enforce the lien which they contended was given them by the condition above recited in respect of the whole of the unpaid account. In order to prevent the goods being detained, an arrangement was made by which the goods were delivered on the terms that the rights of the shipowners should not be prejudiced thereby. The undertaking given by Mr. Whinney to this effect is contained in a letter from him to the solicitors of the defendants in this action dated the 20th Jan. 1909, and it is sufficiently wide to ensure (as it was intended to do) that the defendants should be paid all that they could have obtained by insisting on their lien. As a matter of arrangement the amount claimed was subsequently paid, and this action is brought by Mr. Whinney to recover it back.

The clearest way of presenting the point in issue in this case is as follows: It is admitted by the parties to the action that if there had been no appointment of a receiver and manager the defendants would have had the right of lien they claimed, because in that case Ind, Coope, and Co. Limited would have been both shippers and consignees. But it is contended by the plaintiff that the fact that a receiver and manager of the business of the company had been appointed changes the rights of the shippers and prevents their acquiring the lien claimed. I shall examine in turn the grounds on which this contention rests. The first is one put forward at the time by the plaintiff in his letter of the 20th Jan.—viz., that the goods belonged to him as receiver, and that therefore the lien could not attach. This, of course, affords no answer to the claim of lien. The question to whom do the goods belong is immaterial so soon as it is admitted—as it must be in this case—that they were delivered to the ship for carriage by those lawfully entitled to ship them. A right of lien is good against all the world under such circumstances. The second ground is that a lien for the unpaid freights of previous consignments did not arise because the consignee was not the same. It was suggested that Ind, Coope, and Co. Limited, after the appointment of the receiver and manager, was a different entity to that which it was before that date. To my mind this is a complete fallacy. The company then was and still is a going concern. No steps have been taken to wind it up. The debenture-holders found that it was to their interest to keep the company alive, and, so long as it lives, it is, and must be, one and the same entity. No one but the limited company of that name can carry on business as Ind, Coope, and Co. Limited so long as that company exists. The whole beneficial interest in its assets may have passed to the debenture-holders and others, and this may fundamentally change the position of those who seek to enforce legal rights against it; but its identity is unchanged, and, as the consignee under the bill of lading is Ind, Coope, and Co. Limited, it is the same consignee to whom the previous consignments were sent, and these unpaid freights come within the lien clause exactly as they would have come if the debenture-holders had not taken steps to enforce their security. Thus far I have considered the effect of the lien clause from the point of view of the identity of the consignee. This suffices to support the defendants' case in this action, but in my opinion the shippers were also identical. This, however, is more conveniently considered in connection with the ground upon which the plaintiff next relies, which I will now proceed to consider. It will be seen that the letter of Jan. 13 sent to the Liverpool agents when the goods were consigned for shipment is signed "Ind, Coope, and Co. Limited. By Arthur F. Whinney, Receiver and Manager. C.C.C." It is contended that the presence of the words "Receiver and Manager" make this not a consignment by the company but by Mr. Whinney personally on behalf of the debenture-holders, and that therefore this is not a shipment by the company at all. It was contended that this must be so because from and after the appointment of the receiver and manager the assets belonged to the debenture-holders, and the company could no longer deal with them in any way. And it was continually urged upon us that this was a case of a mortgagee taking possession, and that thereafter the mortgagor had nothing whatever to do with the property, and the dealings with it must *ex necessitate rei* be dealings of the mortgagees and not of the mortgagor. To my mind the error in this reasoning is due to taking too superficial a view of the nature of the transaction. It is true that

it is a case of mortgagees taking possession, but it has the peculiarity that part of the property mortgaged is the undertaking of the company itself. The debenture-holders might, of course, refuse to perform or to enforce the contracts to which the company was a party or to use any of its assets for the continuance of its business or in discharge of its liabilities. In their own interests they do not act thus, but, on the contrary, keep the business alive. It is the consequences of their carrying on the business in this way that we have here to consider and not merely the ordinary incidents in a case of mortgagees taking possession of the mortgaged property. The business that is thus continued is the business of the company. That this is so is evident. The receiver has the right, if he thinks fit, to fulfil or enforce, as the case may be, the contracts existing with the company. In doing so there is no question of novation. That would make his right so to do contingent on the consent of the other contracting party. It follows, therefore, that the entity that is a party to the contracts must be the same as before the enforcement of the security—that is to say, must be the company. And this is rendered evident also by the form of the order which the court makes at their request, which is dated the 15th Jan. 1909. Under it the plaintiff is appointed "to manage the business and undertaking of the defendants, Ind, Coope, and Co. Limited." In my opinion the word "manage" there is used in its ordinary sense. I know no other meaning, and the context indicates no other meaning that it can bear. So far as the business of the company is concerned, Mr. Whinney is in the same position, and has the same powers, that the manager of the business of a company would have if he were appointed by the company itself. It is well settled that these do not include the power of borrowing money without express authority, but that does not, in my opinion, detract from the accuracy of the proposition. No doubt, as I have said, most important differences arise if a person attempts to enforce legal rights against the company. The company is in the position of one that is carrying on business entirely with money and goods that do not belong to it, but which are, so to speak, lent to it for the purpose of carrying on its business. But transactions with regard to such money and goods falling within the ordinary scope of business transactions such as the manager of a company would have the power to direct or to carry out are just as valid as they would be if the money and goods still belonged to the company. He can sell and buy, and he can use the plant and premises that form part of the security for the purpose of carrying on the business, and that business remains the business of the company, although the whole beneficial interest in it may have passed to the debenture-holders. In so doing he may, for instance, dispose of goods, and the transaction, if within his powers as manager, and fully completed, cannot be impeached. Sale is only one of the business operations within his authority. He can make contracts as to goods which create a lien, and once the lien has attached, it is as good as though the company had created it before his appointment. This being so, the letter of the 13th Jan. has precisely the same effect, so far as the validity and effect of the transaction to which it relates is concerned, as if the words "by Arthur F. Whinney, Receiver and Manager, C.C.C.," did not appear therein. The consignment to which it refers was made by Ind, Coope, and Co. Limited, and by nobody else, and the addition of the words "Receiver and Manager" simply points to the fact that the plaintiff has authority to carry on the business of the company. For these reasons I am of opinion that there was an identity between the shipper of these goods and the shipper of the previous consignments to which the lien refers. In all cases the shipper was Ind, Coope, and Co. Limited, and no one else. I do not consider it necessary to deal with the question of the difference between the position of a receiver and manager appointed by the court and one appointed by the debenture-holders under powers contained in the trust deed. These matters may be important when we have to consider the nature and extent of the legal rights and remedies possessed by those who contract with the company and the mode in which they can be enforced by application to the courts. But here we are only concerned with the authority of the receiver and manager and not with his responsibilities. The defendants did not require to come to the courts to ask for their aid. If I am right in holding that the plaintiff was duly authorised to act as manager of the business of Ind, Coope, and Co. Limited, and, as such, lawfully consigned these goods for shipment by the defendants in the name of the company on the terms of the bills of lading, the defendants acquired the lien claimed, and it is quite immaterial from whom or by what procedure the plaintiff obtained that authority, or what were the legal responsibilities he incurred by acting on it. To displace the lien you must show that he had no right to act as manager of that business—that is, you must challenge the validity of the order of the court which expressly authorises him so to do. I shall therefore not discuss the cases which bear on the position and responsibilities of, and rights of action against, receivers and managers, only adding that in my opinion the decision in *Reid* v. *Explosives Company Limited* (57 L. T. Rep. 439; 19 Q. B. Div. 264) turned on the special circumstances of that case (as is evident from the judgments delivered), and does not justify the general proposition enunciated in the headnote to that case. Such a proposition is quite inconsistent with the law as laid down in the later case of *Re Marriage, Neave, and Co. Limited*; *North of England Trustee, Debenture, and Assets Corporation Limited* v. *Marriage, Neave, and Co. Limited* (75 L. T. Rep. 169; (1896) 2 Ch. 663, at p. 672). Lindley, L. J. there lays down the true principle that the receiver and manager is there to carry on the business of the company, and that he does not oust the company, and that it is not his function to break any contracts of the company. To my mind the appointment by the court of a receiver and manager of a company has, in itself, no more effect on any contract of the company, or on the continued identity of the business of the company, than a change of manager would have were it brought about by any other means, including the voluntary act of the company.

The last argument on behalf of the plaintiff to which it is necessary for me to refer is that the lien asserted cannot be supported because it would have been *ultra vires* on the part of the

plaintiff to ship goods on terms involving such a lien, in view of the fact that the whole property of the company had passed to the debenture-holders. The argument was expressed in the following way. The lien has the effect of making the shipowners secured creditors in respect of past unpaid freights, and this is a preference which the plaintiff could not give to them. I fail to understand this argument. For the purpose of considering its validity we must assume that the language of the bill of lading makes the giving of the lien a condition of carrying the fresh consignment. The transaction is therefore an ordinary business transaction. He procured the carriage of the goods on known terms, and he must abide by those terms. There is no question here of the plaintiff being taken by surprise, or of his not knowing the contents of the bill of lading. He wished, for the purpose of the business which he was carrying on, to send goods to Malta, and the terms on which the defendants were prepared to carry those goods are expressed in the bill of lading. He chose to accept those terms, and I have no doubt that he could have got the goods carried on no other terms, because shipping lines will not deviate from their recognised form of bill of lading. This being so, it is, to my mind, utterly immaterial whether or not the effect of the terms is favourable or not to the defendants in any respect whatever. The plaintiff chooses, as manager, to send goods out on those terms, and the defendants are entitled to have them performed. One of them is that the defendants have a lien on the goods till certain sums are paid. They are entitled to keep the goods till that is done. For these reasons I am of opinion that the decision of the learned judge was correct, and that this appeal should be dismissed, with costs.

Buckley, L.J. read the following judgment:—The question in this case, other than the question of costs, is academic—an expression which generally conveys that it is of no practical importance to anybody—unless the facts are, as I understand is the case, that the shipowner's remedy against the company as debtors is not worth 20*s.* in the pound. Under these circumstances the contest is really whether the shipowners, being unsecured creditors for unsatisfied freight, have by virtue of this transaction with the receiver, become creditors holding a security upon the goods. If they have, they rank for payment not only in priority to the other unsecured creditors of the company, but also to the debenture-holders, who have taken possession. Two questions do or may arise—namely, first, whether Mr. Whinney did by this transaction give the defendants security; and, secondly, whether if he purported to do so he acted without having obtained the leave of the judge. An answer in the negative to either of these two questions will determine the appeal in favour of the appellant. In my opinion both are to be answered in the negative. The defendants, by their letters of the 25th and 29th Jan., claimed that they were entitled to a lien on the goods to recover the amount of the unsatisfied freight. A common law lien, of course, they could not have. The contention was that they had become contractually entitled to a lien or security upon the goods by virtue of clause 3 in the bill of lading. Mr. Whinney, by his letter of the 30th Jan., asked the defendants to allow the goods to go forward, leaving the question which the defendants had raised to be settled afterwards, and to this course the defendants agreed. In these circumstances the action was brought, it is true, to recover the 171*l.* that was paid, but the rights are to be determined exactly as if the goods had not been released and the plaintiffs were suing to recover the goods, which claim the defendants were resisting upon the ground that for the purposes of the security the goods were theirs. Under these circumstances what is the answer to the first question—namely: Whether Whinney by this transaction gave the defendants security? It is not immaterial—although, of course, it does not decide the question—that if he did he was clearly guilty of a breach of duty. It might have been expedient in the interests of the debenture-holders to have paid a debt for which they were not liable, because such an act would further their interest in the company's undertaking. But there is no suggestion of any facts to lead to the conclusion that this was so, and even if it had been so, still the second question would then have arisen, which I postpone for the moment. What Mr Whinney did in fact was to give the order contained in the letter of the 13th Jan. and to ship the goods upon the terms of the bill of lading. I agree that the company were in this transaction the consignees, but not in the sense in which the defendants seek to affirm that they were such. The debenture holders had intervened and, by a receiver appointed by the court, had taken possession. The shipper was not the mortgagor company, but the mortgagees by their receiver dealing with the assets of the company. The defendants had notice that this was so by the very terms of the letter of the 13th Jan. The persons to whom the ale was to be delivered were there described as Ind, Coope, and Co. Limited, but that was the same Ind, Coope, and Co. Limited who signed the letter above, and was that company by Mr. Whinney as receiver and manager. The shippers and the consignees were the same person, and that person was not the mortgagor, but the mortgagees by their receiver. Assuming then that clause 3 of the bill of lading is for all purposes to be read as forming part of the contract, there was no previously unsatisfied freight due from the mortgagees or from Mr. Whinney the receiver acting for them. Mr. Leslie Scott has urged that the defendants knew only that Mr. Whinney was receiver and manager, and not that he was a receiver and manager appointed by the court. From this he seeks to evolve the proposition that they must have been dealing with him as agent for the mortgagor company as distinguished from the mortgagees who had by him taken possession. The contention is not, I think, well founded in fact. Moreover, apart from this, Mr. Whinney's powers would not be enlarged by the fact, if it existed, of the defendants' ignorance. The point could result only in personal liability in Mr. Whinney, and not in the creation of a security upon the goods, if upon other grounds no such security existed. In my judgment, therefore, the defendants did not, by reason of the shipment made by the mortgagees, obtain a contractual lien or security upon the goods for the unsatisfied freight due from the mortgagors. But, secondly, if I am wrong in the above and the transaction

was one which would create a security, it could not do so in law by reason of the fact that the receiver could not, without the leave of the court, bind the debenture-holders by such an act. Mr. Leslie Scott has urged that this point is not open upon the pleadings. I cannot see that this is so. The plaintiff sues to recover the 171*l.* That in substance affirms that the defendants had not a security upon the goods. Both his writ and his statement of claim disclose that he was suing as receiver and manager appointed under an order of the court. It was for the defendants, if they were going to raise the contention, to set up that he must fail to recover because they had a security, and for that purpose it was for them to allege that he had obtained the leave of the court which was necessary to give validity to such a security. How can it lie in the defendants' mouth to say that because they did not plead that such leave was given, the plaintiff must fail because the fact is that leave was not given? The plaintiff is, I think, entitled to succeed upon the ground that the receiver neither could nor did create in favour of the defendants any lien by contract extending to the unsatisfied debt of the mortgagor company. The appeal must be allowed, and judgment entered for the plaintiff with costs, including the costs of this appeal. *Appeal allowed.*

Solicitors for the plaintiff, *Davidson* and *Morriss.*

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

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Tuesday, Oct. 25, 1910.

(Before DARLING, PICKFORD, and Lord COLERIDGE, JJ.)

HAYLET (app.) *v.* THOMPSON (resp.). (*a*)

Seaman—Articles—Voyage to end "as may be required by master"—Discharge of cargo—Taking bunker coal for future voyage—End of voyage.

A seaman signed articles to serve on board a ship for a voyage not to exceed two years 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 ship sailed from London with a cargo and ultimately came to Rotterdam, where the last of the cargo was discharged. She then came to the Tyne, having between 100 *and* 200 *tons of bunker coal on board. In the Tyne she took on board a further supply of* 1300 *tons of bunker coal, and the seaman there claimed his discharge and wages on the ground that the voyage had come to an end. The master had not required the voyage to end at the Tyne, and he declined to discharge the seaman on the ground that the voyage was not completed, but he did not then say where the ship was proceeding to, but afterwards said that she was to proceed to Glasgow. The* 1300 *tons of coal was not required to take the ship to Glasgow.*

Held, that the mere fact of taking on board the 1300 *tons of bunker coal in the Tyne was not of itself sufficient to show that the voyage ended at the Tyne, and as the master had not required it to end at the Tyne the voyage was not ended there, and the seaman was not entitled to claim his discharge and wages.*

The Scarsdale (10 *Asp. Mar. Law Cas.* 525 (1907); 97 *L. T. Rep.* 526; (1907) *A. C.* 373) *followed.*

CASE stated by two justices of the peace in and for the county borough of South Shields, sitting as a court of summary jurisdiction.

At the police-court in the borough a complaint was made by Peter Thompson (the respondent) under sect. 164 of the Merchant Shipping Act 1894, for that he the appellant did neglect and refuse to pay one Peter Thompson the sum of 8*l.* 8*s.* 5½*d.*, being wages earned by and due to him on the 4th April 1910 as a seaman lawfully engaged on board the steamship *Sarstoon*, which complaint was heard by the justices on the 5th April 1910, when they ordered the appellant to pay to the respondent the sum of 8*l.* 8*s.* 5½*d.* so claimed by him as aforesaid, together with the sum of 1*l.* 3*s.* 6*d.* costs.

Upon the hearing of the complaint the following facts were proved or admitted:—

On the 6th Jan. 1910 the respondent Peter Thompson signed articles to serve as an able seaman on board the steamship *Sarstoon* "for a voyage not exceeding two years duration to any ports or places within the limits of 75 degrees north and 60 degrees south latitude commencing at London proceeding thence to Barbadoes *vid* Dartmouth and for 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."

The rate of wages to be paid to the respondent for his services on board the vessel was to be 4*l.* per month.

The steamship *Sarstoon* sailed from London on the 9th Jan. 1910 laden with a general cargo and proceeded to the West India Islands, calling at Barbadoes, Trinidad, and Demerara, and ultimately to St. Kitts; from there the vessel proceeded with a general cargo to Havre, where part of the cargo was discharged, then to London where further part of the cargo was discharged (where some stores for the next foreign voyage were taken on board), and thence to Rotterdam, where the remainder of the cargo was discharged. The vessel then came to Tyne Dock, on the river Tyne, where she arrived on Sunday the 3rd April 1910—London, Rotterdam, and the Tyne being ports within the home trade limits.

When the vessel arrived in the Tyne there was between 100 and 200 tons of bunker coal on board, which the appellant stated was not sufficient for a voyage from the Tyne to Glasgow at that period of the year, but in the opinion of the justices the vessel had sufficient coal on board to take her from Rotterdam to Glasgow.

The daily consumption of coal on board the vessel was between 25 and 26 tons, and the appellant stated it would be necessary to take 200 tons for the passage from the Tyne to Glasgow, but the justices did not agree with this.

On the arrival of the vessel at London, before she proceeded to Rotterdam, the respondent

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

applied to the chief officer of the ship to be discharged and paid off, but he was told he would have to proceed to Rotterdam in the vessel as the whole of the cargo was not to be discharged at London. When the vessel arrived in the Tyne he again applied to the appellant to be discharged and paid off, but he, the appellant, declined to discharge the respondent on the ground that the voyage was not completed, although he did not at that time, or, indeed, at any time before the hearing of the complaint, tell the respondent where the vessel was to proceed to after leaving the Tyne.

While in the Tyne the vessel took on board 1300 tons of bunker coal.

It was not until the 5th April that the appellant intimated that the vessel was to proceed to Glasgow.

It was admitted that the amount claimed by the respondent had been earned by him.

On the part of the respondent it was contended that the voyage for which he had engaged himself to serve on board the vessel ended in the river Tyne, and that he was entitled to his discharge and to be paid the amount of wages due to him.

On the part of the appellant it was contended that the respondent was not entitled to his discharge on the ground that the Tyne was not the port in the United Kingdom at which the voyage was to end, as he, the appellant, had not so required it to be, as provided by the articles.

The attention of the justices was called to the case of *The Scarsdale* (*sup.*).

The justices stated:

In our opinion the voyage ended in the port of the Tyne, and in coming to this conclusion we have carefully considered the judgments given by the learned judges in the before-mentioned case of *The Scarsdale* (*ubi sup.*). Lord Loreburn, in delivering judgment in that case said: "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 seems 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." We thought those words directly applied to this case in view of the fact that whilst in the Tyne, although there were between 100 and 200 tons of bunker coal on board, a further supply of 1300 tons of coal was shipped. This, in our opinion, indicated the commencement of a further venture, and that the old voyage was ended. We therefore came to the conclusion that the respondent was entitled to claim his discharge, and to be paid the amount of wages due to him.

By sect. 164 of the Merchant Shipping Act 1894 (57 & 58 Vict. c. 60):

A seaman . . . may as soon as any wages due to him, not exceeding 50*l.*, 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

J. R. Atkin, K.C. (with him *Lewis Noad* and *Raeburn*) for the appellant.—It was at one time contended that where a ship discharged her cargo at one port which was different from the port of loading, the voyage ended at the port where the cargo was discharged. That caused the inconvenience of finding a fresh crew to take the vessel to the port of loading, with the result that a clause is inserted in articles defining the end of the voyage as being a port within home trade limits required by the master. The validity of this clause was considered in *The Scarsdale* (*sup.*), and it was held by the House of Lords that it was a perfectly valid clause, and one which could properly be inserted in the articles. The ship went to the Tyne for orders and for bunker coal, and the master's position was that he had not had orders as to where the ship was to proceed to, whether Glasgow or London, and could not tell where the final port was, but when the case came before the magistrates he then had his orders and told the respondent the ship was to go to Glasgow. It cannot be suggested that within the meaning of the articles the master had required the Tyne as the end of the voyage; but it is said that because the ship had sufficient coal at Rotterdam to take her to Glasgow, therefore she must have called at the Tyne for some other reason than to get bunker coal. The answer is that a prudent shipowner will always bunker his ship at a port where he can get the cheapest coal, although it is not the final port of discharge. The test applied by the magistrates was a wrong test. The mere fact that the ship had discharged all her cargo before she reached the Tyne, and had gone to the Tyne for bunker coal, the place where she could get it, did not put an end to the voyage. The magistrates relied on the fact that the ship took this coal on board in the Tyne, but that cannot be sufficient against the plain words of this clause to show that the voyage ended at the Tyne. The master did not require the voyage to end there, and that is the real test, as laid down in *The Scarsdale* (*ubi sup.*). The voyage *primâ facie* ends where the master requires it to end, subject to this that when the facts show that the ship had begun to load a fresh cargo and had started out on a fresh voyage and the master had not required the voyage to end but was going on, then the voyage might end at the port where the fresh cargo was being taken on board, although the master had required the voyage to end at a port beyond that. If it could be shown that the voyage must necessarily have ended before the port to which the master required the seaman to go, then the requirement of the master would be wrong, because he would be requiring the seaman to go to a port beyond the end of the voyage. It is impossible to say that the voyage necessarily comes to an end merely because the ship has gone to a port to take in stores or bunker coal if the master is entitled as it is submitted he is, to order the ship to go on to the place where she is to be loaded. The sole reason given by the justices was that the ship took in bunker coal sufficient for another voyage.

Abinger for the respondent.—It is a question of fact in each case what is a voyage or the end of a voyage. Lord Loreburn, L.C. said in *The Scarsdale* (*ubi sup.*): "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," and so on. Lord James said he founded his judgment on the particular facts of the case. The fact here found is

that the voyage had come to an end, and that fact is found upon some of the very materials which the Lord Chancellor suggested are ingredients in determining whether a voyage has come to an end —namely, whether new cargoes are shipped. The justices therefore applied their minds to the very questions to which it was suggested they should apply them, and they found as a fact that this was a fresh voyage. Where a master calls at a port for commodities which cannot be for that voyage, then it is open to the justices to find, as they found here, that a new voyage began in the Tyne. The ship here took in 1300 tons of coal, although the evidence was that she had sufficient coal to take her to Glasgow. That was cargo and she was taking fresh cargo on board, and the justices have found that she was taking that coal not for the purpose of that voyage, but for the purpose of a new voyage. When a ship has discharged all her cargo and has got to a home port, the voyage is at an end. The justices say, "In our opinion the voyage ended in the port of the Tyne." That is a finding of fact, and this court cannot review it unless there was no evidence at all upon which they could so find. There was abundant evidence to support their finding.

Atkin, K.C. in reply upon the question whether the finding of the magistrates was not a finding of fact.—If the magistrates have found as a fact that the voyage ended in the Tyne then there was no evidence upon which they could so find, and this court can review their finding. The onus is on the seaman to show that the voyage has ended at some place other than that required by the master, and the respondent has not shown that.

DARLING, J.—In this case I think the appeal should succeed. The ship was chartered for a voyage not to exceed two years. She went to various places outside the United Kingdom and she came back to London. She went from London to Rotterdam, getting rid of some of her cargo in London and the rest of it at Rotterdam. From Rotterdam she came across to the Tyne, and the master did not require that the voyage should end there; and, as far as that is concerned, everything goes to show that at that time the voyage was continuing. The natural way to terminate the voyage by virtue of such a clause as this in the contract under which the ship sails is that the master should require that the voyage should end, and then it does end, but at the time in question he did nothing of the kind. Being in the Tyne, the master did a not unnatural thing. He meant to go to Glasgow, he had got between 100 and 200 tons of coal on board, and he could have got to Glasgow with that coal, but being in the Tyne he takes in bunker coal—that is coal which is presumably to be used for moving the ship—to the extent of 1,300 tons. Thereupon, the magistrates, having considered the case of *The Scarsdale* (*ubi sup.*), decided by the House of Lords, set to work, as one can gather from the case stated, to apply that case, and particularly what was said by the Lord Chancellor, to the facts of this case, and they came to the conclusion that it was proved that although the master had not required the voyage to end at the Tyne, yet merely because he had taken in 1,300 tons of coal and that coal was not necessary to take the ship to Glasgow, he thereupon had terminated the voyage, because if anyone terminated it he did, and that act of his terminated it at Newcastle in the Tyne, although he had not required that it should be terminated there. I should have said myself that in the absence of a requirement that it should terminate, this fact was no evidence whatever that the master meant that the voyage should terminate in the Tyne. I should have said it meant this; Finding himself in a place where coal, presumably, is plentiful, and having in contemplation the continuance of the voyage, he prepared at Newcastle for the continuance of the voyage—which had not come to an end—beyond the port at which he found himself and where coal happened to be plentiful. If he had been in some port where he had taken in oranges, or anything of that kind, the magistrates would not have come to this conclusion. They came to this conclusion simply because what he took on board was coal, and they seemed to feel themselves forced to say that because he took in coal he must have meant that the voyage was at an end. I think that the facts show this. The master may have meant that the voyage should still continue, and he took in coal enough to continue that existing voyage for a long time; but it may be that he thought: "The voyage will soon come to an end, not here in Newcastle, but perhaps at Glasgow, or perhaps at London. I may require the coal to finish the voyage and I shall not find coal so easily at Glasgow or at London; I will take in coal now in contemplation of my voyage extending beyond this place, although I may have to finish it presently, either at Glasgow or at London." I can see nothing unreasonable in that, upon the analogy that we are told to prepare in this life for the life which is inevitably to follow, and the wise ones amongst us do prepare, as this mariner did at Newcastle.

PICKFORD, J.—I agree. The difficulty I have had has been whether we are not precluded by the finding of fact by the magistrates that the voyage had come to an end in the Tyne. If they had found that fact upon evidence proper to be submitted to them, I do not think we could have said that the voyage did not end there. According to the articles the respondent was to serve for a certain voyage, defined in its duration and in its limits, to end at such port in the United Kingdom or Continent of Europe within home trade limits as may be required by the master. Therefore the first thing to consider is, Where did the master require this voyage to end? The vessel had gone to several ports, and she had discharged the last of her cargo at Rotterdam, so that she was clear of cargo at Rotterdam. That the voyage does not necessarily end where she discharges the whole of her cargo is clear upon two considerations. First, the articles do not say so, but they say that the end is to be at such port as is "required by the master"; and, secondly, that was expressly decided in the case of *The Scarsdale* (*ubi sup.*), because in that case Bargrave Deane, J., in the Admiralty Division, held that where there was a charter to discharge at Southampton, that was a requirement that the voyage should end at Southampton, and the decision was reversed by the Court of Appeal, and the decision of the Court of Appeal was affirmed by the House of Lords. This vessel, having been cleared of cargo at Rotterdam, then went to the Tyne, and I should have been more satisfied if we had some statement in the case as to why she

went to the Tyne and what the circumstances were under which she went from the Tyne to Glasgow. All that we have stated is that she did go to the Tyne, and there the respondent applied for his discharge, and the master said he would not give him his discharge because the voyage was not ended and the vessel was going on further. Very much the same thing happened in the case of *The Scarsdale* (*ubi sup.*), as between Southampton and Cardiff, except that in that case the master did say he was going to Cardiff, whereas in this case the master simply said he was going further. Being in the Tyne, the vessel took in 1300 tons of bunker coal, and she at any rate took in a quantity of bunker coal that was not required, according to the finding of the magistrates, from the Tyne to Glasgow, and the magistrates have found that by reason of her taking in bunker coal which was not required for the voyage to Glasgow but would be required on a new voyage, on which she was to proceed possibly from Glasgow, this voyage had come to an end in the Tyne. I was troubled at first as to whether that was not a question of fact by which we were bound, but I do not think it was so intended by the magistrates. I am inclined to think from the form of the case that what they meant to say was this: "We consider that the fact that she took in bunker coal which would be used upon a subsequent voyage was of itself sufficient to bring this preceding voyage to an end. We wish to know whether that is right or not?" I do not think it is right. I think that that fact would no doubt be a fact to be considered, but when the master requires the voyage to end not at the Tyne but at Glasgow, the mere fact that being in the Tyne he takes in bunker coal which will afterwards be required, or even that he has gone to the Tyne to take in that coal for a future voyage is not necessarily itself sufficient to show that the voyage ended at the Tyne. Therefore, I do not think that is a finding of fact which concludes as in this case, and I do not think that the facts as stated show that the voyage did come to an end before its *primâ facie* end, namely, the place where it was required by the master to end. Therefore I agree that the appeal should be allowed.

Lord Coleridge, J.—We are asked to hold as a matter of law that because the ship took in coal at Newcastle far beyond the necessity of its voyage to the required port, therefore, as a matter of law the voyage *ipso facto* came to an end. I do not think that that is at all a correct view of the law, and although it lies upon the owner, assuming that Newcastle was not the required port, to show that Newcastle was not the end of the voyage, merely showing that the ship at Newcastle took in bunker coal in contemplation of going farther on some voyage beyond Glasgow, does not seem to me to require us to hold as a matter of law that the voyage ended *ipso facto* at Newcastle.

Appeal allowed.

Solicitors for the appellant, *Botterell* and *Roche*, for *Botterell*, *Roche*, and *Temperley*, Newcastle-upon-Tyne.

Solicitor for the respondent, *Alexander Smith*, for *Robert Winskell*, South Shields.

HOUSE OF LORDS.

Nov. 14 *and Dec.* 13, 1910.

(Before the Lord Chancellor (Loreburn), the Earl of Halsbury, Lords Atkinson and Shaw.)

McDermott (Pauper) *v.* Owners of the Tintoretto. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Employer and workman—Seaman—Injury by accident — Compensation — Wages paid after accident.

The benefit of compensation is applied to seamen by sect. 7, *sub-sect.* 1, *of the Workmen's Compensation Act* 1906, *but the weekly payment is not payable in respect of the period during which the shipowner is under the Merchant Shipping Acts liable to pay the maintenance of injured seamen.*

The 1*st schedule of the Act, par.* 3, *says that in fixing the weekly payment "regard shall be had to any payment, allowance, or benefit which the workman may receive from his employer during the period of his incapacity."*

Lord Loreburn, L.C.: In order to carry out the manifest intention of the Act, some limitation ought to be imposed on these wide words. The generality of the words is limited, and they mean that a man is not to be paid twice over by the overlapping of benefits derived from two separate Acts of Parliament.

Shipowners paid a seaman injured abroad his wages to the date of his discharge and also his medical expenses and the expenses of his maintenance till his return to England under the provisions of the Merchant Shipping Acts 1894 *and* 1906.

Held, that, in fixing the weekly payment of compensation under the Workmen's Compensation Act 1906, *regard must not be had to the above payments.*

Judgment of the Court of Appeal reversed.

Appeal *in formâ pauperis* from a judgment of the Court of Appeal (Cozens-Hardy, M.R. and Farwell, L.J.), Kennedy, L.J. dissenting, reported 101 L. T. Rep. 90; (1909) 2 K. B. 704, setting aside an award of the County Court judge of Lancashire sitting at Liverpool.

The appellant was a seaman an board the steamship *Tintoretto*, of which the respondents were owners. On the 21st Dec. 1908, while the ship was at sea, he met with an accident arising out of and in the course of his employment, which incapacited him. He was in the doctor's hands till the ship reached New York on the 29th Dec. 1908, when he was discharged and paid off. He was conveyed to a hospital in New York, where he remained as a patient for some weeks, and finally returned to England on the 11th March 1909. The respondents paid the appellant his wages up to the date of his discharge, and also his medical and other expenses till his return to England under the provisions of the Merchant Shipping Acts 1894 and 1906.

Upon an application to the County Court judge to fix a weekly payment to the appellant as com-

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

pensation under the Workmen's Compensation Act 1906, the learned judge declined to have regard to the wages which had been paid to the applicant between the date of the accident and his discharge, during which time it was admitted that he had done no work, but the majority of the Court of Appeal held that the judge was wrong in so doing. The workman appealed.

Stewart Brown and *H. H. Harding* appeared for the appellant.

Sir *R. Finlay*, K.C. and *Segar* for the respondents.

Stewart Brown was not called on to reply.

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

Dec. 13.—Their Lordships allowed the appeal and gave judgment as follows:—

The Lord Chancellor (Loreburn). — My Lords: In this case I agree with Kennedy, L.J. The only facts relevant, in my view, are as follows: McDermott, a seaman on board the steamship *Tintoretto*, broke his thigh by an accident on the 21st Dec. 1908. On the 29th Dec. 1908 he was discharged and placed in hospital in New York. He recovered sufficiently to bear the journey to England, and arrived in England on the 11th March 1909, still incapable of work. The owners of the steamship *Tintoretto* paid him his wages from the 21st Dec. till the 29th Dec. Also they paid his medical and surgical expenses, and maintenance in hospital in New York. They were obliged to pay wages and the rest under the Merchant Shipping Acts. Further, they admit their liability to pay him compensation under the Workmen's Compensation Act in respect of his incapacity from the 11th March 1909, when he returned to England. But, say the owners, the County Court judge, in assessing that compensation, ought to have had regard to the eight days' wages which this man received from his employers between the 21st and 29th Dec., and ought to have made some, if only a nominal, deduction accordingly. Now, this contention rests upon par. 3 of the 1st schedule to the Act of 1906, which runs as follows: "In fixing the amount of the weekly payment regard shall be had to any payment, allowance, or benefit which the workman may receive from his employers during the period of his incapacity." Were not these eight days' wages a payment? say the owners. Was the payment not received from the employers, and during the period of the man's incapacity? All this is undeniably true, and unless your Lordships are prepared to say that the literal words of the Act must suffer limitation, in accordance with precedent, in order to carry out the manifest intention of the Act, the owners will prevail. Let me, to begin with, take the literal words, and see what they would lead to in a wholly unqualified construction. The eight days' wages were undoubtedly a payment. But was not the money paid for this man's maintenance and for medical and surgical relief a "benefit" received by him from his employers? Obviously it was, and, if so, the County Court judge ought to have had regard to the benefit as well as to the payment, and have made a deduction for the one as well as the other. The same also if the owners had during the period of incapacity paid to the seaman arrears of wages due long before the accident, or even a sum of money due for breach of contract on an earlier voyage, or for almost any cause which you please to name. It would be a "payment" in the literal words of the Act, and so regard must be had to it in fixing the weekly sum to be given as compensation for the incapacity caused by the accident. This last result would, of course, be so preposterous that Sir Robert Finlay was constrained to admit the need of some words to be read into the clause. The payment, allowance, or benefit must, he argued, be in respect of the incapacity. But that would still entitle the owners to deduct the money spent on maintenance, which is almost equally absurd, because in that view the longer a man had been kept away from England by the consequences of his accident the more he would have to forfeit out of the compensation which begins to become payable when he comes home. It is obvious, and was not disputed at the Bar, that some limitation must be imposed upon these wide words, and the only question is what that limitation should be. We must, in my opinion, seek for it in the scheme of the two Acts with which this case is concerned. I will present it quite summarily. When a seaman meets with an accident at sea which disables him, he must be paid his wages till he reaches a port where he can be discharged. Further, if he is discharged at a foreign port, the owners must maintain him and furnish him with medical aid till he is able to travel and reaches a port in this country. That is the law under the Merchant Shipping Acts. Then the Workmen's Compensation Act 1906 takes up the tale. Before 1906 the seaman was not within the Act. In 1906 the right to compensation for accidental injury was extended to seamen, and begins when the injured seaman ceases to be entitled to maintenance. It is clear that compensation is to begin exactly where the right to maintenance ends. Reading the words of the Act which we have to construe in the light of what I have just said, I have no difficulty in seeing where their generality is limited. It is not every payment, allowance, or benefit which the workman may receive from the employer during the period of his incapacity which the County Court judge must have regard to. It is only such as are received in respect of the incapacity and received in respect of that period of it which is covered by the compensation. It means, in short, that the man is not to be paid twice over, by the overlapping of benefits derived from two separate Acts of Parliament. I feel no hesitation in reading such words into the statute. The same thing has been done by this House before, notably in interpreting the Succession Duty Acts in order to avoid a plain absurdity. In this case it is necessary, in order to avoid a plain frustration of the obvious intention of the Legislature.

The Earl of Halsbury.—My Lords: I am of the same opinion. It seems to me that, as usual, we have slipshod phraseology put into an Act of Parliament, but I think that it may be solved by almost one sentence; the payments (I use the word in its strict sense) are not to overlap.

Lord ATKINSON.—My Lords: The facts of this case have been stated by the Lord Chancellor with sufficient fullness. The payments madet o the appellant for his benefit were by no means gratuities. The respondents were bound to make them under the provisions of the Merchant Shipping Act of 1894, and the amending Act of 1906. By sect 155 of the first-mentioned statute a seaman's right to his wages begins from the time when he begins work, or at the time specified in his agreement for the beginning of his work or presence on board, whichever first happens. By sect. 158, if his services terminate before the date contemplated in that agreement, either by wreck or loss of his ship, or by his being left on shore at a foreign port, under the certificate therein mentioned, by reason of his unfitness or inability to continue the voyage, he is entitled to be paid his wages up to the date of such termination. He loses his right to wages for any time during which he unlawfully refuses or neglects to work when required so to do, unless the court having cognisance of the matter directs otherwise, and for any time during which he is in prison (sect. 159); but he is entitled to his wages while he is rendered incapable of performing his duty by illness, unless it is proved that the illness has been brought about by his own wilful act or default: (sect. 160). And whether well or ill, from whatever cause, capable of performing his duty or incapable of performing it, at sea or in harbour, well-conducted or ill conducted, in prison or free, he is entitled to his maintenance as long as he is not discharged from his ship. By the statute 6 Edw. 7, c. 48 (the Merchant Shipping Act 1906), the 1894 Act is amended, and the rights and privileges of seamen are extended and safeguarded. By sect. 28 elaborate provision is made in the case in which a seaman belonging to any British ship is left behind out of the British Isles for making a record of the wages due to him, and of the effects which he may have left behind, and for delivering an account of these to the proper officer on the termination of the voyage, together with an account of the expenses, if any, caused to the master or owner of the ship by reason of the absence of the seaman. In a case in which the absence is due to desertion, neglect to join his ship, or to any conduct constituting an offence under sect. 221 of the principal Act, these expenses are deducted from the wages due; so that if no expenses be caused to the master or owner by reason of the misconduct of the defaulting seaman, he is entitled *primâ facie* to receive the full amount of the wages due to him. By sects. 30 and 31 the exercise by the master of his power of discharging a seaman at a foreign port is limited and subjected to the supervision of the authority there indicated, and by sect. 32 it is provided that "where the service of a seaman belonging to a British ship terminates at a port out of His Majesty's dominions, otherwise than by the consent of the seaman to be discharged during the currency of the agreement, the master of the ship shall, besides giving the certificate of discharge, and besides paying the wages to which the seaman is entitled, make provision in accordance with this Act for his maintenance, and for his return to a proper return port." So that as far as wages and repatriation are concerned the appellant would be entitled to all that he has received in the present case if he had been discharged in New York otherwise than by his own consent, whatever the cause of the discharge. Sect. 34 provides in effect that if any master of, or seaman belonging to, a ship receives any hurt or injury in the service of the ship, or suffers from illness not due to his own wilful act or default, or to his own misbehaviour, the expense of providing the necessary surgical and medical advice, and attendance and medicine, and also the expenses of his maintenance until he is cured or dies, or is returned to a proper return port, and of his conveyance to the same, shall be defrayed by the owner of the ship without any deduction from his wages. Similar provisions are introduced to meet the case of the temporary removal of a seaman from his ship, either to prevent the spread of infection or for the convenience of the ship. In each and every one of these cases, if the seaman be not discharged, or do not desert, or absent himself without leave, he would be entitled to receive his wages while ill or incapacitated, and medical advice and maintenance in addition. No distinction is drawn between the wages paid to him and maintenance and advice provided for him or given to him under such circumstances. If the one be treated as compensation for an injury sustained so must the other. Up to his discharge he would be entitled to receive wages, and maintenance, and medical advice. After his discharge his wages would cease. These were the mutual rights of the appellant and the respondents under the Merchant Shipping Acts when he landed in England on the 21st March 1909. He then made a claim for compensation under sect. 7 of the Workmen's Compensation Act 1906 in respect of the injury by accident which he had sustained. This statute first extended the benefits to seamen. It was admitted that his claim was good, and that he was entitled to compensation, but it was contended on behalf of the respondents that under the provisions of rule 3 of the 1st schedule annexed to this statute of 1906 the County Court judge, in fixing the amount of the weekly payments payable to the appellant, should have regard with a view to their diminution to any payment, allowance, or benefit paid by the employer to the appellant in respect of the seven days from the 21st Dec. to the 29th Dec. 1908, when he was on board his ship, undischarged but incapacitated from duty. Though in this case the amount in dispute is small, the principle involved is of considerable importance. The main, if not the sole, question for decision is whether the contention so put forward is or is not well founded.

The County Court judge held that the payment of this week's wages to the appellant was wholly irrelevant to the claim made by him under sect. 7 of the statute of 1906, and was therefore not a matter to which he (the judge) was bound to have any regard. I understand Kennedy, L J. to have concurred in that view. In my opinion they were both right, and I think that their decision is in accordance with reason and justice. The Workmen's Compensation Act provides that, where death does not ensue, compensation must be given in the form of weekly payments. The mode in which those weekly payments are to be fixed, the period during which they are to be paid, and the fact that, save in the case of death, a lump sum is not to be

given, would go to show that what in reality is compensated for is the loss of the power of earning, rather than the pain or suffering which the workman has endured. As soon as his incapacity ceases, and his power of earning is restored, the weekly payments cease. It would, therefore, under these circumstances, appear to be only reasonable and right that, in fixing the amount of the weekly payments, regard should be had with a view to their diminution to any payment, allowance, or benefit which the workman should receive from his employer in respect of the injury and the consequent incapacity to earn; else the workman would, in effect, be compensated twice over, in whole or in part, for the same loss of earning power. Rule 3 deals with these latter matters, but the words "in respect of the injury and the incapacity resulting from it" do not occur in that rule; yet they must be implied, otherwise this grotesque result would follow, that money due and payable to the workman before the accident happened, for wages, money lent, work done, or even damages for breach of contract or tort, would to taken into consideration with the view, admittedly, of reducing the weekly payments. Sir Robert Finlay, as I understood, frankly admitted this. Now, if the weekly sum, measured in the manner prescribed, and payable while incapacity continues, is adequate compensation for the loss of the power of earning during that period, it is evident that a seaman who claims under sect. 7 does not claim compensation for his entire loss at all. He only claims payment of these weekly sums in respect of the period during which his incapacity shall continue after the liability of the owner under the Merchant Shipping Acts to defray the expenses of his maintenance shall have ceased. Though sect. 7, sub-sect. (*a*), recognised that the incapacity may commence at the moment of the accident, it confines the weekly payments to that portion of the duration of the incapacity which extends beyond the period of the liability of the owner for maintenance. On what conceivable ground can this be done, unless it be on the ground that the section has itself made a rough kind of set-off, and treated all the benefits conferred upon seamen by these Merchant Shipping Acts as equivalent to the weekly payments receivable under the Workmen's Compensation Act, during that stage or period of incapacity in the course of which those benefits were received or enjoyed? Maintenance lasts the longest of these. The seaman must be maintained until he is repatriated. If he be then completely cured and able to work, he gets nothing whatever under the Workmen's Compensation Act, however serious his injury, or great the pain and suffering which he has endured, or prolonged the antecedent incapacity. In this case the first stage of incapacity covered nearly three months. Sir Robert Finlay admits that the loss resulting from the early stage of the incapacity must be treated as compensated for, but he insists that it is compensated for, not by all the benefits secured to the seaman by the Merchant Shipping Acts, but by one of them alone—namely, maintenance. But wages, medical attendance and advice, medicines, and the cost of repatriation come within the words of rule 3. They are "payments, allowances, or benefits" in as true a sense as is maintenance, and there does not appear in the nature of the thing any reason why a workman who must while in health be paid wages, and also be maintained, should, if incapacitated by accidental injury of the kind mentioned, be held to be compensated for all loss by being maintained only. There does not appear to me to be any warrant for the distinction thus drawn. All payments, allowances, or benefits of the kind mentioned secured to the seaman by these Merchant Shipping Acts must, I think, be regarded with a view to a reduction of the weekly payments, or must all be disregarded. But if all these benefits are to be taken into consideration *bonâ fide* with a view to a reduction of the weekly payments covering the second period of the incapacity, in the manner contended for, and the imperative directions of the Act and rules be not disregarded, then where these benefits are as substantial as they must have been in the present case, the weekly payment must be very considerably reduced. For it would be a mere evasion of the statute and the rule to pretend to regard them in such a case, and then make a nominal reduction in respect of them, or no reduction at all. If, however, this be so, the benefits secured to seaman by the Merchant Shipping Acts prejudice them seriously. They pay a double debt. They first debar the seaman from receiving any compensation for loss sustained during the earlier period of his incapacity however long; and secondly, if the Act be administered honestly, they must diminish somewhat, and may diminish considerably, the weekly payments to which he would be entitled during the second part of his incapacity. I cannot but think that such a result would not only be opposed to every principle of justice, but would also defeat the very purpose and object of sect. 7 of the statute. In my view the County Court judge not only was not bound, but was not entitled to have regard to any of the benefits mentioned, such as wages paid or maintenance given, simply because they were not received by the appellant during the particular period of his incapacity with which alone the County Court judge had to deal, and in respect of which alone he had to fix the weekly payments. They had, I think, served the purpose assigned to them by the statute. They had satisfied the earlier liability of the employer to make weekly payments during the first stage of the incapacity, and were, therefore, matters irrelevant to the claim which the County Court judge was considering, and upon which he was deciding. By the admission of the respondents the words of the rule cannot be taken literally. It must be construed as if it contained words which it does not contain, limiting its reach and generality, and defining to some extent its purpose and operation. In holding, as I do, that the cessation of the owner's liability, being fixed by the statute, is a new point of departure, as I think it is, "the payments, allowances, and benefits" to which regard must be had in the fixing of the weekly payments must be those received within that period of incapacity for and in respect of which alone those payments are to be fixed, I do no violence to the language of the rule comparable to that which must admittedly be done to it to avoid the grotesque results which I have already mentioned. I think, therefore, that the decision of the Court of Appeal was wrong, and should be reversed, and that of the County Court judge restored, and that this appeal

should be allowed with the costs usual in such cases.

Lord SHAW.—My Lords: It is unnecessary for me to recapitulate the facts which have been already stated in the judgments of some of your Lordships. By the Merchant Shipping Acts a seaman who is injured is entitled to payment of wages until the first port of landing, and to medical expenses and maintenance until he is returned to the port at which he was shipped, or to another port agreed to by him. All these payments are debts due by the employer to the seaman. By sect. 3 of the 1st schedule to the Workmen's Compensation Act 1906 it is provided that "in fixing the amount of the weekly payment" of compensation "regard shall be had to any payment, allowance, or benefit which the workman may receive from his employer during the time of his incapacity." The benefits of this Act have been extended to seamen. In ordinary circumstances the compensation to an injured workman runs from the date of the injury; but, with regard to the special case of seamen, as the employers were under the obligations above mentioned, which subsist until the date of the seaman's being landed in a home port, it is provided that the weekly payment under the Workmen's Compensation Act shall not begin to run until after that date. Clashing or overlapping of the remedial provisions of the two Acts is thus avoided. Up to the date of landing the employer must discharge the debts due under the Merchant Shipping Acts, and only for the period subsequent to that date does workmen's compensation run. When, therefore, the 1st schedule dealing with the scale and conditions of compensation uses the language (sect. 1, sub-sect. 6) "Where total or partial incapacity for work results from the injury, a weekly payment during the incapacity" shall be paid, that must mean during the incapacity in respect of which a payment by the employer under the Act is due. In the seaman's case such a payment is not due, as stated, until he is landed at a home port. Similarly when in sect. 3 the language is used "regard shall be had to any payment, allowance, or benefit which the workman may receive from the employer during the period of his incapacity," there is much to suggest that the very same interpretation must be made—namely, that what is meant is the period of his incapacity in respect of which a payment by the employer under the Compensation Act is due. In the present case no such payment was made. It is, however, not necessary to decide the case upon that ground, for, in my opinion, the expression "payment, allowance, or benefit which the workman may receive from the employer during the period of his incapacity," does not cover the discharge or settlement of a debt due to the workman from his employer. The case aimed at by the statute is simply and easily figured. It is the case of a workman injured, but of an interval elapsing between the date of the injury and the award or decree in his favour. That interval may be prolonged by litigation either to settle points raised by those representing the workman, or, in the more frequent case, by insurance companies representing the employer. During that interval the injured workman's house must, so to speak, be kept over his head, and a considerate employer may, not unnaturally, desire to give a "payment, allowance, or benefit" to him and his household in the meantime. The object of the statute is to secure and encourage an employer so disposed by making the payment, which is truly a payment by way of allowance or benefit, a proper credit item against the compensation when it comes to be assessed ultimately. That is what the statute means. But in my opinion it does not mean to make the discharge or settlement of a debt which was due to the workman from the employer enter into the account. It could never be right to give to a debtor who was liable to payment of both and each of two debts the power of treating the payment of debt No. 1 as *pro tanto* an extinction of debt No. 2. In the present case the employers propose to put as a debit item against compensation running from the 11th March 1909 the payment of a debt due on the 29th Dec. 1908—namely, the payment of the workman's wages due to him by statute and contract on that date. I think that such a transaction would be illegitimate, and that the words of the Act do not justify it. Such a construction appears to me to twist what was a protection and encouragement to the considerate employer in making what may justly be treated as an advance to an injured workman into a punishment upon the workman for accepting during his disablement payment of a debt justly due to him as a creditor. If the words "payment, allowance, or benefit" are looked at by themselves they do undoubtedly cover the payment of a debt. I desire to examine this. If the employer owed to his workman a debt of, say, 100*l.*, and were to pay that debt after the injury, but before the assessment of damage, it would, I presume, be maintained that, a payment having been made, the judge, in assessing the compensation due to the workman in respect of his injuries, must have regard to this payment in the sense that he must make a deduction from the compensation, or possibly wipe it out. The words, or rather the individual word, of the Act could be appealed to in justification of this proceeding. Upon which I observe that I reckon it to be quite unsound, and to be productive of wrong and mischief, to interpret a remedial statute in the spirit of meticulous literalism. Everyone would, I presume, agree in such an instance as I have ventured to give. But whether the debt be large or small, due for wages, for arrears, or on any ground whatever, it does not appear to me to affect the question. I do not think it legitimate to introduce this element into the construction of such a clause. The present case is a good instance of the necessity of avoiding such results, and, with regard to the language employed by the Legislature, I see no disloyalty to the text of the statute in a construction which treats "payment, allowance, or benefit" simply as meaning payments by way of allowance or benefit in the sense which I have explained, and as excluding the settlement of debts which were due to the workman on other grounds. The text, if properly construed, seems to be quite apt enough to meet the case aimed at. In my opinion the action of the learned County Court judge in disregarding the payment in this case was right and proper. I agree with the course proposed.

Order appealed from reversed. Respondents to pay to the appellant his costs in this

House and below; the costs in this Hous in the way usual in pauper appeals.

Solicitors for the appellant, *Windybank, Samuell,* and *Lawrence,* for *Fox* and *Bradley,* Liverpool.

Solicitors for the respondents, *Botterell* and *Roche,* for *Weightman, Pedder,* and *Co.,* Liverpool.

Nov. 10, 14, *and Dec.* 12, 1910.

(Before the LORD CHANCELLOR (Loreburn), the Earl of HALSBURY, Lords ATKINSON and SHAW.)

OWNERS OF CARGO OF STEAMSHIP TONGARIRO *v.* ASTRAL SHIPPING COMPANY. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Collision—Both to blame—Rights of owner of cargo—Judicature Act 1873 (36 *& 37 Vict. c.* 66), *s.* 25, *sub-s.* 9.

The rule laid down in The Milan (1 *Mar. Law Cas. O. S.* 185 (1861); 5 *L. T. Rep.* 590; *Lush.* 388), *that in the case of a collision between two ships, where both are to blame, an innocent cargo owner can only recover half his damages from the owners of the other ship, is a rule "in force in the Court of Admiralty . . . at variance with the rules in force in the courts of common law" within the meaning of sect.* 25, *sub-sect.* 9, *of the Judicature Act* 1873.

Judgment of the court below affirmed.

APPEAL from a judgment of the Court of Appeal (Vaughan Williams, Fletcher Moulton, and Buckley, L.JJ.), reported 11 Asp. Mar. Law Cas. 451 (1910); 103 L. T. Rep. 359; (1910) P. 249, affirming a judgment of the President, Sir S. Evans.

The question was whether, when there has been a collision between two ships in such circumstances that both vessels are to be deemed in fault, and cargo on one of the ships has been damaged by the collision, the owners of the cargo so damaged, being in no way identified with the owners of the carrying ship, can recover the whole or only a moiety of their damages from the owners of the other ship.

The collision occurred on the 27th Nov. 1908, near the South Goodwin Lightship, between the respondents' steamship *Drumlanrig* and the New Zealand Shipping Company's steamer *Tongariro.* Both vessels sustained injuries, and damage was done to both cargoes.

The facts are set out fully in the report in the court below. The Admiralty registrar found that the owners of the cargo on the *Tongariro* were only entitled to recover from the owners of the *Drumlanrig* half the damages which they had sustained, in accordance with the rule laid down by Dr. Lushington in *The Milan* (*sup.*). This report was confirmed by the President.

Sir *R. Finlay,* K.C., *Bailhache,* K.C., and *Dumas,* for the appellants, contended that the provision in sect. 25, sub-sect. 9, of the Judicature Act 1873 that "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" should prevail in proceedings for damages arising out of the collision of two ships, where both shall be found to have been in fault, must be understood as applying to such rules as are correct in law, and was not intended to make erroneous rules prevail. The supposed rule here is clearly erroneous. The decision in *The Milan* (*ubi sup.*) rests upon no principle whatever. It was based on the theory of the identification of a passenger with the conveyance in which he was travelling which was adopted in *Thorogood* v. *Bryan* (8 C. B. 115), but that case was overruled by the Court of Appeal in *The Bernina* (6 Asp. Mar. Law Cas. 75 (1887); 56 L. T. Rep. 258; 12 P. Div. 58), which was affirmed in this House (6 Asp. Mar. Law Cas. 257 (1888); 58 L. T. Rep. 423; 13 App. Cas. 1) and the whole basis of the decision in *The Milan* was destroyed. [Lord SHAW referred to *Palmer* v. *Wick Steamship Company* (71 L. T. Rep. 163; (1894) A. C. 318).] "In force" must mean "properly in force."

Aspinall, K.C., *Laing,* K.C., and *Balloch,* for the respondents, maintained that the decision of the Court of Appeal was right. The rule was discussed in this House in *Stoomvaart Maatschappy* v. *Peninsular and Oriental Steam Navigation Company* (4 Asp. Mar. Law Cas. 567 (1882); 47 L. T. Rep. 198; 7 App. Cas. 795), but it was not necessary for the decision of that case. It is not affected by the decision in *The Bernina* (*ubi sup.*). The rule was established in *Hay* v. *Le Neve* (2 Shaw Sc. App. 395), and the cases from 1789 onwards show that ship and cargo were always held to be on the same footing, though the actual point was never laid down in terms till *The Milan* in 1861, but in that case Dr. Lushington, whose experience of the Admiralty Court dated from 1815, said that the practice appeared to have been uniform. It cannot, therefore, have been founded on the case of *Thorogood* v. *Bryan* (*ubi sup.*), which was decided in 1849. The Court of Appeal recognised the rule in *Chartered Mercantile Bank* v. *Netherland Steam Navigation Company* (5 Asp. Mar. Law Cas. 65 (1883); 48 L. T. Rep. 546; 10 Q. B. Div. 521). It is clearly a rule "hitherto in force" within the Act of 1873. They also referred to

The Woodrop Sims, 2 Dodson, 83.

Sir *R. Finlay,* K.C. in reply.—"Hitherto in force" means "according to the true view of Admiralty law." In *The City of Manchester* (4 Asp. Mar. Law Cas. 261 (1880); 42 L. T. Rep. 521; 5 P. Div. 221) James, L.J. appears to have doubted the rule supposed to have been laid down in *The Milan.*

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

Dec. 12.—Their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Loreburn).—My Lords: I think it clear that the Court of Appeal was right. The plaintiffs, owners of cargo, had their goods on board the steamship *Tongariro.* This vessel collided with the steamship *Drumlanrig,* and it is to be taken that both vessels were to blame. Accordingly the plaintiffs claim against the owners of the *Drumlanrig* damages for injury to their goods by the collision. It is only a question as to damages. Can the plaintiffs recover the whole of their loss, or only 50 per cent. of it? In order to apply the statutory

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

direction contained in the Judicature Act of 1873, sect. 25, sub-sect. 9, "In any cause or proceeding for damages arising out of collision between two ships, if both ships should be found to have been in fault, the rules hitherto in force in the Court of Admiralty, so far as they have been at variance with the rules in force in the courts of common law, shall prevail," let me first see what is the rule at common law. In 1873, when the Act was passed, the supposed rule was that the owner of goods in such a case could recover nothing at all, because he was imagined to be identified with the ship in which his goods were stowed, and, she being in fault, he also was disabled by her disability. There was really nothing to say either in principle or good sense for this metaphysical view, and it was finally exploded by the decision of this House in *The Bernina* (*sup.*), which decided that so far from recovering nothing the owner of cargo could recover the full amount of his loss. The law of Admiralty was different. In Admiralty the rule had been for a long time that in case of collision between two ships, where both were to blame, each shipowner could recover from the other one-half his loss. In 1861, in *The Milan* (*sup.*) Dr. Lushington directly decided that the owner of cargo in one of the ships could in like manner recover only one-half of the loss from the other ship, and he expressly repudiated the supposed doctrine of common law, relying upon the uniform practice in Admiralty. How old that practice may have been in regard to cargo is not quite certain. Dr. Lushington spoke of it as uniform forty-nine years ago. The question before us is, to my mind, very simple. It is this: Was this Admiralty rule in 1873 a rule "hitherto in force," or was it not? That is to say, Was it a rule under which the court regularly acted? I think that it clearly was. Accordingly, it prevails over the common law rule, whether we take that to be the erroneous practice which obtained before the decision in *The Bernina* or the sound law which obtained after it. Sir Robert Finlay's argument, when sifted, really means that although this Admiralty rule had in 1873 been "hitherto in force," yet that it ought not to have been in force, because it was founded on some sort of compromise with the erroneous and now discarded practice in common law, and, therefore, must fall when the error in regard to the common law was corrected. I think that it is not so in fact, and that the practice as to the cargo owner only receiving one-half his loss may have been based upon the similar and long-settled practice as to shipowners. Perhaps the analogy was a false one and the practice not really fair. Indeed, that is my own opinion, and I should be very glad if I could award to these plaintiffs the full amount of their claim. But we must obey the Act of Parliament, and when once it is made good that the rule as to recovering one-half only was in 1873 "hitherto in force," we have no choice. If this state of the law is to be remedied the remedy must be provided by the Legislature. It is no valid argument to say that it ought never to have been established. It may, indeed, be said that the effect of this view is to stereotype all the Admiralty rules which were in force in 1873 where they varied from the common law rules, even if it should afterwards appear that they ought not to have been in force. On the other hand, the opposite construction would ignore altogether the words of the Act, "hitherto in force." I do not feel at liberty to do this.

The Earl of HALSBURY.—My Lords: For my own part I think that the whole case which has to be decided here lies in the construction of those words in the Judicature Act of 1873; and whatever might have been in my opinion—and I confess that it has wavered very much in the course of this case—I must abide by the plain language of the statute. It seems to me that where there have been rules which have been in force, and the words of the statute are "rules hitherto in force," we must give effect to that enactment. While I entirely agree with the view pointed out by Lord Atkinson of what the courts—Courts of Appeal as well as other courts—are supposed to do, that is not to make law, but simply to affirm what the law is and so to represent it, on the other hand I should have felt extreme difficulty in deciding this case but for the express words of the enacting clause of the Act of 1873. The real truth is that the Court of Admiralty—that is to say, the Court of the Lord High Admiral—administered a different system of jurisprudence, and it is not apt language to speak of an alteration of the law as a rule of court; but I have come to the conclusion that what the Legislature meant was that there should be from henceforth a change in the law, if there was any difference. I do not think that it was very apt language, and I somewhat lament that the opportunity was not taken to put in express terms what in such cases as this should be the law. It is a part of that system of legislation by reference which I think has led to so much difficulty in the explanation of the law. At the same time I must abide by what the law is as exhibited by what are called the Rules of the Admiralty Court, and I think that I must take it that the Legislature meant, if there was any difference, to change the law. There is no doubt that the difference of administration of the Lord High Admiral by his court was not a question simply of practice such as would be appropriately described as a rule of court, but it was a different system of jurisprudence which under the circumstances was administered (and I must assume by authority which was good) in that court differently from the law of England. One knows historically, of course, that from the reign of Richard II. downwards there was a constant conflict between the courts of common law and the Court of Admiralty, and, in the form of prohibition, it arose from time to time. One reason for it was that there was a difference in the law—not merely in the practice of the court, but a difference in the law. If one reads the preface made by Lord Tenterden when he published his work on the subject, Abbott's Law of Merchant Ships and Seamen—a preface dating, I think, from 1802—one sees the different elements from which what was called the jurisdiction in Admiralty arose. It was by no means the same source of law as those which were the sources of the common law. Different circumstances, of course, gave rise to different administration, and the effort on the one side was to apply that very immoral maxim *Boni judicis est ampliare jurisdictionem*, and on the other side to keep what was a mixture of commercial customs both of the sea and of commerce applicable therefore to all nations; from which came the extraordinary mixture of Rhodian law and French law, and the

Edicts of Louis XIV.; and all those things were mixed together, and we got a system of jurisprudence which was administered in the Court of Admiralty. I say this without reference to what was the true view of the law, and I agree that it is only the jurisdiction of the court to lay down what is the existing law, and not to attempt to alter or even improve it; but while I say that, on the other hand I think that this which would have been an extremely interesting archæological disquisition is simply settled by this—that the Legislature says that what was constantly called (whether rightly or wrongly) the rule of the Admiralty Court as laid down is that which we are now to accept as the law; and although I feel very strongly the effect of the argument of counsel for the appellants on the subject, I think that these words estop me from going further than this—to ascertain, if I can, what was the rule of the Court of Admiralty, and if I can ascertain it I am to apply it in such a case as this. Under these circumstances I have no alternative but to say that I agree with the decision which has been given, and I agree accordingly with the motion to be made by the Lord Chancellor.

Lord Atkinson.—My Lords: The sole question for decision in this case is this—whether the rule of law in force in the Court of Admiralty in this country in the year 1873, to the effect that when two ships collide, each being found to blame, the innocent owner of the cargo carried by one of them is only entitled to recover half the damages which he has sustained from each ship in default, is still in force. This, again, depends upon two considerations—first, whether this rule is in reality based on the principle that the cargo carried is identified with the ship which carries it, according to the principle laid down in the case of *Thorogood* v. *Bryan* (*ubi sup*); and, secondly, whether, even if this be so, the rule is stereotyped and continued in force by the provision of sect. 25, sub-sect. 9, of the Judicature Act 1873. Your Lordships, in the case of *The Bernina* (*ubi sup.*), undoubtedly held that the case of *Thorogood* v. *Bryan* was wrongly decided, and that the principle laid down in it was erroneous in law; and counsel for the appellants contend that because of this the rule of law based upon the principle so held to be erroneous must, in the construction of the above-mentioned provision of the Judicature Act, be treated as non-existent, since the rules mentioned in the sub-section mean true rules of law, not rules laid down in misapprehension of what the law on the subject really is. I presume that every decision of your Lordships' House as a final Court of Appeal must in strictness be regarded as a decision simply declaring the law, or as a decision declaring the law and applying it to the particular facts of the case, or as a decision applying to those facts the law as already declared by your Lordships on some previous occasion. In your capacity as a final Court of Appeal you, in the strict sense, neither make new law nor alter the old law, but merely declare what the law really is. When, therefore, a decision of any tribunal brought before your Lordships on appeal is reversed, it must be assumed that that tribunal has misunderstood the law and declared it erroneously, or has misapplied the law, truly interpreted, to the facts of the case. When, therefore, the law laid down by such a tribunal as the Court of Admiralty, no matter how often, or over what a period of time, is declared by your Lordships' House to have been laid down erroneously, the rule must be treated as if it had never existed—treated as a mere misrepresentation or misstatement of the law, which, this being once authoritatively pointed out, goes for nothing. I shall presently consider whether the appellants' contention as to the foundation of this rule be sound or not; but, even assuming that it is sound, I do not think that the rule, however erroneous, can be thus got rid of. The words of the sub-section are: "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 words "hitherto in force," or words equivalent to them, do not occur in sub-sects. 10 or 11 of the same section dealing with the conflict between the rules of the common law and the rules of law as administered by the Court of Equity. The words "so far as they have been" are also peculiar to this sub-section. They point apparently to the past, and it certainly would appear to me that both these phrases have been introduced in order to stereotype and perpetuate the rules of law in force in the Court of Admiralty when this Judicature Act of 1873 was passed; while sub-sects. 10 and 11 cover not only rules of law already enforced in the Court of Equity, but rules which might in the course of time be adopted, and be in antagonism either with the rules of the common law then existing or thereafter to be evolved. I am unable to see what other object could have been aimed at, or what other purpose subserved, by the introduction of these words. On whatever principle this rule of law was in reality founded, I think that these words are too strong to be overcome, and that the rule must be held to be still in force, and must be held to prevail over any rule of the common law with which it is in conflict.

The question remains: Is this rule in reality based upon the principle of *Thorogood* v. *Bryan* (*ubi sup.*)? If not, its authority is untouched by the case of *The Bernina* (*ubi sup.*). Well, in the first place the cargo is not completely identified with the ship which carries it, for its owner, though he, like the owner of that ship, is only entitled to recover half the damage sustained from the owner of the other ship, is entitled to recover the other half from the owner of the carrying ship. Again, Dr. Lushington in *The Milan* (*ubi sup.*) discusses this rule, first, from the point of view of its abstract justice, and, secondly, from that of the principles on which the Admiralty practice is founded. As to the first he says: "The only inference which I can draw from this view of the matter is that beyond all doubt an action would be maintainable by the owners of the cargo against the owners of either vessel, but to what extent damages should be recoverable against one party only is left an open question." He then proceeds to deal with the rule of the Admiralty Court, and after pointing out that *Hay* v. *Le Neve* (*ubi. sup.*) decided that the owner of the cargo is only entitled to recover half the damages from the ship which does not carry it, he says: "Abstract justice might give a remedy to the owner of the cargo against the owner of each vessel in proportion to the culpability of each, but

as it is impossible, where both of them are in fault, to apportion the blame strictly by an equitable though arbitrary rule, or, as it has been called a *judicium rusticorum*, the opposing ship is made liable to one-half only of the damage, and the innocent owner of the cargo is left, as to the other half, to sue the owner of the ship on board which the goods were carried. I do not see any injustice in this arrangement; on the contrary, its purpose is equity." He then proceeds to repudiate in most explicit terms the authority of *Thorogood* v. *Bryan*, and refuses to be bound by it. He says: "It is difficult to conceive how it can be contended that he—that is, the owner of the cargo—is *particeps criminis* when he is not so either as principal or agent. It is argued that he shall be so considered, and deprived of his remedy because he himself or his agent selected the ship by which the goods were carried. But there is, in my judgment, in the mere selection of the ship for the cargo, none of the ingredients which constitute any kind of responsibity for a collision, for I cannot conceive a responsibility for an act done where the individual has not, either by himself or his agents, any power of interference or control."

This would appear to me to be the precise line of reasoning which led the Court of Appeal and your Lordships' House in the case of *The Bernina* to decide that *Thorogood* v. *Bryan* was wrongly decided, and to overrule it, and the case of *Armstrong* v. *Lancashire and Yorkshire Railway* (33 L. T. Rep. 228; L. Rep. 10 Ex. 47) which followed it. Dr. Lushington proceeds to add: "I decline to be bound by *Thorogood* v. *Bryan* because it is a single case; because I know that it has been doubted by authority; because it appears to me to be not reconcilable with other principles laid down at common law; because it is directly against *Hay* v. *Le Neve*." Lord Esher, M.R., in commenting in *The Bernina* upon the passage in Dr. Lushington's judgment, says: "It has been supposed that the ultimate judgment of Dr. Lushington was inconsistent with this stout disagreement, but he decided to give the plaintiff only half his loss, upon wholly other grounds peculiar to the Admiralty Court—namely, that it had always been the practice there, instead of saying that an innocent plaintiff might recover his whole loss against any one wrongdoer, to say that he must recover part from one and part from the others; and, if there are only two, half from each. He said in terms that the plaintiff must sue the owner or owners of the ship in which his cargo was for the other half." In *Stoomvaart Maatschappy* v. *Peninsular and Oriental Steam Navigation Company* (*ubi sup.*) Lord Blackburn points out that this relief cannot be given to the owner of the cargo on the ground that the owners of each of the ships in fault are, relatively to the owner of the cargo, in the position of joint wrongdoers, as is apparently suggested in *The Lord Melville* (1816, 2 Shaw Sc. App. 402, cited in *Hay* v. *Le Neve*, *ubi sup.*). He says: "In the possible event of one set of owners proving insolvent, whilst the others were solvent, the owner of the cargo would, if the rule was as laid down in *The Lord Melville*, 'that the owners were liable jointly,' receive full indemnification for his loss from the solvent owners. By the rule as laid down in *Hay* v. *Le Neve* he only gets one-half from them, and gets a dividend only from the insolvent owners." It would appear to me, therefore, that the rule applied in *The Milan* is not based upon the principle of *Thorogood* v. *Bryan* at all, and was not so regarded, but that it is based rather on some supposed principle of equity and justice to the effect that, as the innocent owner of the cargo suffered by the negligence of each of the ships found to blame, each should compensate him for a portion of his loss; and that, as it was found impossible to measure these respective portions according to the relative culpability of the two wrongdoers, the portions were made equal, the owner of each ship being thus made liable for half the damage. I am therefore of opinion that on both these grounds the judgment appealed from was right, and that the appeal should be dismissed with costs.

Lord SHAW.—My Lords: I concur in the judgment of the Lord Chancellor. A collision took place between the two ships *Tongariro* and *Drumlanrig* under circumstances in which it is admitted that both vessels were in fault. A claim is made for damage to cargo on board the *Tongariro*. Not for very many years would it have been doubted that in such a case the owners of cargo were entitled to recover their damages distributed in moieties between the two ships. In the present case, however, it is maintained that this rule of distribution is not a rule of the Admiralty, but is a mistake of many years' standing, arising out of a decision of Dr. Lushington in *The Milan*, decided in the year 1861. It is accordingly further maintained that, there being no rule of the Admiralty applicable to such a situation, the rules of the common law liability apply, and that the owners of the cargo on board the *Tongariro* are accordingly entitled to recover not a moiety, but the whole, of their damages from the owners of the ship *Drumlanrig*. Speaking for myself, I could attach no weight to the argument that the rule of common law liability—namely, liability *singuli in solidum*—is founded upon principle, and that the rule of liability, according to hitherto accepted Admiralty practice—namely, the division of the damages equally between two wrongdoers—is not founded upon principle. The only real principle which in such a situation could apply would be that the quantum of damage should be measured and apportioned in the ratio of the quantum of blame. So far, however, has the common law of England diverged from this principle that, if decree have passed upon one of several wrongdoers, he cannot, at least in ordinary cases of negligence, have redress or contribution from the others. *Merryweather* v. *Nixan* (1799, 8 T. R. 186), relied on as the foundation of this rule, was much discussed in *Palmer* v. *Wick and Pulteneytown Steam Shipping Company* (71 L. T. Rep. 163; (1894) A. C. 318), and Lord Herschell, L.C. said of it: "I am bound to say that it does not appear to me to be founded upon any principle of justice or equity, or even of public policy, which justifies its extension to the jurisprudence of other countries." It was accordingly not extended to the jurisprudence of Scotland, and, in the course of the judgment of Lord Watson, he cites with approval the treatise of that philosophical jurist, Lord Kames, thus: "He discusses the principle of mutual relief between co-cautioners, and points out that the same principles are equally applic-

able to *correi debendi*," adding, "and it makes no difference whether the *correi debendi* be bound for a civil debt or be bound *ex delicto*, for in both cases equally it is the duty of the creditor to act impartially, and in both cases equally equity requires impartiality." The truth is that the lack of principle, in the sense which I have indicated—viz., of accurate apportionment—is manifest, not only in the declinature to give proportionate redress in England against a decree for the entirety of damage, but is apparent also at the earlier stages, when the damages come to be fixed. The saddling of one wrongdoer with all the liability for the *culpa* of more than one—the common law rule—and the division of liability equally among two—the Admiralty rule—are simply the expedients of practical convenience in working out a remedy for a wrong. In one case arising in Scotland a strong effort was made in the direction of closer approximation to the apportionment of damage to blame than could be reached by either the common law or the Admiralty rule. In the case of *Hay* v. *Le Neve* (2 Shaw, Sc. App. 395) the Court of Session apportioned the damages two-thirds against the greater and one-third against the lesser delinquent. In this House that judgment was altered and damages were given, and the damages were divided equally between the two vessels, Lord Gifford, in the course of a learned and standard judgment, observing: "It might be extremely difficult to regulate the quantum of neglect on one side and the other, and to apportion the damages by any other rule." This difficulty occurs in all cases of divided blame. In the course of his judgment in the present case, Fletcher Moulton, L.J. observes: "Now, the President seems to think that this Admiralty practice is apt to be very unjust. For my own part, I think that, if you look at the whole question, it is just as likely to do justice in the majority of cases as the doctrine that prevails at common law. But whether it is just or not, he lays down (and I think clearly and rightly lays down) that it has become the Admiralty practice, and he suggests a reason for it; he suggests that the Court of Admiralty looked upon the two peccant ships as two tortfeasors, and it divided the responsibility equally between them so that the owners of cargo could recover one-half of their damages from one and the other half from the other. That certainly is, at least, as just a doctrine as the common law doctrine that there is no contribution between tortfeasors."

I desire to state my express concurrence in that observation. One might, indeed, go further and say that where there has been some blame on the part of each of two delinquents it is more just that each should pay some of the damage than that one should pay none and the other all. There being accordingly no preference in principle for either the common law rule or the alleged Admiralty rule, all that remains in the case is to ascertain whether the latter was a rule in fact and in practice of the Admiralty Court of England. I venture to agree with the judgment of Lord Atkinson upon that subject. I do not think that the rule started with the judgment of Dr. Lushington in the case of *The Milan* (*ubi sup.*). It was affirmed in the case of *Hay* v. *Le Neve* (*ubi sup.*), decided in 1824, and applicable not to ship alone, but also to cargo; and the judgment of Lord Gifford takes the Admiralty practice back to the year 1789, and the judgment and important dicta of Lord Stowell, to which reference is there made. But the case of *The Milan* is important, not because it contains a dictum in the year 1861, to the effect that in the opinion of Dr. Lushington the rule of equal apportionment should apply as well to damage to cargo as to damage to ships, but on account of the decision of that most learned and experienced judge to the effect that the practice of Admiralty in that sense had been a uniform practice. In that sense he cites many cases unreported, one of which occurred in the Privy Council, in support of his view; but his own experience as a judge of Admiralty extended from the year 1838, and his testimony on this point of practice must stand as of unquestioned weight. I do not myself doubt that the rule has been in constant application, and a convenient instance of the acknowledgment of it is the case of the *Chartered Mercantile Bank* v. *Netherland Steam Navigation Company* (*ubi sup.*). As for sect. 25, sub-sect. 9, of the Judicature Act 1873, in my opinion "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," which are enacted as those which are to prevail, include the rule of liability for damage to cargo or ships at sea, and therefore cover this case. In so far as any indication appears in the judgments of the court below of a preference, on the ground of principle, for the common law rule as compared with the rule of the Court of Admiralty, I cannot express any adhesion to such opinions. Nor, indeed, do I think that the terms "arbitrary," "unsuitable," &c., applied to it by the learned judges who pronounced judgment in *The Stoomvart Maatschappy* v. *Peninsular and Oriental Steam Navigation Company* (*ubi sup.*), are more applicable to the one rule than to the other. But as to the practice, in my opinion it would be contrary to the safe administration of justice to upset what has prevailed as a rule of Admiralty jurisdiction for over one hundred years. I have not dealt with the case of *Thorogood* v. *Bryan* and its correction in recent years by the case of *The Bernina* for the simple reason that *Thorogood* v. *Bryan* never was Admiralty law. Dr. Lushington would not accept it as Admiralty law when it was cited to him in *The Milan*, and he treated it as very suspect common law, his suspicions being afterwards amply confirmed. I can accordingly attach no weight to the reversal of a common law rule laid down in *Thorogood* v. *Bryan* when it never was the rule of, nor influenced the practice of, the Court of Admiralty.

Judgment appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellants, *Cattarns* and *Cattarns*.

Solicitors for the respondents, *Botterell* and *Roche* for *Weightman, Pedder*, and *Co.*, Liverpool.

Supreme Court of Judicature.

COURT OF APPEAL.

Wednesday, June 1, 1910.

(Before VAUGHAN WILLIAMS, FLETCHER MOULTON, and BUCKLEY, L.JJ.)

COMPANIA SANSINENA DE CARNES CONGELADAS *v.* HOULDER BROTHERS AND CO. LIMITED AND OTHERS. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Practice—Parties—Joinder of several defendants —Alternative relief claimed against defendants — Different causes of action — Order XVI., rr. 1, 4, 7.

Order XVI. is not confined to joinder of parties, and the effect of rule 4 *thereof is that persons may be joined as defendants in the same action in respect of causes of action which are not necessarily limited by the same state of facts, contracts, and circumstances.*

By a contract in writing made between the plaintiffs, who were exporters of frozen meat, and the defendants H. Brothers and Co. Limited, who were owners of a line of steamers, the defendants agreed to carry from the Argentine to Europe frozen meat to be shipped by the plaintiffs on certain steamships named in the contract or on other suitable steamers in addition to or substitution for the said named steamers.

It was subsequently agreed between the plaintiffs and these defendants that they should provide the D., *belonging to the F. Steam Navigation Company Limited, in addition to the steamships named in the contract, and that the plaintiffs should ship frozen meat by her for carriage to England on the terms set out in the contract. The plaintiffs duly shipped the frozen meat under bills of lading in the form used by the H. Line. The frozen meat arrived in England in a damaged condition.*

In an action brought by the plaintiffs in respect of the damage alleged to have been caused by the unseaworthiness of the D., *they joined as defendants H. Brothers and Co. Limited and the F. Steam Navigation Company Limited, claiming damages against the first named defendants on a breach of the terms of the above-named contract, and against the second named defendants on a breach of the contract contained in the bill of lading.*

Held, reversing the decision of Hamilton, J., that the joinder of the defendants was right.

Smurthwaite and others *v.* Hannay and others (71 *L. T. Rep.* 157; (1894) *A. C.* 494) *and* Sadler *v.* Great Western Railway Company (71 *L. T. Rep.* 561; (1896) *A. C.* 450) *discussed and distinguished.*

Frankenberg *v.* Great Horseless Carriage Company Limited (81 *L. T. Rep.* 684; (1900) 1 *Q. B.* 504) *and* Bullock *v.* London General Omnibus Company and others (95 *L. T. Rep.* 905; (1907) 1 *K. B.* 264) *followed.*

Child *v.* Stenning (40 *L. T. Rep.* 302; 5 *Ch. Div.* 695) *approved.*

APPEAL by the plaintiffs from an order of Hamilton, J. in chambers, dated the 26th April 1910, whereby he ordered that the Federal Steam Navigation Company Limited be struck out of the action as defendants.

The action was brought by the plaintiffs, a company established in Buenos Ayres according to Argentine law and carrying on business as exporters of frozen meat to this country, against Houlder Brothers and Co. Limited, who are ship-owners and managers of a line of steamers trading to Buenos Ayres, and the Federal Steam Navigation Company Limited.

The points of claim delivered were as follows:—

1. The plaintiffs are a company established in Buenos Ayres, and carry on business both there and in London as exporters of frozen meat to England. The defendants Houlder Brothers and Co. Limited are owners of a line of steamers trading to the Argentine, and the defendants the Federal Steam Navigation Company are the owners of the steamship *Devon*.

2. By a contract in writing dated the 23rd Dec. 1903, and made between the plaintiffs and the defendants Houlder Brothers and Co. Limited, the said defendants agreed to carry from Buenos Ayres and (or) Bahia Blanca to Europe frozen meat to be shipped by the plaintiffs on certain steamships named in the said contract, or on other suitable steamers in addition to or substitution for the said named steamers, upon the terms set out in the said contract. And it was a term of the said contract that all clauses and conditions therein contained should apply to each steamer performing the service in question, each steamer being considered under the contract as a separate interest each voyage.

3. On the 21st Dec. 1908 it was verbally agreed between the plaintiffs and the defendants Houlder Brothers and Co. Limited, and this verbal agreement was subsequently confirmed in writing by a letter of the same date from the said defendants to the plaintiffs, that the said defendants should provide the *Devon* (then belonging to the defendants the Federal Steam Navigation Company) in addition to the steamships named in the said contract to do service thereunder, and that the plaintiffs should ship by her 450 tons of meat at Bahia Blanca to be carried to Avonmouth and (or) Liverpool.

4. The plaintiffs duly shipped at Bahia Blanca in good order and condition about 450 tons of frozen meat on the *Devon* to be delivered in like good order and condition under bills of lading in the form used by the Houlder Line dated the 3rd Feb. 1909, but the said frozen meat arrived at Avonmouth and Liverpool worthless or in a damaged condition, whereby the plaintiffs have suffered damage.

5. By art. 2 of the said contract it was provided that the said steamer should be tight, staunch, and strong, and in every way equipped for the voyage, and in the respects set out in par. 7 the *Devon* was not properly equipped for the carriage of the said meat on the said voyage.

6. Further, it was an implied condition of the said contract of carriage between the plaintiffs and the defendants Houlder Brothers and Co. Limited, and it was an implied condition of the contract of carriage expressed in the bills of lading referred to in pars. 4 and 8 hereof, that the said steamer should be seaworthy.

7. The *Devon* at the commencement of the said voyage was not seaworthy for the carriage of meat in that her main boilers and their respective furnaces were defective and worn out, and the boiler tubes and furnaces and combustion chambers were scaled or were in such condition that they became blocked with salt, so that the said boilers were not in a fit condition to maintain a sufficient supply of steam to the refrigerating plant in order that a proper temperature might be maintained in the freezing chambers.

(*a*) Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.

8. Alternatively, the plaintiffs claim against the defendants the Federal Steam Navigation Company as owners of the *Devon* and say that the said goods were received on board the vessel of the said defendants in good order and condition, and the bills of lading referred to in par. 4 hereof were signed on behalf of these defendants as owners of the *Devon* by their agents duly authorised in that behalf.

Particulars.—Full particulars of the damage claimed have been delivered to the defendants on or about the 4th Aug. 1909.

The plaintiffs claim against the defendants Houlder Brothers and Co. Limited and alternatively against the defendants the Federal Steam Navigation Company Limited damages 1397*l.* 11*s.* 7*d.*

By the points of defence delivered by Houlder Brothers and Co. Limited they admitted (1) the making of the contract dated the 23rd Dec. 1903 mentioned in the points of claim; (2) that it was agreed that the plaintiffs would load in the steamer *Devon* 450 tons of frozen meat on the terms in the letter of the 21st Dec. 1908 mentioned; (3) that the plaintiffs shipped on board the *Devon* about 450 tons of frozen meat under bills of lading signed by or on behalf of the defendants the Federal Steam Navigation Company Limited, but they did not admit that the frozen meat was shipped in good order or condition, or that it arrived at Avonmouth or Liverpool worthless or in a damaged condition; (4) they denied that the *Devon* was not properly equipped for the carriage of the said meat on the said voyage, or that there was any contract of carriage between them and the plaintiffs; (5) they relied on certain provisions in clause 15 of the contract as exempting them from any liability and as a defence to the action; (6) alternatively they said that if they were bound by the bills of lading mentioned in the points of claim, they relied on certain terms and conditions of the said bills of lading as exempting them from any liability to the plaintiffs, and they further said that the said bills of lading were subject to and controlled by the provisions of clause 14 of the said contract.

The plaintiffs duly loaded the said 450 tons of frozen meat on board the *Devon*, forming part of her total cargo, on the terms of bills of lading dated the 3rd Feb. 1910 which contained the following clause:

Freight and all other conditions as per letter dated the 21st Dec. 1908 between Messrs. Houlder Brothers and Co. Limited of the one part and the Compania Sansinena de Carnes Congeladas of London, therein designated as the shippers, of the other part, and the owners and shippers' rights and liabilities to be those only which are thereby defined.

The meat having arrived in a damaged condition, the plaintiffs instituted the present action, joining both Houlder Brothers and Co. Limited and the Federal Steam Navigation Company Limited as defendants.

The letter of the 21st Dec. 1908, referred to in par. 3 of the points of claim, was as follows:

146, Leadenhall-street, London, E.C., 21st Dec. 1908. —The General Manager, Messrs. Compania Sansinena de Carnes Congeladas, Long-lane, E.C.—Dear Sir,—Steamship *Devon*.—We beg to confirm our conversation with you on the telephone this morning, when it was agreed that you will load in the above-named steamer 450 tons of frozen meat at Guatreros (Bahia Blanca) for Avonmouth and (or) Liverpool on the following terms: Rate of freight, 13-32nds of a penny per pound. You have the right of taking delivery of a portion of your meat at Glasgow, providing the steamer proceeds to that port to discharge other cargo and the stowage permits. The Houlder Line bill of lading to be used, and all other conditions to be in accordance with our contract with you for conveyance of meat to Liverpool. Steamer is expected to arrive at Guatreros about the 20th Jan.—We are, dear Sir, yours truly, for Houlder Brothers and Co. Limited, Thos. L. Rose, Managing Director.

The clauses of the agreement of the 23rd Dec. 1903, so far as material, were as follows:—

Art. 1. The owners engage to place at the disposal of the shippers the following steamers, with the estimated spaces there enumerated [here follows a list of the steamers with their respective tonnages], or other suitable steamer in addition or substitution, classed 100 A 1, or equal class, insurable at first-class rates, and fitted with refrigerating machinery and the necessary chambers sufficient in power and capacity to hold and keep frozen the meat that may be stowed in the enumerated insulated spaces on a voyage from Buenos Ayres and (or) Bahia Blanca to Europe; but the shippers shall in no case be bound to ship more than 1000 tons weight of frozen meat, or its equivalent when chilled is shipped. . . .

Art. 2. The steamers being tight, staunch, and strong, and in every way equipped for the voyage, and the refrigerating machinery and chambers in proper working order and condition, shall proceed after the discharge of outward cargo at ports in the River Plate or its tributaries or other places to the loading berth, and there receive alongside from the shippers the quantity of meat the shippers have contracted to ship. . . .

Art. 13. Subject to the power of earlier determination hereinafter provided for, this agreement shall continue for the term of two years, to be computed from the date of the sailing of the first steamer under this contract, and thereafter from year to year until one party shall give to the other at least twelve calendar months' notice by registered letter post of their intention to determine this agreement, but such twelve calendar months' notice shall not be given before the said term of two years has expired. . . .

Art. 14. All meat shipped by the shippers in pursuance of this agreement shall be received and carried subject to the terms and conditions of these presents. Bills of lading, according to the form attached hereto, shall be signed as and when presented, but so far as the conditions thereof differ from or add to or subtract from the terms hereof they shall be void and of no effect.

Art. 15. Notwithstanding any obligation herein imposed on the owners, or any other matter or thing in this contract contained, the owners are not to be liable for any loss or damages, however caused or brought about, which may be sustained by the shippers or consignees or owners of the meat in consequence of the meat, or any portion thereof, becoming at any time after shipment unsound or damaged, or arriving or being landed or delivered in a damaged or unsound condition, or being jettisoned as having become unsound.

The Rules of the Supreme Court provide:

Order XVI., r. 1. All persons may be joined in one action as plaintiffs in whom any right to relief [in respect of or arising out of the same transaction or series of transactions] is alleged to exist, whether jointly, severally, or in the alternative [where if such persons brought separate actions any common question of law or fact would arise; provided that, if upon the application of any defendant it shall appear that such joinder may embarrass or delay the trial of the action, the court or a judge may order separate trials, or make such other

order as may be expedient], and judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to, without any amendment. But the defendant, though unsuccessful, shall be entitled to his costs occasioned by so joining any person who shall not be found entitled to relief unless the court or a judge in disposing of the costs shall otherwise direct.

Rule 4. All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative. And judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities, without any amendment.

Rule 7. Where the plaintiff is in doubt as to the person from whom he is entitled to redress, he may, in such manner as hereinafter mentioned, or as may be prescribed by any special order, join two or more defendants, to the intent that the question as to which, if any, of the defendants is liable, and to what extent, may be determined as between all parties.

Bailhache, K.C. (*Stuart Bevan* with him) for the plaintiffs.—There is a question of fact in this case as to whether the *Devon* was unseaworthy, and, further, whether the alleged unseaworthiness resulted in the damage complained of. It is also doubtful whether the contract for the carriage of the meat had been entered into with a principal or with an agent. Par. 8 of the points of claim is based on a contract alleged to be subsisting between the plaintiffs and the Federal Steam Navigation Company on a bill of lading in the form adopted by the first-named defendants. There would therefore appear to be a liability to the plaintiffs by both defendants. Hamilton, J. struck out the names of the defendants the Federal Steam Navigation Company as being improperly joined in the action as defendants on the principles laid down in *Smurthwaite and others* v. *Hannay and others* (*sup.*), which was a decision on Order XVI., r. 1; but that rule has now been altered. The plaintiffs had a general contract of carriage with Houlder Brothers and Co. Limited under the agreement of the 23rd Dec. 1903. Not having a ship of their own Houlder Brothers arranged to ship the plaintiffs' goods on the *Devon*, which belonged to the Federal Steam Navigation Company. The question of law arises on the construction of the bill of lading and of the overriding contract of carriage. Both parties are bound by the bill of lading which incorporates the particular contract. The provisions of Order XVI., rr. 4 and 7, apply to this case. The plaintiffs are not able to say whether Houlder Brothers acted as agents or principals in obtaining the steamship belonging to the other defendants; neither can they say whether the Federal Steam Navigation Company were contracting independently so as to be liable as principals. The plaintiffs are not compelled before issue of the writ to make up their mind which of the parties they intend to proceed against. Under the above rules they are entitled to join both defendants where there is a sufficient connecting link between them. The rule applicable to this case is very well laid down by Mellish, L.J. in *Child* v. *Stenning* (40 L. T. Rep. 302; 5 Ch. Div. 695, at p. 702), where he says: "If we were to say that two persons could not be joined as defendants unless the causes of action against them were exactly the same, the object of the Legislature would be entirely defeated. In most cases where alternative remedies are sought against two persons the causes of action are different; as in the case where an action is brought against an agent and his principal, because the plaintiff is uncertain whether he will be able to prove the authority given to the agent, as in *Honduras Inter-Oceanic Railway Company Limited* v. *Lefevre and Tucker* (36 L. T. Rep. 46; 2 Ex. Div. 301). There the plaintiff seeks compensation for one wrongful act, but he cannot tell which of two parties is really liable. I think it was exactly the case intended to be provided for by the rule." Similarly in cases of contract it is the common practice to sue both husband and wife. *Bullock* v. *London General Omnibus Company* (95 L. T. Rep. 905; (1907) 1 K. B. 264), in which the alteration of rule 1 of Order XVI., following on the decision in *Smurthwaite and others* v. *Hannay and others* (*sup.*), is discussed, clearly supports the contention of the plaintiffs in this case.

Atkin, K.C. (*Lewis Noad* with him) for the defendants the Federal Steam Navigation Company.—The order of Hamilton, J. is quite right. It has been decided by the House of Lords in *Smurthwaite and others* v. *Hannay and others* (*sup.*) that Order XVI. has reference only to joinder of parties and not to joinder of causes of action. Pars. 1 to 7 of the points of claim have no reference to the Federal Steam Navigation Company at all. The terms of the excepted perils clause in the contract differ from those contained in the Houlder Line form of bill of lading. In the agreement of the 23rd Dec. 1903 there is no express contract with regard to unseaworthiness; it is an agreement between the plaintiffs and Houlder Brothers only. The claim that is put forward against these defendants in par. 8 of the points of claim does not refer either to the charter-party or to the letter of the 21st Dec. 1908; it arises only out of the bill of lading. There are therefore two different causes of action relating to different contracts made at different times and containing different stipulations. The claim against the Houlder Line does not turn on the bill of lading at all. The points of claim do not disclose any contract with the Federal Steam Navigation Company as principals under the letter of the 21st Dec. 1908. It is true that since the decision of the House of Lords in *Smurthwaite and others* v. *Hannay and others* (*sup.*) there has been an alteration in Order XVI., but that alteration has reference to rule 1 only and does not affect rule 4, which applies to the present case. He also cited

Sadler v. *Great Western Railway Company*, 71 L. T. Rep. 561; (1896) A. C. 450;
Bennetts and Co. v. *M'Ilwraith and Co.*, 8 Asp. Mar. Law Cas. 176; 75 L. T. Rep. 145; (1896) 2 Q. B. 464;
Thompson and another v. *London County Council*, 80 L. T. Rep. 512; (1899) 1 Q. B. 840;
Frankenberg v. *Great Horseless Carriage Company Limited*, 81 L. T. Rep. 684; (1900) 1 Q. B. 504;
Gower v. *Couldridge*, 77 L. T. Rep. 707; (1898) 1 Q. B. 348.

Bailhache, K.C., for the plaintiffs, was not called upon to reply.

VAUGHAN WILLIAMS, L.J.—I cannot say, so far as I am myself concerned, that I am quite satisfied with regard to this case. I am, however

going to base my judgment on similar grounds to those on which Romer, L.J. decided *Frankenberg* v. *Great Horseless Carriage Company (sup.)*. In that case he arrived at the conclusion that the real cause of action against the defendants was the issue of a misleading prospectus, and he said that under those circumstances it was possible, without any violation of any of the rules of Order XVI., to add the various persons as defendants. I am prepared in this case to say the same thing, and the more easily because the plaintiffs' claim, as it appears upon their points of claim, is so little precise that it is extremely difficult to say what it exactly means. It is quite possible that the claim may be taken to be one embracing, as against the defendants here, two distinct and separate causes of action with only this nexus between them, that in either case the plaintiffs are seeking to recover as against the defendant companies prospectively damages for injury to cargo arising from unseaworthiness. The mere fact—even where it is not true to say that the causes of action are other than separate and distinct causes of action—that such causes of action arise out of the same transaction is not a sufficient ground, in my opinion, for allowing the several defendants to be joined in the same action; but, even if this is a possible view which might not unnaturally be taken of the effect of these vague and unprecise points of claim, I think it is possible to read them in the way suggested on behalf of the plaintiffs—that the Federal Steam Navigation Company were principals and that Houlder Brothers and Co. were their agents. According to the practice, as I understand it, in the Commercial Court and in the courts generally under the Judicature Acts, no more precision of statement is required than appears in these points of claim. I am not the only judge who has commented on this lamentable want of precision in the present system of pleading. The result therefore is that, having regard to the construction which might be put upon these points of claim, the order of Hamilton, J. striking out the Federal Steam Navigation Company as defendants in the action must be set aside.

Fletcher Moulton, L.J.—In this case the plaintiffs sue Houlder Brothers and Co. and the Federal Steam Navigation Company in respect of damage to a cargo of frozen meat brought from Bahia Blanca under these circumstances. The relation between the plaintiffs and Houlder Brothers was formulated by the standing agreement of the 23rd Dec. 1903, by which agreement Houlder Brothers supplied from time to time certain named steamers to carry frozen meat from Buenos Ayres to Europe; but on the 21st Dec. 1908 it was agreed between them and the plaintiffs that Houlder Brothers should provide the steamer *Devon*, which belonged to the other defendants—the Federal Steam Navigation Company—to carry the plaintiffs' cargo of frozen meat. It is stated in par. 4 of the points of claim that "the plaintiffs duly shipped at Bahia Blanca in good order and condition about 450 tons of frozen meat on the *Devon* to be delivered in like good order and condition under bills of lading in the form used by the Houlder Line dated the 3rd Feb. 1909, but the said frozen meat arrived at Avonmouth and Liverpool worthless or in a damaged condition, whereby the plaintiffs have suffered damage." That means that the action is brought in respect of damage done to the meat shipped under those bills of lading. The claim of the plaintiffs against Houlder Brothers is that they are liable for that damage; but alternatively the claim is that if Houlder Brothers are not liable, then that the Federal Steam Navigation Company are, upon the ground that there was a breach of contract in respect of which either one or the other of these defendants is liable. Under these circumstances these two defendant companies were joined by the plaintiffs as defendants in the action; and an application was made to the judge of the Commercial Court to strike out the second defendants. The learned judge acceded to that application, and the question we have to decide is whether he was right in so doing. The question appears to be governed mainly by Order XVI., r. 4, which runs thus: "All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative. And judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities, without any amendment." Speaking for myself, if this matter had been *res integra* I should have thought that that rule was expressly framed to cover a case like that now before us. The main issue will be whether under the circumstances there was such a breach of the contract of carriage as to make one or other of the two parties to the contract liable for the damage sustained, and a case in which the question is as to which of two parties who have been made defendants are so liable appears to me to be precisely that class of case in which a right to relief might be alleged in the alternative within the rule. I should not myself have had any hesitation in allowing both these companies to remain as defendants in the action. It is, however, urged that we are not at liberty to do so by reason of certain past decisions in the House of Lords and in the Court of Appeal. Two decisions were no doubt given in the House of Lords when the rules of Order XVI. were not in their present form. At that time rule 1 of Order XVI. was in terms corresponding to those of rule 4, and in a case—*Smurthwaite and others* v. *Hannay and others (sup.)*—where I should have thought the joinder of plaintiffs was, if I may say so, distinctly improper, their Lordships gave a decision as to the meaning of rule 1 of Order XVI. as it then stood, and said that it did not relate to joinder of different causes of action, but only to joinder of parties in regard to the same cause of action. That decision would be binding on this court if the provisions of Order XVI. had not been altered. In a similar case—*Sadler* v. *Great Western Railway Company (sup)*—which related to joinder of defendants under the then existing rules, the House of Lords gave a decision with regard to rule 4 similar to that which they had previously given as regards rule 1. Thereupon the Rule Committee altered rule 1 and made it perfectly clear that it now relates not only to the joinder of different plaintiffs in regard to the same cause of action, but also to the joinder of different plaintiffs in respect of different causes of action. [His Lordship then read Order XVI., r. 1, as it now stands.] To my mind the rule makes it quite clear that

Order XVI. does not now solely deal with joinder of parties, but that it also deals with joinder of causes of action. I now come to the consideration of rule 4, and, just as the House of Lords when deciding upon the proper construction of the wide language of rule 1 of Order XVI. as it then stood with reference to the general scope of that order considered that there was no intention to deal with causes of action, I also think we are now entitled to consider what is the meaning of the wide language of rule 4 which appears in an order purporting to deal with joinder of causes of action. I turn to the new rule 1, and I find that the words there put in are of the nature of restrictions or qualifications which show an intention not merely to deal with joinder of causes of action, but also to put some limitation on the joinder of causes of action. Looking at rule 4, in the light of the alteration which has been made in rule 1, the Rule Committee did not think it necessary to put similar words in rule 4 because they wished to keep it in its original wide terms. I do not consider myself bound in any way to limit the plain meaning of the language of rule 4 by reason of the two decisions in the House of Lords given in a totally different state of circumstances. A series of decisions in the Court of Appeal have also been brought before us, which I must confess I have felt it very difficult to reconcile, and I have therefore been driven back to the plain meaning of the words of rule 4. I have also before me the decision in the case of *Frankenberg* v. *Great Horseless Carriage Company Limited* (*sup.*), which was an action brought against a company for the rescission of a contract to take shares and the return of money paid on allotment. The individual directors of the company were joined as defendants, and the plaintiff claimed damages as against them upon the ground that they were liable under the Directors' Liability Act 1890 for certain false statements made in the company's prospectus. It is quite clear to me that the causes of action were different causes of action, yet this court held that they were in substance the same cause of action, and that all the defendants could be joined in the action. That decision shows that the extreme interpretation which counsel for the respondents asks us to put upon the rules of Order XVI., that they do not permit defendants to be joined in respect of separate and different causes of action, is one which has not been followed in the decisions of this court. I am of opinion that all the decisions to which we have been referred can be distinguished, and therefore think that these two companies ought to be joined as defendants in the present action; and that the appeal must be allowed.

Buckley, L.J.—In the Rules of the Supreme Court each order bears a heading. The heading of Order XVI. is "Parties"; the heading of Order XVIII. is "Joinder of Causes of Action." The House of Lords held in *Smurthwaite and others* v. *Hannay and others* (*sup.*), which was decided in 1894, that rule 1 of Order XVI., which was the rule they had to deal with—a rule as to joining plaintiffs—dealt merely with the parties to an action, and had no reference to the joinder of several causes of action. Lord Herschell, L.C., in delivering his opinion in that case, said: "It cannot be doubted that whatever construction is put upon the rule I have been considering—that is, rule 1—must be applied equally to rule 4 of the same order." Rule 4, which is the rule as to joining defendants, is the rule with which we have to deal in the present case. As the consequence of the decision of the House of Lords in *Smurthwaite and others* v. *Hannay and others* (*sup.*), rule 1 of Order XVI. was altered, and so altered that it does not now affect to deal with the question of joinder of different causes of action. Under these circumstances it seems to me the material question is, What is now the effect of rule 4? It is quite truly said that the Rule Committee did not alter rule 4 when they altered rule 1. What is the result of this? I think the result is that Order XVI. is not now confined to joinder of parties, but that, as far as rule 1 is concerned, it certainly extends to joinder of causes of action. I have to read rule 4 as forming part of the code of rules as it now stands, and its language is: "All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative. . . ." The question is whether under that rule it is not now possible to join as defendants in the same action persons who are said to be liable in respect of causes of action which are not necessarily limited by the same state of facts, contracts, and circumstances. In *Child* v. *Stenning* (*sup.*) the Court of Appeal arrived at the conclusion that under the rules as they then stood—which, of course, were less useful for the present purpose than the form in which they now stand—there could be joint causes of action of the following description. The plaintiff in that case brought an action for damages for trespass to his land, and he joined as defendants the person alleged to be the trespasser and the person who was grantor to the trespasser, and he said that the first defendant was liable for trespass because he had no business to be on the plaintiff's land, and, as to the second, he said that if the first-named defendant had any right to be on the land because the second named defendant had granted him a right of way, he was entitled to sue the latter for breach of the covenant which he had entered into with the plaintiff for quiet enjoyment. It was held that the plaintiff could join those two causes of action. I am not aware that that decision has ever been in any way overruled; it is a decision of this court, and is binding upon us except so far as the rules may have altered it.

But Mr. Atkin has presented an argument to us which seems to me to be inconsistent with at least two recent decisions. The one is *Frankenberg* v. *Great Horseless Carriage Company Limited* (*sup.*), and the other is *Bullock* v. *London General Omnibus Company* (*sup.*). In the former of those two cases the cause of action in the circumstances which gave a right of relief against somebody was the issue of a prospectus. The defendants were the company or corporation whose shares were offered by the prospectus, and the directors of that company or corporation. As against the company the relief sought was in the way of rescission of the contract to take shares; as against the directors the relief sought was damages for fraud, including the statutory fraud arising from sect. 38 of the Companies Act 1867. The facts, therefore, were that, under one set of circumstances, the defendant company were said to be liable upon certain grounds which

did not include a ground which was asserted against the co-defendants—namely, that they were bound by sect. 38 of the Act of 1867, a section which did not affect the company at all. Obviously, therefore, the two causes of action in the sense of all the material circumstances which lead to show liability were not coterminous. They ended with the company before they ended with the directors, there being an additional element as against the directors, and it was held in this court that those two causes of action could be joined. The case of *Bullock* v. *London General Omnibus Company* (*sup.*) was this. The plaintiff was riding in an omnibus belonging to the London General Omnibus Company, and there was a collision with an omnibus of another company whereby the plaintiff was injured. She alleged that her injuries were caused by the separate negligence of each company, or alternatively by the joint negligence of both. The case against those defendants would not be limited by the same set of facts. The facts that show negligence of one company would not necessarily show the negligence of the other. The objection to the joinder was not taken until the parties got to trial. It is said not to be an exact decision on the point, and in a sense that is true. In that case a question arose as to costs, and that question had to be determined by ascertaining whether the defendant company which was not held liable was rightly joined, and it was held that it was. The case pressed upon us from the other point of view is *Thompson and another* v. *London County Council* (*sup.*). That seems to be a totally different case for this reason. It was an action for damages for letting down a house. The plaintiff alleged against the London County Council that they had let down his house by excavating the street for some purpose and removing the soil. As against the other defendants, the New River Company, he alleged that they had let down his house by allowing their water main to leak with the result that the soil under his house was washed away. There were two totally different sets of facts therefore. The facts which rendered one defendant liable were different from the facts relied upon to make the other defendant liable. Under these circumstances it was held that these two causes of action could not be joined.

It only remains to say a word as to the facts of the present case. The plaintiffs here allege that they shipped certain meat belonging to them in a vessel to be carried from the Argentine to this country, and that the vessel was not seaworthy, whereby their meat was damaged, for which they sue for damages. They join two defendants, and against the one they allege that he entered into certain contracts with them; against the other they say that the ship in which their goods were carried was the ship of this defendant which the first-named defendant had introduced into the contract made with the plaintiffs, but that he had contracted with the plaintiffs by virtue of bills of lading which were signed in favour of the plaintiffs when the cargo was put on board. The plaintiffs allege that one or both of the defendants are liable for the damage that resulted. Shortly stated, the cause of action, if by that is meant all the material facts which go to show that there was injury by unseaworthiness and that the vessel was unseaworthy, is common to the two defendants. The difference, of course, lies in this, as it was in *Frankenberg* v. *Great Horseless Carriage Company* (*sup.*), that one defendant may be liable on one ground, and the other defendant on another, and that these grounds are not common to both defendants. That is a point of difference, but, on the authorities as they now stand, it seems to me that is not a ground for saying that that which is really a cause of action as involving one investigation of facts is not a matter which can be properly tried under the rule. I think that the Federal Steam Navigation Company were properly joined as defendants, and that this appeal must succeed.

Appeal allowed.

Solicitors for the plaintiffs, *Coward* and *Hawksley, Sons*, and *Chance*.

Solicitors for the defendants the Federal Steam Navigation Company Limited, *W. A. Crump* and *Son*.

Thursday, Nov. 3, 1910.

(Before VAUGHAN WILLIAMS, BUCKLEY, and KENNEDY, L.JJ.)

THE PORTSMOUTH. (*a*)

Charter-party—Demurrage—Arbitration clause—Bill of lading—Receipt of goods by bill of lading holder — Discharge of cargo — Vessel on demurrage—Action against bill of lading holder for demurrage — Incorporation of arbitration clause in bill of lading—Stay of proceedings—Arbitration Act 1889 (52 *&* 53 *Vict. c.* 49), *s.* 4.

A cargo of wood was shipped on a vessel, the charter containing a demurrage clause, certain exceptions and conditions, and a submission to arbitration, the terms of which were "any dispute or claim arising out of any of the conditions of this charter-party shall be adjusted at port where it occurs, and same shall be settled by arbitration."

A bill of lading was given to the shipper which contained the following terms: "He or they," referring to the shipper or his assigns, "paying freight for the said goods, with other conditions as per charter," and in the margin was written in ink, "Deckload at shipper's risk, and all other terms and conditions and exceptions of charter to be as per charter-party, including negligence clause." The shipowners having instituted proceedings against the holders of the bill of lading on the Admiralty side of the County Court to recover demurrage, the bill of lading holders applied to the judge under sect. 4 of the Arbitration Act 1889 *to stay the proceedings. The County Court judge made the order, and the shipowners appealed to the Admiralty Divisional Court, which affirmed the decision of the County Court judge. The shipowners appealed to the Court of Appeal.*

Held (reversing the decision of the Divisional Court), that the arbitration clause was not applicable to this dispute between the shipowners and the holders of the bill of lading.

Hamilton *v.* Mackie (5 *Times L. Rep.* 677) *followed.*

APPEAL from a decision of the Admiralty Divisional Court affirming a decision of His Honour Judge Kelly sitting in Admiralty in the County Court of Glamorgan at Cardiff staying an action and referring a dispute which had arisen as to demurrage to arbitration.

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

The appellants were the Portsea Steamship Company Limited, the owners of the *Portsmouth*; the respondents were T. W. Thomas and Co. Limited, holders of the bill of lading.

On the 14th Jan. 1909 McNeill, Hinde, and Co., the managing owners of the *Portsmouth*, entered into a charter-party with C. T. White and Sons Limited, of Alma, New Brunswick, by which they agreed that the *Portsmouth* should load a cargo of wood at a North American port and proceed with it to a good and safe port on the west coast of Great Britain or east coast of Ireland.

The charter further provided that the charterers' liability ceased as soon as the cargo was alongside, the vessel holding a lien upon the cargo for freight and demurrage.

A further clause provided that

> Cargo . . . to be discharged by the steamer at port of destination, in the usual manner, with customary steamer dispatch, according to the custom of the port, during ordinary working hours (Sundays, general holidays, and Bank Holidays excepted); but if through any fault of the merchant or charterer the steamer is longer detained, demurrage to be paid at the rate of twenty-five pounds per day, but any time lost through the act of God, political impediments, frost, floods, droughts, including logs hung up, storms, weather, strikes, lock-outs, fire, accidents, combinations of workmen, stoppages, or reduction of labour, or any other extraordinary causes or hindrances of what kind soever beyond charterers' control, delaying either the sending of the cargo alongside or the loading or the discharge of removal of the cargo is excepted. Lay days to commence when steamer is ready in a proper clear loading or discharging berth respectively and after notice has been given. The usual custom of the wood trade of each port is to be observed by each party, in cases where not specially expressed. Any dispute or claim arising out of any of the conditions of this charter-party shall be adjusted at port where it occurs, and the same shall be settled by arbitration.

The *Portsmouth* loaded her cargo at Parrsboro Roads, Nova Scotia; the cargo was shipped by W. Malcolm Mackay, and a bill of lading was given him, dated the 29th Nov. 1909, which provided that the cargo was

> To be delivered in the like good order and condition at the port of Swansea, Great Britain . . . unto W. Malcolm Mackay or to his assigns, he or they paying freight for the said goods, with other conditions as per charter-party with average accustomed.

In the margin of the bill of lading the following clause appeared:

> Deckload at shipper's risk, and all other terms and conditions and exceptions of charter to be as per charter-party, including negligence clause.

The respondents, T. W. Thomas and Co. Limited, were the holders of the bill of lading and took delivery of the cargo.

On the 22nd Feb. the shipowners made a claim for eight days' demurrage at 25*l.* a day incurred at Swansea, and in a letter their solicitors stated that under the charter-party any dispute was to be settled by arbitration, and they suggested the names of two arbitrators. The solicitors for the respondents replied on the 2nd March and wrote suggesting other names, and pointing out that, as the matter involved a question of custom in the timber trade in the British Channel, someone should be appointed who knew the trade.

On the 4th March the appellants refused to accept any of the arbitrators suggested by the respondents, and suggested that each should appoint an arbitrator and that the arbitrators should appoint an umpire. The respondents fell in with this suggestion, but on the 12th March the appellants' solicitors wrote saying that the appellants would prefer to have the case tried in the County Court as they thought it would be less costly.

The respondents would not assent to this course, but, after some further correspondence between the solicitors, the appellants on the 27th April issued a summons in the County Court at Cardiff and filed particulars claiming eight days' demurrage of the *Portsmouth* at 25*l.* a day under bill of lading dated the 29th Nov. 1909, 200*l.* The respondents, the bill of lading holders, entered an appearance under protest, and gave notice on the 2nd May 1910 that they would apply to the judge under sect. 4 of the Arbitration Act 1889 for an order to stay proceedings in the action. That application was made to the judge on the 9th May, and he made an order staying proceedings as he was of opinion that the arbitration clause was incorporated in the bill of lading. On the 14th May the shipowners gave notice of appeal against the order of the County Court judge on the grounds that he was wrong in holding that the arbitration clause contained in the charter-party was incorporated in the bill of lading under which the respondents received the cargo; that he was wrong in holding that the appellants were not entitled to proceed with their action for the demurrage incurred in the discharge of the cargo; and that he was wrong in holding that the provisions of the Arbitration Act 1889 were a bar to the plaintiffs' action.

The appeal came on for hearing in the Divisional Court on the 19th July.

Sect. 4 of the Arbitration Act 1889 (52 & 53 Vict. c. 49) is as follows:

> 4. If any party to a submission, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings, and that court or a judge thereof if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.

On the 27th July 1910 the Divisional Court delivered judgment.

THE PRESIDENT.—The short question raised by this appeal is whether the plaintiffs' claim for demurrage under a bill of lading is a claim to which the arbitration clause contained in the charter-party applies. The plaintiffs are the owners of the vessel; the defendants are the holders for value of the bill of lading. The demurrage claimed is 200*l.*, being eight days at the rate of 25*l.* per day. In the proceedings the plaintiffs put the claim forward as a fixed sum

of 200*l.* "arising out of an agreement made in relation to the use or hire of the steamship *Portsmouth*, and in relation to the carriage of goods on board the said steamship." As throwing some light upon how the question is regarded in the commercial and shipping communities, I may note that before action the plaintiffs, through well-known shipping solicitors, demanded arbitration under the clause; but a dispute as to the *personnel* of the arbitrators supervened; but this, however, does not affect the question of law. The bill of lading does not fix the rate of demurrage, but it contains the usual provision "he or they paying freight, with other conditions as per charter-party," and in the margin "all other terms and conditions and exceptions of charter to be as per charterparty, including negligence clause." The rate of demurrage is fixed by the charter-party as follows: "But if through any fault of the merchant or charterer, the steamer is longer detained, demurrage to be paid at the rate of 25*l.* per day." The same clause contains various terms, conditions, and exceptions which would require to be considered in determining whether any, and, if so, how many days' demurrage was payable. The arbitration clause in the charter-party reads thus: "Any dispute or claim arising out of any of the conditions of this charter-party shall be adjusted at port where it occurs, and same shall be settled by arbitration." We were referred to various cases and text-books, all of which I have carefully considered. The principle which has been generally accepted in all the cases is stated by Willes, J. in *Russell* v. *Niemann* (17 C. B. N. S. 177): "The question depends on whether the words 'and other conditions as per charter-party' include all the stipulations and conditions contained in that instrument, or whether they are not limited to conditions *ejusdem generis* with that previously mentioned, viz., payment of freight—conditions to be performed by the receiver of the goods. It is a mere question of language and construction, and we think it enough to say that the latter is the construction which we put upon these words." These words were expanded or explained by Lord Blackburn in an unreported case of *Taylor* v. *Perrin* in the House of Lords in the following passage: "The case which has been referred to—*Russell* v. *Niemann*—in which Willes, J. gave judgment, as it appears to me perfectly correctly, decided that the reference to the charter-party is meant to bring in those conditions which would apply to the person who has taken the bill of lading, and in taking delivery of the cargo, such as payment of demurrage, the payment of freight, the manner of paying, and so on; but is by no means to be taken to incorporate all the conditions of the charter-party" (quoted per Lopes, L.J., at p. 295, in *Serraino* v. *Campbell* (1891) 1 Q. B., and at p. 51 of 7 Asp. Mar. Law. Cas.). It appears to me that if the words "the ascertainment of the amount of the demurrage or freight" were inserted after the word "freight" in the above passage it would be equally accurate; and, if so, it would apply directly to the present case. Lord Esher has said that the words mean that you must read the conditions of the charter-party verbatim into the bill of lading, as though they were printed *in extenso*, and then disregard such as were inconsistent with the bill of lading. Mathew, L.J. in *East Yorkshire Steamship Company* v. *Handcock* (1900, 5 Com. Cas. 266, at p. 268) states the effect of the decisions thus: "The only provisions of the charter-party which are not incorporated into the bill of lading are those which are not clearly relevant to conditions which have to be performed by the consignee on the arrival of the ship." We were pressed by counsel for the appellants with the decision in *Hamilton* v. *Mackie* (5 Times L. Rep. 677), and if the facts were the same that case would, of course, bind us. It related to an arbitration clause. The case is very shortly reported. I have done my best to obtain a copy of the record, and the documents, but without success. It appears from the short report that "the action was brought for the balance of the bill of lading freight"; that the charter-party provided that "all disputes under this charter shall be referred to arbitration"; and that on the bill of lading were stamped the words "all other terms and conditions as per charter-party." The Master of the Rolls said it was clear that the condition as to arbitration did not refer to disputes arising under the bill of lading, but to disputes arising under the charter-party. Lord Collins explains that decision in *Temperley Steamship Company* v. *Smyth* (1905) 2 K. B. 801; 10 Asp. Mar. Law Cas. 123) thus: "He (Lord Esher) 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-party *only*." The italics are mine. I agree with the late Judge Carver that the context must in each case be looked at: (see par. 160 of Carriage of Goods by Sea). As was said by Willes, J., it is a mere question of language and construction in each case.

In this case the arbitration clause refers not to disputes under the charter-party only, but to "any dispute or claim arising out of any of the conditions" of the charter-party. This action is brought for demurrage fixed by the charter-party. How many days' demurrage is payable, and in what circumstances it is recoverable, depends upon the terms and conditions of the demurrage clause in the charterparty; in other words, the charter-party must be referred to in order to ascertain the amount and the conditions of liability. The dispute or claim in this case arises out of those conditions, and accordingly is a dispute or claim coming literally and expressly within the arbitration clause. Suppose the words "any dispute or claim arising out of any of the conditions of this clause shall be settled by arbitration" were added, so as to form part of the demurrage clause itself, I think it is pretty clear that this claim would come within that provision. It cannot make any difference that the words form a separate clause by themselves. I think, therefore, that the arbitration clause applies to the claim in this action, and that this appeal fails.

BARGRAVE DEANE, J.—I am of the same opinion, but I want to add a word or two on the question of fact. It is remarkable that when the plaintiffs' solicitors applied for a summons in the County Court they said it was a claim "arising out of an agreement made in relation to the use or hire of the steamship *Portsmouth*, and in relation to the carriage of goods on board the said steamship." This is repeated in the affidavit

for leave to issue the summons against the defendants out of the district made by Mr. Hinde, one of the managers and directors of the plaintiff company. He says, "for a claim arising out of an agreement made in relation to the use or hire of the steamship *Portsmouth*, and in relation to the carriage of goods on board the said steamship." Upon that an order was made for particulars, and then you find a difference, because you find a claim for "eight days' demurrage of the steamship *Portsmouth* at 25*l.* per day under bill of lading, dated the 29th Nov. 1909." Well, there is nothing in the bill of lading which refers to 25*l.* per day demurrage, and therefore you must look back to the charter-party to see what the claim is and how it is framed. Before the case came into court the plaintiffs themselves claimed that there should be an arbitration and suggested the names of gentlemen who should arbitrate in accordance with the terms of the charter-party. The matter went on in discussion between the plaintiffs and defendants as to who should be the arbitrator, and it was not a dispute as to whether there should be an arbitration. It is perfectly clear that at the beginning the plaintiffs themselves were the persons wanting an arbitration, pursuant to the terms of the charter-party. In my opinion, apart from the question of law which the President has dealt with, the facts are conclusive against the plaintiffs in respect of the matter being tried by arbitration. They admitted at one time that it was a matter which should be submitted to arbitration. Now, when it does not suit their purpose to agree to the arbitrator, they fall back upon the point of law which my Lord has pointed out is against them. In my opinion, both on law and fact, the plaintiffs fail, and the appeal must be dismissed, with costs.

From this decision the shipowners appealed to the Court of Appeal.

Bailhache, K.C. and *D. W. Carr* for the appellants.—The point raised by the appeal is whether certain words in the bill of lading incorporate in the bill of lading a submission to arbitration which is to be found in the charter-party. The proper method of construing the clauses in this case was laid down in *Hamilton* v. *Mackie* (5 Times L. Rep. 677). As between the charterer and shipowner the charter contains the contract between them, and the bill of lading is a mere receipt for the goods:

Rodocanachi v. *Milburn*, 56 L. T. Rep. 594; 6 Asp. Mar. Law Cas. 100 (1886); 18 Q. B. Div. 67.

In this case the dispute is not between the charterer and the shipowner, but between a bill of lading holder and the shipowner, and the contract between them is contained in the bill of lading and not in the charter. *Runciman* v. *Smyth* (20 Times L. Rep. 625) appears to support the view of the respondents, for the parties in that case were the charterer and the shipowner; but that case was overruled by *Temperley Steam Shipping Company* v. *Smyth and Co.* (93 L. T. Rep. 471; 10 Asp. Mar. Law Cas. 123; (1905) 2 K. B. 791), in which the parties to the dispute were again the charterer and the shipowner. It should be remembered that when the parties to the dispute are the shipowner and the charterer who is also the consignee it is not so much a question of incorporating a clause in the bill of lading, but of deciding which document it is which contains the contract which binds the parties. In this case White and Sons are the charterers and Thomas and Co. are the bill of lading holders and consignees. The contract between White and Sons and the shipowner is contained in the charter, and the contract between Thomas and Co. and the shipowner is contained in the bill of lading. If the bill of lading is construed in the manner laid down in *Hamilton* v. *Mackie* (*ubi sup.*), the submission to arbitration is not incorporated in it, for the submission refers to disputes under the charter.

Leslie Scott, K.C. and *Holman Gregory*, K.C.—*Hamilton* v. *Mackie* (*ubi sup.*) was a case in which the arbitration clause was construed as applying only to disputes between shipowner and charterers. [BUCKLEY, L.J.—If it is to apply to anyone else, why does it not say that shipowner, charterer, and bill of lading holder are to submit disputes to arbitration?] In effect this clause does say that. The language used indicates an intention to include everyone. In *Temperley* v. *Smyth* (*ubi sup.*) the action was on the charter, and the arbitration clause applied because the contract had not been in any way altered or annulled by the bill of lading, the bill of lading being a mere receipt for the goods. [VAUGHAN WILLIAMS, L.J.—*Temperley* v. *Smyth* (*ubi sup.*) does not throw any doubt on *Hamilton* v. *Mackie* (*ubi sup.*).] It is not necessary to say that *Hamilton* v. *Mackie* is wrong, for this is a totally different contract. If the arbitration clause in the charter is so framed as to refer exclusively to disputes between charterers and shipowners, it of course has no bearing on disputes between the bill of lading holder and the shipowner, but the words of this submission are wide. One of the last cases on this point is *Diedericksen* v. *Farquharson* (77 L. T. Rep. 543; 8 Asp. Mar. Law Cas. 333; (1898) 1 Q. B. 150). The words "other conditions as per charter" may be words of identification only, but the incorporating clauses have grown wider. First the clause used was "paying freight and all other conditions as per charter-party," which was held to mean conditions *ejusdem generis* with the payment of freight; then the phrase grew into "paying freight and all terms and conditions as per charter." This bill of lading has both these clauses, and so every clause in the charter is incorporated in the bill of lading, though some, of course, have no effect, for they can only apply as between the charterer and shipowner. [VAUGHAN WILLIAMS, L.J.—In *Serraino* v. *Campbell* (64 L. T. Rep. 615; 7 Asp. Mar. Law Cas. 48; (1891) 1 Q. B. 301) the case of *Hill* v. *Mackie* (*ubi sup.*) sems to have been approved by Kay, L.J.] No rigid rule of construction can be laid down to cover every case. The cases of *Restitution Steamship Company* v. *Pirrie* (7 Asp. Mar. Law Cas. 11, n.) and *Shamrock Steamship Company* v. *Storey* (5 Com. Cas. 21) show the the principle to be followed when construing one document which is incorporated in another. There is no difficulty in construing both clauses in this bill of lading together, for they do not contradict one another—one merely enlarges the other, so no such exception can be taken to these clauses as was taken in *Elderslie* v. *Borthwick* (92 L. T. Rep. 274; 10 Asp.

Mar. Law Cas. 24; (1905) A. C. 93). In a demurrage case local witnesses must be called and local customs may be in question, so it is more reasonable to have the matter settled by arbitration.

Vaughan Williams, L.J.—I think this appeal must be allowed. The action was brought by the owners of the ship for the purpose of recovering demurrage, and thereupon the defendants, who were the bill of lading holders, thought that it was a case which was governed by the arbitration clause in the charter-party. They applied, therefore, for a stay of the proceedings in the action, and that stay was granted. The President and Bargrave Deane, J., when the matter came before them, affirmed the conclusion of the County Court judge, and considered that the case was one which was governed by the arbitration clause in the charter-party. The question we have to decide is whether or not this arbitration clause was binding upon the bill of lading holder or not. I may as well say a word or two about the charter-party and the bill of lading. We have had both before us. The charter-party provides first for the ship having a lien upon the cargo for freight and demurrage, and then there is a demurrage clause which begins with the statement that the cargo is to be furnished free alongside at the port of loading at merchants' risk and expense, and then makes reference to the days for loading, and continues, "but if from any fault of the merchants or charterers the steamer is longer detained, demurrage to be paid at the rate of 25*l.* per day." Then comes what is called the arbitration clause, which is almost at the end of the charter-party. It says, "Any dispute or claim arising out of any of the conditions of this charter-party shall be adjusted at port where it occurs, and same shall be settled by arbitration." I think I have now read enough of the charter-party, and it is not in dispute here that as between the ship and the charterer this is a case where an arbitration clause would apply—where the tribunal to dispose of any disputes or claims is fixed by contract to the exclusion of the jurisdiction of the ordinary courts of law. That being so, one has now to ask oneself how far this clause is applicable in the case of rights and liabilities arising under the bill of lading. Now, the bill of lading runs, so far as it is material, thus: "He or they paying freight for the said goods, with other conditions as per charter-party." At that point I take it one has to read in certain words which appear in the margin, and they say, "Deckload at shipper's risk and all other terms and exceptions of charter to be as per charter-party, including negligence clause." When I ask myself how far, according to the terms of this bill of lading, the relations of the ship and the bill of lading holder are governed by the arbitration clause in the charter-party—which of course would be operative in a dispute between the ship and the charterer—I cannot help at once saying that so far as the literal meaning of the words is concerned they are not applicable to this case. But when it is said you should not take the literal meaning of the words, but you should say that there is a dispute which, although it does not arise out of any of the conditions of the charter-party *quâ* charter-party, does arise out of the conditions of the bill of lading which incorporated the clauses of the charter-party, then I should say that one generally would feel it one's duty as a judge, as would anyone disposing of this dispute, to decide how far the clauses of the charter-party incorporated in the bill of lading are applicable to this dispute, so as to leave the matter to be decided by arbitration, to the exclusion of the ordinary courts of law. I therefore look at the words which I find in the bill of lading itself, and it seems to me to be obvious that the parties did not mean or assume that every clause in the charter-party which was applicable as between ship and charterer was to be incorporated and used as part and parcel of the bill of lading, so as to govern the relations between the ship and the bill of lading holder. Having then to ask myself that question, I have come to the conclusion that these words in the bill of lading which really are, to say the least of it, ambiguous, leave it open to question whether the words of the arbitration clause are to apply as between the ship and the holder of the bill of lading. I look at all the circumstances of the case, and although it is said that the clause must apply unless I can find something inconsistent with the clause, I do not think one need find anything that is expressly inconsistent. In my opinion really the case which has been so much talked about to-day, of *Hamilton* v. *Mackie*, is conclusive of the matter, though I know it is said that that case may be read in two ways. The report, which is quite short, says: "The plaintiffs were the owners of the steamer *President Garfield*, and the action was brought for the balance of the bill of lading freight, the defendants being the consignees of the cargo and indorsees of the bill of lading. It was agreed by the charter-party that any dispute that might arise under the charter was to be settled by arbitration at the port where the dispute arose. On the bill of lading the words were stamped, 'All other terms and conditions as per charter-party.' The judge at chambers stayed the action on the ground that the matter ought to have gone to arbitration, and the Divisional Court upheld his decision." The Court of Appeal allowed the appeal. The Master of the Rolls (Lord Esher), in delivering judgment, said "that 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 arising 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." In my opinion it is clear here, if you look at the charter-party and then look at the bill of lading, that the condition which it is said is incorporated in the bill of lading does not refer to disputes arising under the bill of lading, but to disputes arising under the charter-party. Under those circumstances,

if this decision is right, there is an end of the present case. It is said, however, that the provisions in this case are somewhat different. I do not agree. I think that the case of *Hamilton* v. *Mackie* (*ubi sup.*), as long as it is unreversed, is binding upon us, and is conclusive of the case that we have before us. I only wish to add here that if you look at the decision in *Temperley Steam Shipping Company* v. *Smyth and Co.* (*ubi sup.*), it seems to me that the judgment of Lord Collins, then Master of the Rolls, and the judgment of the other members of the court, did not in any way question the correctness of the decision in *Hamilton* v. *Mackie* (*ubi sup.*), but, on the contrary, they affirmed it. If this case of *Hamilton* v. *Mackie* (*ubi sup.*) was affirmed we are bound by it, and the only question outstanding is what that case did. I have already said I find nothing in that case to differentiate it from the present case, and *Hamilton* v. *Mackie* (*ubi sup.*) is a case which has been cited over and over again in cases before this court. Among others, it was cited and dealt with in the case of *Serraino* v. *Campbell* (*ubi sup.*). Kay, L.J. there said: "*Hamilton* v. *Mackie* seems to have decided that these words of reference would not introduce into the bill of lading a clause for reference to arbitration of any dispute upon the charter-party." I consider that this clause in this bill of lading is a clause which refers to any dispute arising under the charter-party and nothing else, and I do not think that the words in the bill of lading were introduced so as to make the arbitration clause applicable in the case of any dispute arising between the ship and the bill of lading holder. In these circumstances, I think the appeal must be allowed. I do not say for a moment that the case is not one upon which a great deal may be said on both sides. Counsel for the appellants said someone was going to take the case to the House of Lords. I do not know what the ultimate decision may be, but, looking at it as the case stands at the present time, we must follow the decision in *Hamilton* v. *Mackie* (*ubi sup.*), and I have already expressed my opinion of what that case decides.

BUCKLEY, L.J.—The question for determination is quite short. It is only as to the meaning, according to their true construction, of these words in the charter-party as introduced by reference into the bill of lading. The words are: "Any dispute or claim arising out of any of the conditions of this charter-party shall be adjusted at port where it occurs, and same shall be settled by arbitration." The appellant contends that these words are equivalent to any dispute or claim arising under this charter-party. If that is their true meaning, this case is concluded, so far as this court is concerned, by *Hamilton* v. *Mackie* (*ubi sup.*). The respondents contend that the words are equivalent to any dispute or claim arising as to any of the matters as to which there are conditions in the charter-party. Of those two contentions, in my judgment, the former is right and the latter is wrong. I will in the first instance give the reasons why I think the latter contention is wrong. In reading words of reference such as we have here in the bill of lading you ought, I think, to treat the matter in this way. You find in the charter-party words which have practically this effect as between the shipowners and the charterers—demurrage shall be paid at a certain rate. When you read the words of reference in the bill of lading you are to read them as providing, as between shipowner and bill of lading holder, "It is hereby agreed in a certain event that demurrage shall be paid at a certain rate." When you get to the arbitration clause you have to do it in exactly the same way. Reading the charter-party first, you find this: "As between shipowner and charterer it is hereby agreed that any dispute or claim arising out of any of the conditions of this charter-party shall be referred to arbitration." Plainly that is a contract. It is agreed between shipowner and charterer that any dispute or claim arising between shipowner and charterer out of the conditions which under this instrument are binding between shipowner and charterer shall be settled by arbitration. When you get to the bill of lading you read it in this way: "It is hereby agreed as between shipowner and bill of lading holder that certain disputes or claims shall be referred to arbitration." The whole question is what disputes or claims are, by way of bargain between the shipowners and bill of lading holders, to be referred to arbitration? I must read the documents to see what is to be referred. It is "disputes or claims arising out of the conditions of this charter-party." No dispute or claim as between shipowner and bill of lading holder can arise out of the conditions of this charter-party. It must arise between those parties out of some condition in the instrument which is binding as between them, and the whole argument is that I am to read it as if these words. "any of the conditions of this charter-party," were merely words of identification, and the sentence were exactly the same as if it read "any dispute or claim as to any of the matters as to which there are conditions in this charter-party." Those are not the words. The claim which is referred to arbitration is a claim which, even when you have transferred the words from one instrument to the other, would be a claim arising out of the conditions in an instrument which is not a binding instrument as between the shipowner and the bill of lading holder, but is binding as between the other two parties. Therefore t seems to me that that contention cannot be maintained. I cannot substitute for the words "any dispute or claim arising out of any of the conditions of this charter-party" the words "as to any of the matters as to which there are conditions in this charter-party." If that be rejected, the other solution necessarily follows. Now, just examine the words and see if it is not the fair meaning. "Any dispute or claim arising out of the conditions of this charter-party." How does that differ in any respect from "any dispute or claim arising under this charter-party"? If it arises out of conditions it must arise under the charter-party, and if under the charter-party, it must arise out of the conditions of the charter-party. The words are different, but the legal effect is the same, and if you read this clause as if it were "any dispute or claim arising under this charter-party," the case is, of course, the same as *Hamilton* v. *Mackie* (*ubi sup.*), and that decision is binding upon this court. For these reasons I think the appeal must be allowed, with costs here and below, and the order staying proceedings must be discharged.

Kennedy, L.J.—I am entirely of the same opinion, and I wish to point out that what strikes me is the unreality of the case which has been so ably put before us by counsel for the respondents. On the facts of this case we are asked to read this arbitration clause as applying to govern the rights of the shipowner and the bill of lading holder on account of the words which occur in the margin of the bill of lading: "Deckload at the shipper's risk, and all other terms and conditions and exceptions of charter to be as per charter-party, including negligence clause." These are the words which I understand to be the substantial words—they are the only words upon which this arbitration clause can be read into the contract. With regard to the words in the body of the contract, "he or they paying freight," &c., to my mind it has been over and over again settled by authority that they would not bring in an arbitration clause. But it is said, and was argued here before us, that you have got special terms written in here in this contract. Now, I can entertain no doubt, having regard to the context, these other terms and conditions are those things which are printed immediately below. I have compared this document with the bill of lading, and I find that every condition is either copied directly from the conditions and exceptions of the charter-party or is not put in. What they wanted to do is to my mind perfectly plain. They wanted to have those risks which might affect the shipowner or consignee with regard to the ship or goods, and the right to act in regard to such matters as towing and being towed, salvage, and negligence of the master, all covered in the bill of lading as between shipowner and consignee, as they are covered in the charter-party as between shipowner and charterer. As a matter of business it is clear to me that if they had wanted to put in an arbitration clause they would have put it in. They have put in everything which might be called a condition or exception. They have not included arbitration, but what they have included are natural matters in shipping contracts, to be effective against the consignee, namely, the things which will affect, as conditions or exceptions, the performance of his contract, or the performance of the shipowner's contract towards the consignee. Assume for a moment as was assumed on the wording of *Hamilton* v. *Mackie* (*ubi sup.*) that a clause with reference to arbitration may properly be treated, and argued about, as a condition of the charter-party, then for reasons which I am not going to repeat it appears to me that it is impossible to discriminate between the words in *Hamilton* v. *Mackie* (*ubi sup.*) and the words in the present contract. That authority is binding upon us, and we need not go further.

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

Solicitors for the respondents, *Botterell* and *Roche*, agents for *Vaughan* and *Roche*, Cardiff.

Nov. 2 *and* 17, 1910.

(Before Lord Alverstone, C.J., Buckley and Kennedy, L.JJ., and Assessors.)

The Hazelmere. (*a*)

Collision—Duty of steam vessel approaching harbour entrance—Duty of steam vessel leaving harbour entrance—Applicability of collision regulations—Crossing rule—Collision Regulations 1897, *arts.* 21, 23, 27.

Where a vessel was proceeding across Barry Dock entrance at such a distance as seriously to impede the exit of a vessel coming out, and instead of keeping her course and speed reversed her engines so as practically to seal the exit for outward going vessels, the Court of Appeal (Lord Alverstone, C.J. and Kennedy, L.J., Buckley, L.J. dissenting) held that a vessel coming out of the dock entrance was justified in not obeying art. 23 *and in not reversing earlier than she did, owing to the nature of the locality in which she was navigating and to the special circumstances, and having regard to the terms of art.* 27.

Quære, *whether the Collision Regulations apply to a vessel leaving Barry Dock in such circumstances.*

Appeal from a decision of Bargrave Deane, J. by which he found the steam vessel *Refugio* alone to blame for a collision which occurred between that vessel and the steam vessel *Hazelmere* about 5.45 a.m. on the 28th May 1910 off the western breakwater at the entrance of Barry Harbour.

The case made by the appellants (plaintiffs in the court below) was that shortly before 5.45 a.m. on the 28th May 1910 the *Refugio*, a steel screw steamship of 2642 tons gross and 1678 tons net register, manned by a crew of twenty-two hands all told, had arrived from Rotterdam in Barry Roads, Bristol Channel, where she was to receive orders for a port of loading. The wind was about W.N.W. a light breeze, the weather was fine and clear, and the tide half-flood of the force of about two knots. The *Refugio*, in water ballast and in charge of a duly licensed Bristol Channel pilot, after passing the signal station on Nells Point, steered E. by N. ½ N. along the land, and three or four times sounded a long blast on her whistle to attract the attention of the boatmen by whom it was expected orders would be sent her. A good look-out was being kept on board her.

In these circumstances and when drawing up towards the Barry Dock entrance those on board the *Refugio* observed over the western breakwater and distant about a third of a mile the masts and funnel of the *Hazelmere* which bore about five points on the port bow. The *Refugio* was kept on her course until the *Hazelmere*, as she was passing out of the entrance between the breakwater, sounded two short blasts, and was seen to be acting as if under starboard helm, thereby causing danger of collision. The helm of the *Refugio* was thereupon put hard-a-port, one short blast was sounded on her whistle, and her engines were put full speed astern as the best means of avoiding collision. The *Hazelmere*, which repeated her signal of two short blasts, was then seen suddenly to swing to starboard as if under hard-a-port helm. The engines of the *Refugio* were immediately put full speed ahead and her helm hard-a-starboard in the hope of throwing her quarter clear and as the best means of reducing the

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

blow; but the *Hazelmere*, although loudly hailed to go astern, came on at great speed, and with her stem struck the port side of the *Refugio* just abaft amidships, doing her serious damage.

Those on the *Refugio* charged those on the *Hazelmere* with not keeping a good look-out; with neglecting to pass port to port; with neglecting to keep out of the way; with attempting to cross ahead of the *Refugio;* with not easing, stopping, or reversing their engines; with improperly starboarding; with afterwards improperly porting; with neglecting to keep on her starboard-hand side of the channel; and with neglecting to sound whistle signals.

The case made by the respondents (defendants and counter-claimants in the court below) was that shortly before 5.50 a.m. on the 28th May 1910 the *Hazelmere*, an iron steamship of 722 tons net register, manned by a crew of sixteen hands all told, was proceeding in the course of a voyage from Barry Dock to Birkenhead laden with a cargo of coal. The wind was light, variable, the weather fine and clear, and the tide flood of the force of about three to four knots. The *Hazelmere* was on a course out from Lady Windsor Lock, Barry, to go out of the entrance making about three to four knots. A good look-out was being kept on board her.

In these circumstances those on board the *Hazelmere* observed the masts and funnel of the *Refugio* over the breakwater about three cables distant and about three or four points on the starboard bow. The *Hazelmere* had already given a long warning blast when coming through the lock, which she repeated when the *Refugio's* masts and funnel were seen. The *Hazelmere* was proceeding out in the usual way, and, as soon as she was able to do so without danger from the breakwater, her helm was put hard-a-port, and one short blast was sounded on her whistle, and afterwards her engines were reversed full speed astern, but the *Refugio*, instead of keeping her course and speed and not obstructing the entrance, kept in the way and with her port side struck the stem and port bow of the *Hazelmere*, doing damage.

Those on the *Hazelmere* charged those on the *Refugio* with not keeping a good look-out; with failing to keep their course and speed; with failing to keep clear of the entrance; with failing to indicate their course by whistle signal; with failing to keep to the starboard-hand side of the channel; and with failing to ease, stop, and reverse their engines; and counter-claimed for the damage they had sustained.

The following Collision Regulations 1897 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.

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.

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.

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.

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.

28. 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 :—

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, "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.

The action was heard in the court below on the 27th and 28th July 1910, when the following judgment was delivered :—

BARGRAVE DEANE, J.—This is a collision between the *Refugio* and the *Hazelmere*, which took place on the 28th May in the early morning—broad daylight—just outside the entrance to Barry Docks, and the question in this case is, Did the *Hazelmere* blow two short blasts while she was within the breakwater, and a second time just as she came out? With regard to that, I do not like to say anything offensive to anybody, but I have sworn evidence on the one side by a great many witnesses that this two-blast signal was so made twice, and was heard, and that the vessel was seen to alter her course to port, indicating that her helm had been starboarded. On the other hand, I am told by various witnesses that no such two-blast signals were made, and that the vessel did not alter her course to port. What am I to do in a case where witnesses come—somewhat of equal degree, mostly pilots—and swear the direct opposite? Strange to say, two men come, on opposite sides, who were standing alongside each other in the same spot, and the one swears one thing and the other swears the other. What I propose to do is to discard their evidence altogether, and say I am not at all satisfied that those two blasts were blown. It is said that, whether the two blasts were blown or not, the *Hazelmere* did alter her course to port, or her head went off to port. I have asked the Elder Brethren about this, and they tell me that, as she proceeded out of the entrance of these docks and caught the tide on the starboard bow, her head might temporarily be carried off to port, not necessarily under starboard helm. The fault of this collision, I think, rests with the *Refugio*. She had no right

to be so close in, as I find she was, to the entrance of this dock so as to obstruct it. In my belief, she was a great deal too close. She had come in so close because she wanted to get in touch with people on shore to get her orders. Instead of doing what she ought to have done, turned round and anchored a reasonable distance off, she kept in as close as she could, and in that way obstructed the entrance to the dock. I think, apart from that, she was a vessel which was crossing another one, and the other vessel had her on her starboard hand, and therefore it was the duty of the *Refugio* to keep her course and speed. Instead of that, she reversed her engines, and reversed them right in the path which she ought and reasonably might have known that the other vessel was going to take. Having dealt with the question of the two-blast signal, and the starboarding of the helm, of the *Hazelmere* in her favour, I do not see in what other way the *Hazelmere* can be found to blame. Therefore I find the *Refugio* was alone to blame.

On the 9th Sept. the owners of the *Refugio* delivered a notice of appeal praying that the decision might be reversed and that the *Hazelmere* might be found alone to blame.

The appeal was heard on the 2nd Nov. 1910.

Laing, K.C. and *H. C. S. Dumas* for the appellants.—The collision regulations apply. The *Hazelmere* was bound to keep out of the way. The excuse that the breakwater prevented her from doing so is an idle one. She could and ought to have reversed earlier. The look-out on the *Hazelmere* was defective. Even if the collision regulations do not apply, the *Hazelmere* is to blame, for those on board her saw the *Refugio* in time to avoid her if they had taken the proper steps. The *Refugio* could not keep her course and speed. Up to the last moment she was bound to do something to lessen the blow, and to reverse was the only thing to be done.

Aspinall, K.C. and *A. D. Bateson* for the respondents. — The master of the *Hazelmere* proved that the breakwater hid the *Refugio* from view and created a difficulty as to the look-out. [Buckley, L.J.—Ought you not to have proceeded in such a way that you could stop when you did see her?] The officer can only be asked to do what is reasonable. The *Refugio* was only about 350ft. off when those on the *Hazelmere* first saw her. They were confronted with a difficulty, and the fact that they did not do the best thing ought not to be unduly pressed against them. [Lord Alverstone, C.J.—That is apart from the statutory rules.] Even if the rules apply, if it is dangerous to stop and reverse, the *Hazelmere* is not bound to do it. Reversing sooner than she did would have put her on the breakwater:

The Ceto, 62 L. T. Rep. 1; 6 Asp. Mar. Law Cas. 479 (1889); 14 App. Cas. 670.

The breakwater is a circumstance which brings art. 27 into operation. The duty of those on the *Hazelmere* was to port, and that they did.

Laing, K.C. in reply.—The evidence shows that those on the *Hazelmere* thought that the *Refugio* was bound up channel; if that was so, they should have waited to let her pass.

Lord Alverstone, C.J.—This is an appeal from the decision of Bargrave Deane, J. in regard to a collision which occurred outside the Barry Dock entrance between the vessels *Refugio* and *Hazelmere*. The learned judge found the *Refugio* alone to blame. Though there was considerable conflict on material points, the main facts were not in dispute. The *Refugio*, bound to Barry Roads, Bristol Channel, for orders, was at about 5.45 on the morning of the 28th May steaming up channel, expecting to receive orders from the signal station at Nells Point. Not having received such orders, she proceeded onwards in an easterly direction across the entrance to the Barry Docks, expecting a boat to come off. Her distance from the entrance was a point in dispute, the owners of the *Refugio* alleging that she was at a distance of some 600 yards from the dock entrance, and the owners of the *Hazelmere* that she was at a distance of some 300ft. The learned judge has found, and, for reasons which I will presently state, I concur in that finding, that the *Refugio* was very close to the dock entrance, whether so close as 300ft. it is not necessary to consider, but certainly at such a distance as seriously to impede the exit from the dock entrance of a vessel coming out as she was passing. The case for the *Refugio* was that as she was off the west pier of the dock entrance she saw the *Hazelmere* coming out, that the *Hazelmere* gave two signals indicating that she was starboarding, and that the stem of the *Hazelmere* canted to port as though under a starboard helm. The tide at the time was flood, running to the eastward, the force being variously stated at from two to three to four knots. Those on board the *Refugio* stated that on hearing the starboard-helm signal from the *Hazelmere*, and observing her to be apparently acting under a starboard helm, the helm of the *Refugio* was put hard-a-port and her engines put full speed astern, in order to give the *Hazelmere* more room to go to the eastward. The evidence on behalf of the *Refugio* failed to satisfy the judge that any starboard-helm signals were given from the *Hazelmere*. It was admitted on behalf of the appellants that they could not dispute this finding, and therefore the case was argued before us upon the admission that no starboard-helm signals were given from the *Hazelmere*, and that she did not in fact starboard, and that the slight alteration of her head to port, if any, was due to the bows of the ship taking the flood tide. The case for the *Hazelmere* was that they observed the masts and funnel of the *Refugio* over the breakwater about three cables distant and about three or four points on the starboard bow; that they had given warning blasts as they came through the dock entrance; that the *Hazelmere* put her helm a-port as soon as she could safely do so and blew one short blast, but that the *Refugio*, instead of keeping her course and speed and not obtructing the entrance kept in the way by which alone the *Hazelmere* could pass out. Upon these facts the learned judge has condemned the *Refugio* on two grounds —first, that she had no right to be so close in to the entrance of the dock as to obstruct it; secondly, that she improperly neglected to keep her course and speed by reversing her engines in the path which she ought and reasonably might have known the *Hazelmere* was going to take. On the first point I entirely concur in the finding of the learned judge, that the *Refugio* was a great deal too close in, so close as to obstruct

the exit from the dock. Whether she was as near as a ship's length it is not material to inquire, but I am satisfied that had the *Refugio* been anything like a cable and a half or two cables' lengths out, the *Hazelmere* under her port helm would have passed down to the northward of the *Refugio*, and there would have been no collision or risk of collision.

Upon the above statement of facts and the finding of the learned judge, it is quite clear that the *Refugio* was to blame. Assuming the crossing rule to apply, her duty was to keep her course, and she ought to have known that the duty of the *Hazelmere* was to port and pass under her stern, and therefore her manœuvre in reversing so as to check her way in front of the entrance and remain to the westward of the western breakwater was clearly wrong. The difficult question which arises, however, is whether or not the *Hazelmere* is not also to blame, and it was alleged on behalf of the appellants that she was to blame for not keeping a proper look-out, and for not stopping and reversing when she became aware of the position of the *Refugio* on her starboard bow. When coming out of the dock entrance on the flood tide the only proper course of the *Hazelmere* would be to port so as to put her head on tide. That this was her duty and expected by those on board the *Refugio* is clear from the evidence. The learned judge has found, as I have said, that the *Refugio* did come in as close as she could, and was obstructing the dock entrance. It must be taken that those on board the *Hazelmere* knew that there was a steamer outside bound east, but I see no reason to think that they could tell that she had come in so close to the dock entrance between the time when she was first seen and the time when the *Hazelmere* could clear the piers of the breakwater. Under these circumstances, assuming the crossing rule to apply, I think it clearly is a case which comes within art. 27, which is: "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." It was contended for the appellants that on seeing the *Refugio*, or at least on seeing that she was reversing—though it is to be observed that no reversing signal was given—the *Hazelmere* ought to have reversed her engines. If, as the judge has found on the evidence, the *Refugio* was quite close in and obstructing the dock entrance, I am by no means satisfied that the *Hazelmere* could safely have reversed her engines at any time which would have affected either the collision or the character of the collision. The entrance is very narrow, the water comparatively shallow, and immediately to the eastward of the dock entrance there is a projecting shoal and spit of land which might place the *Hazelmere* in a great danger. Moreover, it is a dock entrance, and had she grounded near there the consequences might have been most serious to any vessels going out. It was said on behalf of the appellants that the reasons for not reversing which occur to me were not suggested in the evidence given at the trial, and this is to a certain extent true. It seems to me that it is to be accounted for by the fact that the case really set up by the *Refugio* and maintained until the trial was that she was misled by the starboard-helm signals of the *Hazelmere* and that the *Hazelmere* was to blame for acting contrary to those signals. The only reference I can find in the whole record as to the stopping and reversing of the *Hazelmere* is in her captain's evidence-in-chief (p. 53, question 975): "And how were your engines working at the time of the collision? Slow ahead right up until the collision occurred—almost immediately before the collision occurred I rang full speed astern.—Why did not you go astern before? It would put me on the breakwater." There was no cross-examination of this witness, nor as far as I can find did any witness in the case state that the *Hazelmere* could safely have reversed, so as to keep clear of the *Refugio*. No doubt at the last and just before the collision she did reverse, but reversing at that time does not to my mind show that she could safely have reversed earlier. We are advised by our assessors that the *Hazelmere* could only have reversed a very little earlier than she did. The captain of the *Hazelmere's* answer on the point seems to have been accepted by those representing the *Refugio*, and I have no doubt this view was taken by the judge and by the Elder Brethren who advised him. For these reasons, in my opinion, the appeal should be dismissed. In the foregoing judgment I have not considered the question whether the Regulations for Preventing Collisions at Sea apply. In the view I take of this case it is not necessary to consider this point, but I think it right to say that I express no opinion on this question as to how far they do apply in the case of a vessel coming out of dock under circumstances similar to those under which the *Hazelmere* was placed.

Buckley, L.J.—I say nothing as to the *Refugio*. The learned judge found her to blame, and we have heard no argument to the contrary. As to the *Hazelmere*, the first and vital question is as to the distance outside the breakwater at which the *Refugio* was when the *Hazelmere* came out. Upon this the learned judge has left me without any finding of fact. He has found only that the *Refugio* had no right to be so close in as she was, and that she was a great deal too close, but what those expressions exactly are intended to convey I do not know. Upon this question I must therefore, upon the evidence, form my own conclusions of fact. The minimum and maximum distances are put at 300ft. and 600 yards respectively. The former is put forward by the defendants, the latter by the plaintiffs. In my judgment the plaintiffs are the more near to the truth. Upon the defendants' own evidence the *Hazelmere* turned under her port helm from four to six points while the action of the tide was such as to be a resistance to her turning in that direction. Nevertheless she had time to turn, and did turn at least four to six points. Her speed was slow ahead, and is put by the defendants at about two or three knots. The distance must have been such as that she had time to make that deflection under the action of her helm. The *Refugio* must, I think, have been at a distance of at least two cables from the end of the breakwater. The evidence of the chief officer of the *Hazelmere* supports this view. He says that when he shouted the *Refugio* was not ahead of the *Hazelmere*; that when he shouted the *Hazelmere* was nearly clear of the breakwater; and that he thought there was going to be a collision; and that three minutes elapsed after he had seen the

Refugio before the collision occurred. Putting the speed of the *Hazelmere* as before at three knots, this would give about 300 yards, or a cable and a half. At her speed the *Hazelmere* had, if this last evidence is right, three minutes, and if two cables' lengths is right, about four minutes, during which she maintained her speed and helm. The *Refugio* was coming astern, and the *Hazelmere*, in fact, by maintaining her helm and speed brought herself into collision with the *Refugio*, which was coming astern to meet her. The relative position of the vessels was such that the *Hazelmere* was under the rules bound to keep out of the way of the *Refugio* and the *Refugio* was bound under the rules to keep her course and speed. Accepting all the defendants' evidence as to the extent to which the *Hazelmere* had previously seen and had been prevented from seeing the *Refugio*, the facts on the defendants' evidence are that the *Hazelmere*, on clearing the breakwater, saw the *Refugio* with headway on her, but with her propeller stopped, and saw that she immediately began to reverse. The *Refugio* did not blow the proper three blasts, but the *Hazelmere* saw her propeller and saw her reversing.

The point of the case, I think, is what was, under these circumstances, the duty of the *Hazelmere*. What she did was to put her helm hard-a-port and to continue her engines at the same rate at which they were running right up to the time when the collision occurred. She did not stop, she did not reverse, and this notwithstanding that she knew that the *Refugio* (wrongly, I will assume) was reversing, so as to bring herself directly into the point of danger if the *Hazelmere* maintained her helm and maintained her speed. The *Hazelmere* was the vessel which, under art. 23, was bound to keep out of the way, and was bound, if necessary, to slacken her speed or stop or reverse. She was not, I think, relieved from the duty of obeying the last part of this rule because the *Refugio* was breaking another rule. But then it is said that the *Hazelmere*, had she reversed her engines, would have put herself into danger in this narrow gut and might have driven ashore. Her master (p. 53, question 976) says that he did not go astern at an earlier moment "because it would have put him on the breakwater." By this I think he means the breakwater on his starboard side, the western breakwater. I do not follow how this could have been so, as a matter of fact. His course was such and the position of the western breakwater and of the eastern shore was such that if by reversing he would have gone ashore at all, it would have been on the eastern shore. There is no suggestion that that would have happened. Moreover, the *Hazelmere* did at a later moment in fact reverse and no evil consequence ensued. Further, apart from reversing, the *Hazelmere* did not even stop her engines, but went on at the same speed right up until the collision occured. So far as I see, upon the evidence, she could certainly have stopped without danger, and had she stopped the sternway of the *Refugio* might have carried her out of the dangerous position. The result of these considerations is to arrive at the conclusion that the *Hazelmere* was also to blame. I prefer to rest my decision upon these grounds, although I think there is substantial reason for saying that the *Hazelmere* was not keeping a proper look-out. I think the order under appeal should be varied by finding both vessels to blame.

KENNEDY, L.J.—The appellants' counsel in this case accept so much of the judgment of Bargrave Deane, J. as pronounces that the *Refugio* was to blame both for faulty navigation in coming in too close to the entrance of the Barry Docks, and in not keeping her course and speed as she ought to have done in compliance with the regulations for the prevention of collisions at sea; and they accept also the adverse finding of the court, upon the main issue at the trial, that the *Hazelmere* did not give a two-blast helm signal, and did not starboard her helm as she was leaving the entrance. But they have argued before us that the *Hazelmere* ought also to be held partly responsible for the collision on the ground that a proper look-out was not kept on board of her, and that she did not stop and reverse earlier than she did. The learned judge in the court below has not dealt specifically with either of these two points. After considering particularly the question of the alleged two-blast signal and starboard helm, he has, in regard to all other charges against the *Hazelmere*, exonerated her from blame in general terms. I have come to the conclusion that the appellants have not proved that he was wrong; but I regret that this court has not the advantage of any explicit statement by the court which heard the oral evidence of the considerations which moved it to acquit the *Hazelmere* of blame in respect of the two charges upon which the appellants now rely. In regard to the first of these two charges —an insufficient look-out—I do not feel much difficulty, after carefully considering the notes of the evidence. I do not feel myself justified in holding that those on board the *Hazelmere* must, if they had kept a proper look-out, have realised the close proximity of the *Refugio* to the entrance before they did, which was, as I understand, the evidence of the master of the *Hazelmere*, only when the *Hazelmere* was very nearly between the eastern and western breakwaters. The *Hazelmere* was not a large vessel, she was loaded, and the height of the long western breakwater lay between her and the *Refugio* as she came down under it along the lock or channel from the Barry Dock. All that could be seen from the deck was the upper part of the masts and funnel of the *Refugio* in a westerly direction; and this afforded no clear indication of the close proximity of the *Refugio* to the line of the entrance. And one must not forget that those on board the *Hazelmere* might reasonably suppose that those in charge of the *Refugio* would not be guilty of such gross negligence as to navigate that vessel so as practically to seal the exit for outward-going vessels.

The second point made by the appellants, viz., the admitted action of the *Hazelmere* in holding on, after the position of the *Refugio* was ascertained, at slow speed, and neither stopping nor reversing until almost at the moment of collision, appears to me a much more serious matter. Obedience to art. 23 has ever been held to be of the utmost importance. But, of course, in a particular case there may be present special circumstances which excuse, or even necessitate, different action. Art. 27 provides for such cases. Here, as it appears to me, everything

depends upon the two connected facts, the distance of the *Refugio* from the dock entrance and the existence of a danger to the *Hazelmere* of getting aground or coming into collision with the breakwater if she had stopped or reversed before the time when her master gave the order just before the collision occurred. The defendants' witnesses put the *Refugio* at the distance of only some 300ft. from the entrance. The witnesses for the *Refugio* put her two and a half to three cables off the entrance. That the distance was greatly overstated by the witnesses for the defendants I feel no doubt. It seems to me that the collision, in those circumstances, could not have occurred as it did. But if the distance of the *Refugio* was anything like two cables, so that the *Hazelmere* had space after getting well clear of the breakwater, under her port helm, without risk to herself, to take off her way by stopping, or by stopping and reversing before the collision, I should have felt quite considerable difficulty in holding that she was not to blame for not duly observing art. 23. I thought at one time that the fact that, on the evidence of her own witnesses, she had altered four or five or possibly even six points, under her port helm before the collision, pointed in this direction. But it is to be remembered against such an inference that she did not come out into still water, but into a three-knot tide, running eastward, which might have an effect in making her head cant under the port helm in a smaller circle than it would otherwise have done. And against the view that there was any but a very short distance between the *Refugio* and the breakwater is the fact—to which I think, on the hearing of an appeal, very great weight indeed is to be attached—that the court which heard the evidence on both sides, on the most important issue in the case, viz., the alleged starboarding of the *Hazelmere*, was unable to accept the evidence called upon the part of the plaintiffs; and, further, expressly found that the *Refugio* was a great deal too close to the dock entrance—so close as to obstruct it. I can interpret this last finding only as meaning that the distance of the *Refugio* if not one of only 300ft. from the dock entrance (as the defendants' witnesses deposed) was at least very much nearer that position than the distance of two and a half cables; so much nearer that it might well be that, as the master of the *Hazelmere* deposed in cross-examination, he could not safely move the engines astern before he did, because if he had done so, he would have put his ship on the breakwater. If this evidence is true, I think with the Lord Chief Justice that art. 27 applies to exonerate the *Hazelmere* from blame. And I agree with the Lord Chief Justice that it is noteworthy that no attempt appears to have been made by the plaintiffs' counsel to sift or challenge this answer either by cross-examination of the deponent upon it or in the cross-examination of other witnesses for the defendants. Stopping, without reversing, was never even suggested in cross-examination either to the master of the *Hazelmere* or to any other of the defendants' witnesses. The master's answer, had he been asked this question, would doubtless have been the same as that to the question as to reversing. In the court below the learned judge said: "Having dealt with the two-blast signal and the starboarding of the helm, I do not see in what other way the *Hazelmere* can be found to blame." I can only suppose that in the peculiar circumstances of this case—and especially the narrowness of the entrance—the neighbourhood of the breakwater and the eastward setting tide, and the closeness of the *Refugio*, the court which heard the evidence was satisfied that no blame, either in respect of seamanship or as a breach of art. 23, could justly be imputed to the *Hazelmere* in not stopping and reversing earlier than she did. The appellants have not persuaded me that this was an erroneous conclusion, and I think that this appeal must be dismissed.

Solicitors: for the appellants, *Thomas Cooper and Co.*; for the respondents, *W. A. Crump and Son*, agents for *Gilbert Robertson*, Cardiff.

Nov. 10, 11, *and Dec.* 3, 1910.

(Before COZENS-HARDY, M.R., FLETCHER MOULTON and FARWELL, L.JJ.)

BRANDY *v.* OWNERS OF THE STEAMSHIP RAPHAEL. (*a*)

APPEAL UNDER THE WORKMEN'S COMPENSATION ACT 1906.

Employer and workman—Compensation—Amount—Concurrent contracts of service—Stoker—Merchant service—Member of Royal Naval Reserve—Annual retainer—Workmen's Compensation Act 1906 (6 *Edw.* 7, *c.* 58), *s.* 9, *sched.* 1, *par.* 2 (*b*).

A stoker on board a merchant steamship, who was also a stoker in the Royal Naval Reserve, was injured by accident arising out of and in the course of his employment on the merchant ship which disabled him from continuing in the Reserve.

Held (*Farwell, L.J. dissenting*), *that his service under the Crown was a concurrent contract of service with that with the owners of the merchant ship within par.* 2 (*b*) *of sched.* 1 *of the Workmen's Compensation Act* 1906, *and the amount of the retaining fee of 6l. a year paid to him by the Crown as a member of the Royal Naval Reserve being "earnings" under a concurrent contract of service must be taken into account in assessing the amount of compensation payable by the owners of the merchant ship.*

The only effect of sect. 9 *of the Act is to protect the Crown and not persons other than the Crown from claims under the Act.*

APPEAL by employers from a decision of the Liverpool County Court judge sitting as arbitrator under the Workmen's Compensation Act 1906.

The applicant was a stoker in the merchant service, and was also enrolled in the Royal Naval Reserve.

A man cannot be enrolled in the Royal Naval Reserve as a stoker unless he produces evidence of his employment at sea in a capacity not lower than fireman, and makes a declaration of his intention to follow the sea for at least five years, or unless he furnishes evidence of his ability as a fireman ashore and makes a similar declaration. One of the obligations is to undergo certain training afloat. When afloat, under training, he is entitled to certain pay per day and other allow-

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

ances, and he is also entitled to a retainer of 6*l.* a year.

Brandy met with an accident on board the steamship *Raphael* which resulted in the amputation of two fingers. This disabled him from continuing to serve in the Royal Naval Reserve. He consequently lost the retaining fee of 6*l.*, and he claimed, as against the shipowners, that half the amount he received as a member of the Royal Naval Reserve, which may be taken as 2*s.* 4*d.* per week, should be added to half his weekly earnings from the shipowners. The learned County Court judge held that this contention was correct and made an award in his favour.

R. S. Segar for the employers.—The service under the Crown is not "a concurrent contract of service" within the meaning of par. 2 (*b*) of sched. 1. The retainer of 6*l.* is not "earnings" within the Act. Earnings which arise without any contract of service are not to be taken into account. Then sect. 9 of the Act takes the service under the Crown out of the Act, and anything received by the applicant in respect of such service cannot be taken into account. As to this naval pay, there is neither "workman" nor 'employer" within the Act:

Dewhurst v. *Mather*, 29 C. C. C. Rep. 46; 99 L. T. Rep. 568; (1908) 2 K. B. 754;
Perry v. *Wright*, 28 C. C. C. Rep. 351; 98 L. T. Rep. 327, 330; (1908) 1 K. B. 441;
Simmons v. *Heath Laundry Company*, 29 C. C. C. Rep. 432; 102 L. T. Rep. 210; (1910) 1 K. B. 543;
Gough v. *Crawshay*, 28 C. C. C. Rep. 359; 98 L. T. Rep. 334; (1908) 1 K. B. 441;
Workmen's Compensation Act 1906, s. 13, "Employer" and "Workman."

Stewart-Brown and *H. H. Harding* for the applicant.—The 6*l.* a year is a part of the remuneration this man received for a part of his employment. There are "concurrent contracts" within sched. 1, par. 2 (*b*). Besides, the money received from the Crown is taken into account by the civil employers when fixing the wages to be paid by them, as well as the fact that he may be called away suddenly. The object of sect. 9 is only to prevent the Crown being liable under this Act if an accident takes place while the man is on duty under the Crown. It does not affect his rights under the Act while in civil employ:

Penn v. *Spiers and Pond*, 28 C. C. C. Rep. 365; 98 L. T. Rep. 541; (1908) 1 K. B. 766;
Hathaway v. *Argus Printing Company*, 25 C. C. C. Rep. 25; 83 L. T. Rep. 465; (1901) 1 Q. B. 96.

Segar in reply.

Cur. adv. vult.

Dec. 3.—Cozens-Hardy, M.R.—This appeal raises an important question as to the compensation payable under the Workmen's Compensation Act to a stoker on a merchant vessel who is also a Royal Naval Reserve stoker. The facts may be shortly stated. [His Lordship then stated the facts substantially as set out above, and continued:] The case may be looked at in two ways. It is contended that there are "concurrent contracts of service" with two employers within the meaning of sect. 2 (*b*) of the 1st schedule, and, alternatively, that the money received from the Government is an element which the shipowners must have taken into account in fixing his wages, and that this sum was incidental to his employment as a stoker on board the *Raphael*. As to the first point, apart from sect. 9, I think there were concurrent contracts of service. Brandy's contract was that in consideration of the payment of 6*l.* a year he would continue as a stoker and keep himself fit to serve in the Fleet whenever called upon so to do by proclamation, and would also undergo certain training. It is no doubt true that at the moment of the accident he was not in actual service with the Fleet. Nevertheless, I think there was a subsisting contract of service under which the Admiralty had a right to require him to leave the *Raphael*. But then it is said that this is not so, because, by sect. 9, the Act does not apply to persons in the naval or military services of the Crown, and, that being so, his contract with the Admiralty must for all purposes be disregarded, with the result that there are not two concurrent contracts. I have felt, and still feel, considerable doubt on this point. The words cannot be read literally, so as to exclude Brandy from all right under the Act against the respondents because he is in the naval service of the Crown. This has not been contended. Some narrower construction must be adopted. Upon the whole, I think the object and effect of sect. 9 was only to exempt the Crown from being rendered liable under the Act, a separate provision being contemplated as applicable to soldiers and sailors in sect. 9, sub-sect. 2. In other words, though Brandy cannot claim compensation against the Crown, it does not follow that we ought not to have regard to the undoubted fact that he is receiving money from the Crown under the contract of service. The consequences of the opposite view are startling. In the common case of a workman who has a contract with employer A., and has accepted a scheme under sect. 3, and has also an ordinary contract of service with employer B., it is plain that the workman cannot claim compensation under the Act against A., but can claim against B. And I hesitate to say that the workman's rights against B. are reduced by reason of the scheme. Similar observations would apply to a casual labourer employed by A. for his private purposes and by B. for the purposes of his trade or business. There is nothing in par. 2 (*b*) which necessarily involves liability on the part of both employers. No right is given to one of them to claim contribution from the other. On the second point I think the argument on the part of the workman is economically and theoretically sound. A stoker who is liable to be summoned from the ship is not likely to get the same wages as a stoker who is not subject to this liability. The receipt of the 6*l.* must be taken to be known by the shipowner. It is a sum earned by reason of his employment on the ship, and I think the analogy of *Penn* v. *Spiers and Pond* (*ubi sup.*) is close. The result is that, in my opinion, the County Court judge was right in the view which he took, and that this appeal must be dismissed

Fletcher Moulton, L.J.—The point in this case is a very interesting one. The applicant was a stoker and a member of the Royal Naval Reserve. Under the provisions of the Acts and regulations which govern the Royal Naval Reserve, the firemen are expected to keep themselves in active employment in the mercantile marine, but nevertheless are subject at any moment to be called out for active service. They also have to undergo a certain period of training in every other

year for which they are specially paid at fixed rates. For this claim upon their services they receive an annual payment or retainer of 6*l.* per year, or about 2*s.* 4*d.* a week. There is no dispute about the accident or the liability, but, in estimating the average weekly earnings of the man, the learned County Court judge has taken into consideration this 2*s.* 4*d.* a week as being earnings under a concurrent contract of service. From this decision the respondents have appealed, and they contend that it ought to be entirely excluded from consideration in estimating the compensation to be given. The points raised are two in number. In the first place it is said that the 2*s.* 4*d.* is not earnings, and in the second place it is said that it is expressly excluded by sect. 9, sub-sect. 1, of the Act, which reads as follows: "This Act shall not apply to persons in the naval or military service of the Crown, but otherwise shall apply to workmen employed by or under the Crown to whom this Act would apply if the employer were a private person." With regard to the first point, I fail entirely to understand the grounds on which it is suggested that these are not earnings. They are payments under a definite contract of service which includes not only actual service during a certain period of the year (when, of course, the payment is at a different rate), but also the liability to be called upon to perform actual service at any other period. This contract of service lasts throughout the year, and to my mind the payment is typically in respect of a concurrent contract of service. The remuneration under it ought therefore to be taken into consideration in estimating the average weekly earnings of the applicant.

The second point is a more difficult one and raises a question not unlike that which this court has had to consider in the case of *Skailes* v. *Blue Anchor Line* (103 L. T. Rep. 741). The language of sect. 9, sub-sect. 1, appears at first sight to create a personal disqualification in all persons in the naval and military service of the Crown so that as individuals they are excluded from claiming the benefit of the Act. But, as in the other case, a closer examination convinces me that this is not the true meaning of the provision. If we so construe it we should be obliged to go to greater lengths than even the appellants venture to contend for, and we should have to hold that a seaman who is employed in the naval reserve and is expected to keep himself in work in the mercantile marine so as to be fitted for active service at any moment would be precluded from claiming against his employers in the mercantile marine because he was personally disqualified by sect. 9, sub-sect. 1. This is clearly an impossible interpretation, and therefore, to my mind, there is no alternative except to take it that this provision deals solely with the rights under the contract of service with the Crown. It precludes the fireman from making claims against the Crown, but is not intended to deal with, and does not deal with, the rights of other parties with whom he may have made contracts of service. In short, its object is in nowise to protect or shield from claims persons other than the Crown. This being so, the claim is rightly made, and the only question is whether the contract of service with the Crown comes within the provision as to concurrent contracts which is found in sched. 1, par. 2 (*b*), which relates to concurrent contracts of service. Now, there is nothing whatever in the Act to say that a contract of service with the Crown is not a contract of service. It is perfectly true that the employer is in such case shielded from claims under such contract of service, but that is in these contracts the personal privilege of the Crown, and does not arise from the contract with the Crown being declared by the Act not to be a contract of service at all. The language of sched. 1, par. 2 (*b*), is perfectly general. The contracts of service therein referred to are not restricted to contracts of service under which the employer is liable to claims under the Act. Not only is this true with regard to the language of the section, but it is also necessitated by the evident aim and object of the section. It is intended to enable the tribunal to arrive at a proper estimate of the average weekly earnings of the workman for the purpose of measuring the compensation under a contract of service under which an employer is liable. Now, assume that a workman is working under two concurrent contracts of service, A and B, and that with respect to B he has contracted out under a scheme in accordance with sect. 3, whereby the benefits in case of accident are decided by some other tribunal or according to some other scale than that which is provided by the Act. This fact protects the employer under contract B, but, inasmuch as it does not preven B being a contract of service, and does not affect in any way the earnings of the workman thereunder, how can we suppose that the existence of such a scheme prevents contract B being a concurrent contract of service, the earnings under which are to be taken into consideration under the provisions of sched. 1, par. 2 (*b*)? The same must be true of a contract with the Crown, such as that before us. To my mind, both the Crown and the employers of the fireman in the mercantile marine are precisely in the same position as if there existed for firemen in the service of the Crown a scheme under sect. 3. I am therefore of opinion that the learned judge was right in taking into consideration the payment which the seaman received in virtue of his being a member of the Naval Reserve, and that this appeal must be dismissed.

Farwell, L.J.—I regret that I am unable to agree with my brethren in this case. I am of opinion that the effect of sect. 9 is to exclude the Crown and persons in the naval or military services of the Crown from the operation of the Act, and that sect. 13 must accordingly be read as if the words "other than the Crown" were written into the definition of "employer," and the words "other than persons in the naval or military services of the Crown" were written into the definition of "workman." Turning next to sched. 1, par. 2, it seems obvious to me that the "workman" and "employer" therein mentioned are the only workmen or employers to whom the Act applies, and that clause (*b*) cannot be read so as to give two different meanings to the words "employer" and "workman" according to the circumstance whether the accident happened while he was in the service of the Crown or of the employer. It is clear that if the accident happened while he was in the service of the Crown he would get no compensation under the Act at all,

because he is not a workman nor is the Crown an employer within the meaning of the Act. I fail to see how I can treat Crown and workman as within the Act when the workman is in the employment of another person. Two conditions have to be fulfilled before clause (*b*) has any application. If they are stated in two sentences instead of one, the matter becomes clear: "If a man being a workman within the Act has entered into a contract of service with an employer within the Act under which he worked at one time for such employer, and the same man being a workman within the Act has entered into another contract with an employer within the Act under which he worked at another time for such second employer, the two contracts being concurrent." Under these words no question arises, and I can see no ground on which the meaning of the words workman and employer can be varied in such a case so as to make employer include the Crown in one but not in the other, and workman include a man in the naval or military services of the Crown in one case but not in the other. (*a*)

Solicitors: *Botterell* and *Roche*, agents for *Weightman, Pedder*, and *Co.*, Liverpool; *Windybank, Samuell*, and *Lawrence*, agents for *Fox* and *Bradley*, Liverpool.

Dec. 6, 7, 8, *and* 20, 1910.

(Before COZENS-HARDY, M.R., FLETCHER MOULTON and FARWELL, L.JJ.)

KISH v. TAYLOR, SONS, AND CO. (*b*)

APPEAL FROM THE KING'S BENCH DIVISION.

Charter-party — Bills of lading — Unseaworthiness—Putting into port of refuge—"Deviation" — Effect of, on contract of carriage — Dead freight—Lien for—Unliquidated damages.

Deviation is a question of fact. Its justifiability is a mixed question of fact and law.

Where the necessity for deviation—even though reasonably necessary for the safety of ship and cargo—is due to the default of a shipowner in sending a ship to sea in an unseaworthy state, he is not entitled to enforce a lien for "dead freight" given to him by the bill of lading against the cargo owners.

The terms of a charter-party conferred upon shipowners a lien for dead freight, and by the bills of lading the cargo was made deliverable to the shippers' order or their assigns, "all other conditions as per charter-party."

The charterers failed to load a complete cargo, and the shipowners accordingly loaded other cargo at a lower rate of freight than that provided by the charter-party in order to minimise the loss.

At the time of sailing the ship was in fact unseaworthy by reason of an excessive quantity of cargo having been piled on deck, and, in consequence of such unseaworthiness, she was obliged to put into a port of refuge for repairs, after which she completed her voyage.

The shipowners claimed against the holders of the bills of lading for a lien on the cargo for loss sustained in consequence of the charterers' failure to load a complete cargo.

Held, that the deviation to a port of refuge was not justifiable, inasmuch as a shipowner could not be permitted to substitute by his own default a different voyage for that to which the exceptions in the bills of lading related, and yet hold the owners of the cargo bound by the conditions and exceptions thereof.

Strang Steel and Co. *v.* Scott and Co. (6 *Asp. Mar. Law Cas.* 419 (1889); 61 *L. T. Rep.* 597; 14 *App. Cas.* 601) *considered.*

Decision of Walton, J. (11 *Asp. Mar. Law Cas.* 421 (1910); 102 *L. T. Rep.* 910) *reversed.*

THE plaintiffs, who were the owners of the steamship *Wearside*, claimed as against the defendants, who were the holders of bills of lading dated the 23rd Jan 1908 for goods loaded in the *Wearside* for carriage to Liverpool, a declaration that they were entitled to a lien upon the cargo carried under the bills of lading and a charter-party dated the 18th Dec. 1907, for dead freight of the steamer, and for payment of dead freight.

The material clauses of the charter-party, which was in the "Pitch Pine" form, and made between the plaintiffs and the Mississippi Transportation Company were as follows:—

1. That the said steamship . . . shall with all convenient speed . . . sail and proceed to Mobile, Ala. Charterers also have the option of loading vessel at Pensacola, Pascagoula, or Gulfport, as per margin . . . and there load, always afloat, from the said charterers or their agents, a full and complete cargo of pitch pine sawn timber, and (or) deals and (or) battens and (or) boards and (or) scantlings at charterer's option. Deck load (if required by the master) to be supplied by the charterers at their risk and at full freight, to consist of hewn and (or) sawn pitch pine timber, and (or) deals and (or) battens and (or) boards and (or) scantlings at the shippers' option. . . . Charterers agree to furnish only such under-deck cargo as will go through the steamer's hatches. Charterers have option of shipping 750 loads hewn under-deck at 5*s.* extra per standard, not exceeding what she may reasonably stow and carry over and above her tackle, apparel, provisions, and furniture, and being so loaded shall therewith proceed to a direct port on Continent between Bordeaux and Hamburg, both inclusive, Rouen excepted. Charterers have also option of ordering vessel to discharge at two or three places as per reverse hereof or so near thereunto as she can safely get and deliver the same always afloat at any usual discharging place for such cargo, provided that if the charterers or their agents shall on the steamer's arrival at the port of discharge direct her to proceed to any ready available berth, wharf, dock, or place, where she can be always afloat she shall proceed thereto, and to deliver cargo there. Freight shall be paid as follows . . . 4*l.* 2*s.* 6*d.* per St. Petersburg standard hundred of 165 cubic feet. 6. 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, not accountable for splits or shakes, unless caused by careless or improper handling, freight, and all conditions, clauses, and exceptions as per this charter. 7. The Act of God, the King's enemies, restraints of princes and rulers, perils of the seas, jettison, fire, barratry of the master and crew, pirates, collisions, strandings, accidents, faults or errors in navigation or in the management of the said steamer, accidents to hull, and (or) machinery, and (or) boilers or latent defects therein, although existing at the time of shipment, and although occasioned by the faults or errors in judgment of the pilot, master, mariners, or

(*a*) *Semble, Archer* v. *Olympia Oil Cake Company* (130 L. T. Jour. 39) overruled.

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

other persons in navigation or in the management of the steamer, not resulting in any case from want of due diligence by the owner of the steamer, always mutually excepted. The steamer has liberty to call at any ports, in any order, including Newport News, Norfolk, and Sydney, Cape Breton, to coal, or for loading or discharging cargo . . . and to tow and to assist vessels in distress, and to deviate for the purpose of saving life and property. 13. The master or owner to have an absolute lien upon the cargo for all freight, dead freight, demurrage, and should the receiver require the cargo to be delivered overside, or at a place where the owners cannot exercise their lien then the approximate freight, &c., to be paid during delivery. 14. The vessel to be consigned to charterers or their agents at the port of loading, paying them 2½ per cent. commission on the estimated amount of freight. 15. Charterers or their agents to provide and pay a stevedore to do the stowing of the cargo under the supervision of the master, to supply dogs and chains (at their risk), pay wharfage, custom house, tonnage, quarantine dues (but not fumigating expenses or other special charges consequent on sickness of the crew), and consular fees for entrance and clearance, harbour master's fees, and pilotage in and out at the port of loading at four dollars fifty cents (4.50 dollars) per St. Petersburg standard of 165 cubic feet on the entire cargo on board at port of loading. 20. Charterers' responsibility under this charter shall cease as soon as the cargo is shipped and bills of lading signed, provided all the conditions called for in this charter have been fulfilled or provided for by bills of lading. 22. Any difference between charter-party and bills of lading freight to be settled at port of loading before vessel sails. If in vessel's favour to be paid in cash at current rates of exchange less insurance. If in charterers' favour by captain's bill payable ten days after arrival at port of discharge.

The *Wearside* proceeded to Mobile, Ala, and gave notice of readiness to load on the 16th Jan. 1908, and there loaded a part of her cargo. The cargo, in respect of which a lien was claimed in the present case, was shipped at Mobile under a bill of lading dated the 23rd Jan. 1908, which provided as follows:

Shipped in good order and condition by N. G. G. Donald, of Mobile, in and upon the good steamship called *Wearside* . . . now lying at Mobile and bound for Liverpool *via* Rotterdam and Dunkirk other loading ports as per charter dated the 18th Dec. 1907, 148 pieces hewn oak timber containing 9946 cubic feet. The rate of freight on the above to be 26*s.* per load of fifty cubic feet. . . . The steamer has liberty to call at any ports, including Newport News, Norfolk and Sydney, Cape Breton, to coal or for loading or discharging cargo, . . . and to tow vessels in distress and to deviate for the purpose of saving life and property . . . unto shippers' order or their assigns he or they paying freight for the same as above all other conditions as per charter-party, dated the 18th Dec 1907, all the terms, provisions, and exceptions contained in which charter are herewith incorporated and form part thereof. . . .

The charterers did not in fact load cargo themselves, but procured cargo to be loaded.

The *Wearside* duly left Mobile and arrived at Pensacola about the 28th Jan. 1908.

On the 16th Feb. after 801 standards had been loaded on the *Wearside*, the charterers, having got into financial difficulties, gave notice to the plaintiffs that they were unable to load any more cargo.

A full and complete cargo would have amounted to about 1463 standards, and the plaintiffs in order to minimise the damages, obtained 661 more standards, some of which were carried at a frieght of 50*s.* and some at 55*s.* per standard.

A portion of the cargo was stowed on deck to the height of 16ft., and the crew complained that the ship was consequently unseaworthy. She was subsequently surveyed by Lloyd's surveyor, who certified that the ship was seaworthy.

Some of the crew still refused to go to sea, and substitutes were obtained.

The *Wearside* left Pensacola at the end of February, and proceeded to Newport News, Norfolk, to bunker, when further trouble occurred owing to members of the crew complaining that the ship was unseaworthy, and more substitutes had to be obtained.

The *Wearside* left Norfolk on the 11th March, and on the 14th March she got into difficulties. A violent change in the wind, accompanied by two big waves, caused the ship to heel over to an angle of 20 degrees, and before she could right herself, the lashings of the deck cargo gave way and the cargo shifted, so that it hung over the side of the ship and held her down. The bulwarks of the ship were cracked, and she made water.

The ship was righted by cutting the wire lashings and filling the starboard tanks so as to counteract the list to port. It was found also that the wire lashings had fouled the propeller.

The *Wearside* then proceeded to Halifax to repair the damage.

Three hundred and eighty-two standards were either lost or jettisoned. The ship then proceeded on her voyage to Liverpool *via* Rotterdam.

The plaintiffs claimed to recover from the holders of the bills of lading on the cargo as dead freight 1387*l.* being the difference between the freight of 50*s.* and 55*s.* per standard on the 661 standards obtained in order to fill the ship and the charter-party freight of 82*s.* 6*d.* per standard.

The defendants by their defence did not admit that the bill of lading incorporated all the terms, provisions, and conditions of the charter-party. They pleaded that by the terms of the bill of lading under which the 801 standards were shipped, the plaintiffs were not entitled to claim any lien upon the 801 standards or any part thereof for dead freight due under the charter-party, that they were entitled to the benefit of 1508*l.* due to the charterers under clauses 14 and 15 of the charter-party; that when the *Wearside* sailed from Pensacola she carried an excessive deckload and was as the result unseaworthy, in consequence of which it became necessary for her to deviate from her chartered voyage and proceed to Halifax; that by reason thereof the plaintiffs failed to perform the contract contained in the charter-party and (or) bills of lading, and were not entitled to the benefit of any of the provisions contained therein, and that the plaintiffs were not in any event entitled to claim dead freight in respect of the excessive deckload.

In May 1910 the action came on for trial before Walton, J., when his Lordship reserved his judgment.

On the 27th May 1910 the learned judge delivered his judgment deciding (11 Asp. Mar. Law Cas. 421 (1910); 102 L. T. Rep. 910), first, that the deviation to a port of refuge for the purpose of repairs was justifiable, notwithstanding that it was occasioned by the unseaworthiness of the ship, and did not have the

effect of putting an end to the contract of carriage and relieving the defendants from their obligation to pay dead freight; and, secondly, that "dead freight" included a claim for unliquidated damages, and the plaintiffs were entitled to the lien claimed.

From that decision the defendants now appealed.

Atkin, K.C. and *Holman Gregory*, K.C. for the appellants.

Bailhache, K.C. and *Adair Roche* for the respondents.

The arguments upon the point on which the appeal was actually determined and the authorities cited in support thereof sufficiently appear from the judgment.

Cur. adv. vult.

Dec. 20, 1910.—The following written judgment of the court (Cozens-Hardy, M.R., Fletcher Moulton and Farwell, L JJ.) was delivered by

FLETCHER MOULTON, L.J.—The critical question in this case relates to the rights of the owners of a ship as against the holders of bills of lading of the cargo in a case where an act has been done by the captain during the voyage which would otherwise have been in breach of the contract of affreightment, but which was justified by the fact that it was reasonably necessary at the time for the preservation of the vessel and cargo. By well-established principles of English law certain acts of this kind (of which jettison of cargo and deviation are examples) are not only permitted, but required to be done in proper cases. They are not only regarded as being no breach of the contract of affreightment, but are held in law to have been done by the master as agent for and on behalf of all interested in the venture, whether as owners of the ship or of the cargo, and give rights of general average contribution from all who thus derive benefit in order to compensate those who have suffered loss from the doing of the act. To enforce these rights the law gives a lien on the cargo which is enforceable by the master, who, in so enforcing it, acts as the agent of all those who are entitled to the contribution or indemnity for the loss which they have suffered. In ordinary cases the application of these principles is in conformity with our most fundamental ideas of justice, and the courts do not hesitate to enforce them. But other considerations arise where the necessity is due to the default of the shipowner and he is the person who claims that he should not suffer. It is a case of this kind which we have here to consider. The vessel to which this action refers—the steamship *Wearside*—started on the voyage (which was from Pensacola to Dunkirk, Rotterdam, and Liverpool) in an unseaworthy condition by reason of an excessive quantity of the cargo, which consisted of lumber, being piled on her deck reaching to a height of 16ft. Meeting with bad weather soon after starting, her deck cargo shifted, carrying away the lashings and tearing up some of the deck plates so that the water poured into the hold. This necessitated her putting into Halifax and effecting temporary repairs. The learned judge in the court below has found that this necessity was due to the unseaworthiness of the ship at the commencement of the voyage, and that for this the plaintiffs as owners of the ship were alone responsible. The defendants are the owners of the bills of lading for a portion of the cargo. For the purpose of the point now under consideration, it is conceded that the action is to enforce rights which are given to the plaintiffs by the bills of lading, but which would not arise from the ordinary common law contract of carriage by common carrier or bailment for the purpose of carriage. The defendants contend that by reason of the deviation the plaintiffs have disentitled themselves to enforce the special contract of affreightment—*i.e.*, the contract evidenced by the bills of lading. Such, they say, would be the legal consequence of a deviation that was not reasonably necessary, and they contend that the rights of the plaintiffs where the necessity for the deviation is due to their own default are the same as if that had been the case. The question which we have to decide is therefore whether in a case where the necessity for a deviation arises from the default of the shipowner in sending the ship to sea in an unseaworthy state he can claim to be in a different position from that in which he would have been had the deviation itself been unnecessary. The legal consequences of a deviation, in fact, from the ordinary course of the voyage specified in the bills of lading are not disputed. If it is reasonably necessary for the safety of the ship or cargo or for saving human life it is, of course, no breach of the contract of affreightment whether that contract be a special contract, such as is evidenced by bills of lading, or whether it is that which is implied from bailment for the purpose of carriage. But otherwise, as decided by this court in the case of *Balian and Sons* v. *Joly Victoria and Co. Limited* (6 Times L. Rep. 345), and more recently in the case of *Joseph Thorley Limited* v. *Orchis Steamship Company Limited* (10 Asp. Mar. Law Cas. 431; 96 L. T. Rep. 488; (1907) 1 K. B. 660), it does away with the special contract of affreightment altogether. The shipowner by his own default has substituted a different voyage from that to which the special contract—whether it be a contract of insurance or a special contract of affreightment—refers, and he cannot claim that contractual exceptions or obligations that relate to the one should be deemed to be transferred to the other. It follows, therefore, that if in the present case the shipowners cannot, as between themselves and the holders of the bills of lading, set up that the deviation, in fact, which undoubtedly occurred when the ship put into Halifax was a deviation justified by necessity, they cannot enforce the rights in question against the holders of the bills of lading. These rights come to them solely through the bills of lading, and they stand or fall with their right to enforce that special contract of affreightment. The position of the owners of the ship in the analogous case of jettison of goods forms the subject of a very important judgment of the Privy Council in the case of *Strang Steel and Co.* v. *Scott and Co.* In that case the master of the ship jettisoned some goods in order to save the ship. It was admitted that the act was reasonably necessary for the safety of the ship, but it was proved that the danger in which the ship lay was due to his own negligence. When the ship came to port he claimed a lien on the goods constituting the cargo for a contribution to general average in respect of the loss of the goods jettisoned. The owners of

the goods on which the lien was asserted insisted that no such right of lien existed by reason of the fact that the danger which justified the jettison was brought about by the negligence of the master himself, for which the shipowners were liable. The court laid down that the sacrifice of the goods being for the general safety, the right of the owners of the jettisoned goods to be indemnified from the owners of the goods saved was unaffected by the fact that the danger was due to the master's negligence. These owners were not responsible for that default, and remained in the position of innocent owners whose goods had been sacrificed for the common safety. But they also laid down that the case was different where the shipowner was making a claim in his own interest, as, for instance, when he was asserting a lien or bringing an action on his own behalf. In such a case he could not be permitted to set up a right due to his own default, and therefore he was not protected from the consequences of the jettison, or entitled to any indemnity in respect of it, because he could not be allowed to claim privileges which arose from his action being justifiable under the circumstances where the circumstances which justified it were brought about by his own failure to perform his own obligations. The right and even the duty of deviation in cases of necessity is as well established as that of jettison. They rest on like grounds, and in my opinion there can be no reasonable doubt that the case of *Strang Steel and Co.* v. *Scott and Co.* (*ubi sup.*) is an authority for saying that in case of a deviation which is necessitated by the wrongful act of the shipowner or his representative, the master, the shipowner would be entitled to no indemnity against the consequences, nor would he be able to protect himself from any damages or contribution to which other parties would have been entitled had the deviation been without reasonable cause. This is indeed conceded by the respondents in the present case. They admit that all the costs of going to an intermediary port which in ordinary cases would be a matter of general average, must be borne by them because the deviation was rendered necessary by the initial unseaworthiness of the ship. But they contend that although this is so, they are not prejudiced in respect of the special contract of affreightment evidenced by the bills of lading, and that in litigation thereon it is open to them to allege that the deviation was a necessary one, even though the necessity was due to their own default. In deciding this question, we think it right to examine very carefully the precise grounds on which the Lords of the Privy Council based their judgment in the case of *Strang Steel and Co.* v. *Scott and Co.* (*ubi. sup.*) for although it is not technically binding on this court, yet short of being absolutely binding upon us it is difficult to conceive of a judgment that ought to carry greater weight with us on account of the authority both of the tribunal and of the individual members who took part in the decision. It carries additional weight, because it is evident from the tenor of the judgment that their Lordships realised that the case raised fundamental questions of shipping law of a novel and important character, and that it was desirable to base their decision on consistent principles of general applicability, and not on any special or peculiar facts of that particular case. Lord Watson, in delivering the judgment of the tribunal, says as follows (at p. 599 of 61 L. T. Rep., p. 421 of 6 Asp. Mar. Law Cas., and p. 608 of 14 App. Cas.): "When a person, who would otherwise have been entitled to claim contribution has, by his own fault, occasioned the peril which mediately 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 indemnity for losses sustained by him, in the endeavour to rescue property which was imperilled by his own tortious act, and which it was his duty to save." The tribunal, in that case, was therefore of opinion that where the necessity for the act arose from his own default the shipowner was personally disentitled to appeal to the necessity of the act in order to shelter himself from its contractual consequences. It is true that in that case the contractual consequences which the tribunal were considering related to rights of contribution arising out of implied contracts. But the reasoning on which the judgment depends affords no ground for the suggestion that it applies only to that particular case. It goes much deeper. It is evident that the tribunal regarded it as another example of the principle that a man may not take advantage of his own wrong. He may not plead in his own interest a self-created necessity. With this we entirely agree; and in applying it no distinction can be drawn between one contract of affreightment and another or between one contractual consequence and another. The rights of the parties are the same as though the act were not justified by the circumstances because the circumstances which in fact justified it were brought about by the party's own default.

The application of this principle to the facts of the present case presents no difficulty. The plaintiffs, the shipowners, make a claim on the cargo owners for certain sums alleged to be due to them as dead freight under the bills of lading. The defendants, the cargo owners, answer that the shipowners cannot rely on the conditions of the bills of lading because the ship deviated from her voyage by putting into Halifax. To this the plaintiffs reply that the deviation was justifiable as being reasonably necessary for the safety of the ship and cargo. To this the cargo owners rejoin that the necessity resulted from the default of the shipowners in sending their ship to sea in an unseaworthy condition. It is conceded that this rejoinder is true in fact and we hold it to be good in law, and it follows therefore that the plaintiffs fail in their action. In the able argument which was addressed to us on behalf of the plaintiffs much reliance was placed on the contention that there had been no deviation because the putting into Halifax was reasonably necessary, and various references were given to passages in text-books where the word "deviation" is used in the sense of unjustifiable deviation. We are of opinion that there is no substance in this contention.

Deviation is a question of fact. Its justifiability is a mixed question of fact and law, the issue so far as it is one of fact being an entirely distinct one. One has only to look at sect. 49 of the Marine Insurance Act to see that this is the true interpretation which is to be attached to the word "deviation." A consideration of the onus of proof shows that it must be so. If a ship chartered for a direct voyage from New York to Plymouth puts in at Lisbon, which, of course, is not on its road, the cargo owners could allege a deviation and prove it from those facts. The onus of justifying it would rest on the shipowners who would successfully defend themselves by showing that although it was a deviation in fact it was necessitated by circumstances. A strong appeal was also made to us on the widespread consequences of a decision against the shipowners in this case, and the suggested injustice of depriving them of the benefits of the conditions of the bills of lading in respect of a deviation which was in fact necessary. We doubt whether the number of cases in which necessity of a deviation is the direct consequence of initial unseaworthiness is large. But the question whether it be large or small does not, in our opinion, affect the justice of our decision. No more striking case could be given than that which we have before us. It is conceded that if the plaintiffs had voluntarily put into Halifax they could not sustain their claim against the defendants. What they did in fact was to start with their ship so overladen that the occurrence of weather, the possibility of which might reasonably be anticipated, would certainly necessitate their so doing. If they were, under such circumstances, allowed to plead in their own favour the necessity of their act we fail to see how a different decision could be given in a case where they had started with only enough coal to permit their getting to the intermediate port. In such a case the going to the intermediate port would be a necessary act and the necessity would be due to the initial unseaworthiness. We fail to see the justice of permitting a shipowner to substitute by his own default a different voyage for that to which the exceptions in the bill of lading relate and yet hold the owners of the cargo bound by the conditions and exceptions thereof. The necessity, whether moral or physical, of making the deviation, which the plaintiffs' counsel regarded as making in favour of his clients' case, appears to us only to strengthen the contention that the original breach was the direct and proximate cause of the change of voyage. Inasmuch as our decision on this point goes to the root of the action we have not dealt in any way with the other important points which were argued before us on the one side or the other. It is, of course, open to the parties to raise any of them should the case go higher and the tribunal come to a different conclusion from us upon the point on which alone we have decided this case. The judgment of the court is therefore that the appeal be allowed and the action dismissed, with costs, both here and below, and it necessarily follows that the cross-appeal of the plaintiffs on the counter-claim is dismissed with costs.

Appeal allowed.

Solicitors: for the appellants, *Trinder, Capron, and Co*; for the respondents, *Botterell and Roche.*

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION

Friday, Oct. 28, 1910.

(Before HAMILTON, J.)

GENFORSIKRINGS AKTIESELSKABET (SKANDINAVIA REINSURANCE COMPANY OF COPENHAGEN) *v.* DA COSTA. (*a*)

Marine insurance—"Open cover"—Verbal agreement—Stamp—Stamp Act 1891 (54 & 55 *Vict. c.* 39), *ss.* 91 93, 97—*Costs.*

The plaintiffs effected a reinsurance contract by way of "open cover" with the defendant, and subsequently put forward a policy upon certain cargo in respect of which they had become liable to pay a loss on their original policy. The defendant refused to sign the policy on the ground that the plaintiffs had failed to make all the declarations which ought properly to have been made by them under their cover, and it was verbally agreed that a person should be nominated to certify as to whether or not all the declarations had been made by the plaintiffs, and, if the person thus nominated certified that all the declarations had been made by the plaintiff, the defendant would sign the policy and pay the loss.

The person nominated certified that all the declarations had been made by the plaintiffs; but, notwithstanding, the defendant refused to sign the policy or pay the loss.

In an action brought by the plaintiffs to recover damages for breach of the verbal agreement:

Held, that the action could not be maintained, for if the defendant were to pay for the loss, he would be paying a sum of money upon a loss relating to sea insurance not expressed in a duly stamped policy in accord with sect. 97 *of the Stamp Act* 1891, *and he would therefore be liable to a penalty; and, secondly, because the verbal agreement was a contract for sea insurance not expressed in a policy and consequently invalid under sect.* 93 (1) *of the Stamp Act* 1891.

Hyams *v.* Stuart King (99 *L. T. Rep.* 424; (1908) 2 *K. B.* 696) *distinguished.*

COMMERCIAL COURT.

Action tried by Hamilton, J., sitting without a jury.

The plaintiffs were a marine insurance company carrying on business at Copenhagen, and the defendant was an underwriter at Lloyd's acting on behalf of himself and other names.

On the 3rd April 1907 Messrs. Morgan, Lyons, and Co., insurance brokers at Lloyd's, acting as agents for the plaintiffs, effected a reinsurance contract by way of open cover with the defendant on behalf of himself and his names.

The contract was open until the 31st Dec. 1908 upon cargo carried by the Roland Line steamers from the continent of Europe to the West Coast of South America and back, and for an amount up to 500*l.* on any one steamer.

The plaintiffs subsequently found themselves interested in cargo in the Roland Line steamers, and put forward declarations followed by reinsurance policies on such interest to the defendant through Messrs. Morgan, Lyons, and Co., and the policies were signed by the defendant for himself and his names.

(*a*) Reported by LEONARD C. THOMAS, Esq., Barrister-at-Law.

In Dec. 1908 the plaintiffs put forward certain policies, including one upon cargo carried by the steamship *Lambert* for 230*l.*, which had already been totally lost by perils of the sea, and for which the plaintiffs had become liable to pay 230*l.* for a total loss upon their original policy.

The defendant refused to sign the policy upon the *Lambert* on the ground that the plaintiffs had failed to make all the declarations that should have been made by them under the cover, in consequence of which the plaintiffs were unable to sue the defendant upon the policy put forward by them for the loss. It was then verbally agreed between the parties that Lloyd's agents at Copenhagen should be requested to nominate some competent person to examine the books and records of the plaintiffs with the view of ascertaining whether all the declarations that should have been put forward under the cover had in fact been put forward; that if such person should certify that the declarations had been properly made, the defendant would sign the policy, pay for the loss, and pay the fee charged by the said person for his investigation; but that if the said person should certify that the declarations had not been properly made, the plaintiffs should pay the fee charged by the said person, and should have no further claim in respect of the loss against the defendant. A Mr. Gether, of Copenhagen, was duly appointed to make the investigation, and in a letter dated the 3rd June 1909 he certified that all the declarations that ought to have been put forward by the plaintiffs under the cover had been in fact put forward. In the course of his letter he said:

> As the Skandinavia from the said insurance companies receives no less than 350 cession sheets, containing about 6000 declarations, I have at random perused some of the cession sheets, comparing the cession sheets with the cards and *vice versâ* to ascertain whether all the insurance declarations were entered on the cards. Further, I went through all the cession sheets of one month chosen haphazard, and found in all cases the whole of the declarations due under the reinsurance cover were in accordance with the declaration handed in to Messrs. Morgan, Lyons, and Co., in cession sheets, the last sheet dated the 9th April 1909. The premiums for the declarations made are coming on very slowly to the Skandinavia, and in more cases I found that the premium had not been passed on to the Skandinavia until six months after the declarations had been made and the shipments had taken place.

He charged a fee of 10*l.* for his investigation, and his letter was put before the defendant by Messrs. Morgan, Lyons, and Co., but the plaintiffs allege that the defendant refused to pay the two amounts of 230*l.* and 10*l.*, or to sign the policy, and they claimed 240*l.* as damages for the defendant's breach of the verbal agreement.

By the defence, the defendant admitted that he had initialled a slip in the form of an open cover, and that he had refused to sign a policy on cargo for the *Lambert* after the loss had occurred. He alleged that he had always been ready and willing to sign a policy in form "upon ship or ships" on which he could raise the question whether he had been treated fairly and in good faith by the plaintiffs under the cover note, or that he would sign a policy in any other form on which he could raise the question. He alleged that Mr. Gether never did examine the books and records of the plaintiffs and never did ascertain whether all the declarations which should have been put forward under the cover had been put forward, and that, not having done so, he had no right to certify and never did certify as alleged by the plaintiffs, and that his certificate was not binding on the defendant.

The defendant further relied on the following provisions of the Stamp Act 1891:

> Sect. 91. . . . The expression "policy of insurance" includes every writing whereby any contract of insurance is made or agreed to be made.
>
> Sect. 92. (1) . . . The expression "policy of sea insurance" means any insurance (including reinsurance) made upon any ship or vessel . . . and includes any insurance of goods, merchandise, or property for any transit which includes not only a sea risk but also any other risk incidental to the transit insured from the commencement of the transit to the ultimate destination covered by the insurance.
>
> Sect. 93 (1). A contract for sea insurance . . . shall not be valid unless the same is expressed in a policy of sea insurance.
>
> Sect. 97 (1). If any person (*a*) becomes an assurer upon any sea insurance or enters into any contract for sea insurance . . . or knowingly takes upon himself any risk, or renders himself liable to pay, or pays, any sum of money upon any loss, peril, or contingency relative to any sea insurance, unless the contract is expressed in a policy of sea insurance duly stamped . . . he shall for every such offence incur a fine of one hundred pounds.

Atkin, K.C. and *Mackinnon* for the plaintiffs.—The action is not brought upon a contract of sea insurance, but upon a contract made for the purpose of settling a dispute in regard to an open cover, which was made for a new and good consideration. By the terms of the new agreement the defendant promised to pay 230*l.* and to sign a policy if a certain person certified the facts in a certain way. The promise to pay 230*l.* was not a promise to enter into a contract of indemnity for a risk. The case was analogous to cases under the Gaming Acts, where, although a promise to pay a bet is null and void, a subsequent promise to pay, if the person to whom it was payable would undertake some forbearance, was a new contract enforceable by action:

> *Hyams* v. *Stuart King*, 99 L. T. Rep. 424; (1908) 2 K. B. 696.

Bailhache, K.C. and *Clayton* for the defendant.—A stamped policy of insurance was essential to entitle the plaintiffs to recover. The original obligation under the open cover was, from time to time, turned into a legal obligation by the issue of policies. Having regard to sect. 97 of the Stamp Act 1891, the defendant could not pay the loss. A contract of marine insurance does not depend on consideration, but upon whether the contract is expressed in a policy.

HAMILTON, J. (after stating the facts).—I have come to the conclusion that Mr. Gether's certificate was conclusive as to his examination and investigation of the plaintiffs' books. The other ground on which the defendant has declined to pay the loss of 230*l.* is that if he were to do so he would bring himself within sect. 97 (1) of the Stamp Act 1891. For the plaintiffs it is said that the matter comes neither within sect. 93 nor sect. 97 of that Act, and the case is said to be analogous to a contract such as that which was in question in *Hyams* v. *Stuart King* (*sup.*). In

the eye of the law a promise to pay a bet which a person has engaged to pay is of no effect. At common law such a promise was enforceable, but by statute it was deprived of its common law effect. If a new promise comes into existence which is not of the precise kind forbidden by the statute there is no reason in law why it should not be enforceable. In the present case the matter comes within sect. 97 of the Stamp Act 1891, for that which the defendant would be called upon to do would, if he did it, be an offence punishable by fine. If the defendant were, in the terms of the contract, to pay 230*l.* for the loss, he would, in the terms of the statute, be paying a sum of money upon a loss relating to sea insurance, and, that being so, I cannot, by a judgment, order the defendant to do that which, if he did it voluntarily, would constitute an offence against the Act. I also am of opinion that the contract itself is a contract of sea insurance. It does not differ from an insurance against this particular loss, with a special term added that there should be a reference to Mr. Gether, and that if he certified in one way no proof should be required from the plaintiffs of any of the matters they would otherwise have to prove to make good their claim, but if he certified in another way the loss was to be taken to have been paid. The effect was to insure against a loss by sea perils. There was therefore a contract for sea insurance. It was not expressed in a policy. The contract could not therefore be sued upon, and the result is that there must be judgment for the defendant. Then comes the question of costs. Without questioning the wisdom of that which the Legislature has ordained, there is a general view among underwriters against setting up a stamp objection, and upon the question of costs, so far as they are discretionary, the court may properly adopt the same standard which has been adopted in practice by underwriters. In the case of *Home Marine Insurance Company* v. *Smith* (78 L. T. Rep. 734; (1898) 2 Q. B. 351), Mathew, J. (1898) 1 Q B. 829) expressed and acted upon this view, and gave judgment for the defendants in circumstances somewhat similar to those in this case, but without costs. I am not prepared to say that there may not be circumstances in which the defence of non-compliance with the requirements of the Stamp Act may not with propriety be raised as a defence. It may be that if, in the first instance, the defendant had, as I assume was the case, *bonâ fide* doubts as to having received all the declarations, he might be warranted in relying upon the legal position, which was that the slip was a contract of sea insurance, and not a policy; but what happened was that he entered into another contract, the intention of which was that if Mr. Gether certified a certain thing he would take that point no longer, but would pay. The conduct of the defendant in raising the Stamp Act after entering into that agreement was not quite fair play to the plaintiffs. The defendant has been the cause of very unnecessary costs being incurred, and in these circumstances I have come to the conclusion that he is not entitled to have his costs against the plaintiffs.

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

Solicitors for the defendant, *Coward* and *Hawksley, Sons,* and *Chance.*

Friday, Jan. 13, 1911.

(Before Lord ALVERSTONE, C.J., HAMILTON and AVORY, JJ.)

DEACON (app.) *v.* EVANS (resp.). (*a*)

Omission to keep proper look-out on ship—Negligence in keeping look-out—Collision—Wilful breach of duty—Liability—Merchant Shipping Act 1894 (57 *&* 58 *Vict. c.* 60), *s.* 220.

Where a shipmaster who omitted to put a look-out man in a proper place and in fact was negligently keeping a look-out himself, the court refused to hold him guilty of an offence under sect. 220 *of the Merchant Shipping Act* 1894, *which, so far as is material, is as follows: "If a master, seaman, or apprentice belonging to a British ship, by wilful breach of duty, or by neglect of duty, omits to do any lawful act proper and requisite to be done by him for preserving the ship from immediate loss, destruction, or serious damage," he shall in respect of each offence be guilty of a misdemeanour.*

CASE stated on an information preferred by William H. G. Deacon (the appellant), superintendent of mercantile marine, and an officer of the Board of Trade, on behalf of the Board of Trade, against John A. Evans (the respondent), the master of the British ship *Gladys*, for an offence against sect. 220 of the Merchant Shipping Act 1894 (57 & 58 Vict. c. 60), for that there spondent did unlawfully, by neglect of duty, omit to do a lawful act proper and requisite to be done by him for preserving his ship, the British ship *Gladys*, from immediate loss, destruction, or serious damage—to wit, by omitting to place a look-out man in such a position on board the ship *Gladys* as to be able to see at least one point on either side of the bow of the ship *Gladys*—with the result that a collision took place between the ship *Gladys* and the British steam trawler *Prome*, whereby the *Prome* was sunk and all on board were drowned.

The respondent having elected to be tried summarily by the magistrate, pursuant to sect. 680 of the Merchant Shipping Act 1894, in manner provided by the Summary Jurisdiction Acts, the cause was heard and determined by the magistrate, and upon such hearing he dismissed the information.

The case was as follows:—

The appellant was a superintendent of mercantile marine and an officer of the Board of Trade, and the respondent was at all material times master of the British ship *Gladys*, official number 98,824, registered at the port of Bristol.

The information laid by the appellant as above set out was laid under sect. 220 of the Merchant Shipping Act 1894, which section provided as follows:

Sect. 220. If a master, seaman, or apprentice belonging to a British ship, by wilful breach of duty or by neglect of duty or by reason of drunkenness (*a*) does any act tending to the immediate loss, destruction, or serious damage of the ship, or tending immediately to endanger the life or limb of a person belonging to or on board the ship; or (*b*) refuses or omits to do any lawful act proper and requisite to be done by him for preserving the ship from immediate loss, destruction, or serious damage, or for preserving any person belonging to or on board the ship from immediate danger to life or limb,

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

he shall in respect of each offence be guilty of a misdemeanour.

Sect. 680. (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 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.

At the hearing of the information before the magistrate on the 9th and 17th Nov. 1909, the following facts were proved or admitted :—

That the ship *Gladys* was a British ship belonging to the port of Bristol, and that she was a three-masted steel barque of 1362 tons gross and 1345 tons net register.

That on the 16th July 1909 the *Gladys* sailed from Antwerp on a passage to Frederickstadt, in Sweden; she was in ballast, the only cargo on board being a small quantity of pig iron; she was manned by a crew of fifteen hands all told, consisting of the master (the respondent), a first and second mate, and twelve seamen, who had been engaged for the run from Antwerp to Frederickstadt.

That on leaving Antwerp and at all material times during the passage the *Gladys* was about 4ft. down by the stern.

That about 9 a.m. on the 22nd July 1909 the *Gladys* was in the North Sea, to the southward of the Dogger Bank. She was under all plain sail and had a number of jibs set, and she was running free on a course of N.E. by E. magnetic, the wind being a strong breeze from the W.S.W., driving the vessel at a speed of eight to nine knots. The sea was smooth, the weather was fine and clear, and it was possible to see at least five miles.

That the respondent was in charge of the vessel and was stationed aft, on the poop, walking from side to side thereof, and keeping a look-out, there was no other person on the look-out; the watch on deck consisted of the second mate and four seamen, who were engaged in cleaning the decks, and an able seaman, who was at the wheel, which was situated on the poop.

That during the previous night there had been a man stationed on the forecastle head keeping a look-out, but he had been withdrawn about 8 a.m., it being stated by the respondent that it was not the custom on board the *Gladys* in moderate weather and bright daylight to have a man as look-out on the forecastle head.

That during the previous night and the early morning of the day in question a large number of fishing vessels had been seen and passed from time to time, and between 8 a.m. and 9 a.m. a considerable number of fishing vessels, forming a portion of the Gamecock trawling fleet, was in sight, mainly on the starboard bow of the *Gladys*.

That the respondent suddenly observed appearing above his vessel's bow, and distant from 100ft. to 120ft., the masthead of a trawler, which subsequently proved to be the British steam trawler *Prome*, of Hull, one of the Gamecock fleet; that she had not been seen previously by the respondent or any other person on board the *Gladys*, and though the respondent stated in evidence that the state of the weather was such that he could have seen the *Prome* from four to five miles away and for at least half an hour before the collision, he was unable to give any explanation of his failure to do so; that the respondent, on seeing the *Prome's* masthead as aforesaid, at once ordered the helm of the *Gladys* hard-a-port, but it was then too late to avoid a collision, and the stem of the *Gladys* struck the *Prome*, doing the *Prome* such damage that she sank almost immediately, and all her crew, consisting of ten hands, were drowned.

That the respondent at the material time was the only person keeping a look-out on board the *Gladys*; he had a clear, uninterrupted view ahead, and could see at least one point either side of the bow, but could not see a vessel half a mile ahead of the stem of the *Gladys*, and that it was inexplicable how he failed to see the *Prome* until she was within 120ft. of the *Gladys*.

There was no rule or regulation which places the master of the vessel, such as the *Gladys*, under an obligation to place a look-out man in such a position as mentioned in the information, but it was contended on behalf of the appellant that the above facts constituted an offence under sect. 220 of the Merchant Shipping Act 1894, and that the magistrate ought to convict the respondent of such an offence.

The magistrate was of opinion upon the evidence (*a*) that the offence charged in the information had not been made out, and he dismissed the information; and (*b*) he was further of opinion upon the evidence that the look-out from the position the respondent occupied was all that was usual in the circumstances, having regard to the time of the day and the state of the weather.

The question for the opinion of the court was whether upon the facts stated the magistrate was right in holding that the respondent was not guilty of the offence charged in the information, or whether he ought to have convicted him of such offence.

Rowlatt for the appellant.—Sect. 220 of the Merchant Shipping Act 1894 makes it an offence if a master, seaman, or apprentice belonging to a British ship, by wilful breach of duty or by neglect of duty, (*b*) "refuses or omits to do any lawful act proper and requisite to be done by him for preserving the ship from immediate loss, destruction, or serious damage," and so on. The case amounts to the clearest possible finding that the respondent, who happens to have been the master of the vessel, but who also was the look-out man, was not keeping such a look-out as was proper, because he could not see an object that was nearer than half a mile from the stem of his vessel, and that is not found to be a proper look-out. The question, therefore, is whether not keeping a proper look-out by the person whose duty it is to do so, or by the person who has assumed the duty of doing it, is such an act as comes within this section.

[LORD ALVERSTONE, C.J.—The reason why we asked that a case might be stated and the matter decided was because I thought that this section was not meant to deal with the case of either a look-out man not keeping a proper-look-out, or a man who was supposed to be on the look-out not doing his duty, but was meant to deal with quite a different kind of thing. I had a great doubt whether this kind of case, which occurs so

frequently in the Admiralty Court, of a man not keeping a proper look-out, was a case of making the man criminally liable.] The present case comes within clause (*b*) of the section: omitting "to do any lawful act proper and requisite to be done by him for preserving the ship"—that is, for preserving his own ship—and the circumstance that he had run down a trawler and drowned ten of the crew does not add to his offence in any way, but is merely part of the proof that the look-out was improper. It was not an ordinary case of a sailing ship and a steamer; the trawler was getting in his trawl, and therefore was not bound to keep out of the way. Nor would it have added to his offence if his own ship had gone down; it is not the happening of the damage that constitutes the offence. "The lawful act proper and requisite to be done" is the keeping of a proper look-out. Here the respondent occupied the two positions. If he had put a look-out man on the forecastle head and the man had been negligent the master would not have been liable. He did not do that; he omitted to put a man in the proper place as a look-out man; he made himself the look-out man, but put himself in a place where he could not see half a mile from the stem of the vessel anything that was in the vessel's path, and that is where he placed the only look-out there was. We submit that it is an act proper and requisite to be done by the master to place a look-out man in a place where he can see the path that the vessel is about to travel, and can see close up to the vessel, not only half a mile ahead. So far as the master is concerned, he must make proper dispositions and place the look-out man in the proper place; here it was wrong to place the look-out where it was—namely, on the poop. The respondent did not go to the poop by mistake; he went there wilfully, and he went to a place where he could not see half a mile, and that is enough to bring him within the section. It is said that it was not the custom on this ship to have a man on the look-out in daylight on the forecastle head, but it is not a question of custom, and, moreover, it is not a finding of fact by the magistrate, and it is quite clear that it was not proper.

Frampton, for the respondent, was not called upon.

Lord ALVERSTONE, C.J.—This case was stated in deference to the opinion of the members of the court as constituted when an order was made to state a case, so that the matter might be seriously considered. The matter is one of great importance for this reason: This section in practically identical terms is more than fifty years old, and it is no exaggeration to say that there have been thousands of cases in which, if this is to be regarded as a criminal offence, prosecutions might have taken place. Therefore, it is of great importance when we find the suggestion made that the negligent conduct of a man, who is purporting to discharge the duty of assisting in navigating a ship, creates a criminal offence. Counsel for the Board of Trade, very properly, does not press us to go so far as that. But when we come to look at the facts of this case, it amounts to this, that a man who might have kept a look-out on the forecastle, but who kept a look-out on the poop, was negligently standing on the poop, and that therefore he has committed an offence. It is to be observed that in this case the magistrate had before him the statement that it was not the custom on the *Gladys* in daylight to have a man as look-out on the forecastle head. We cannot shut our eyes to the fact that it is a very common practice, whether prudent or not depends on the circumstances of the case, for a look-out to be kept by a superior officer who is not stationed forward. The question, therefore, is: Aye or no, was the negligence of the master either in keeping an improper look-out himself from the poop, or in not going forward and standing where he could see a ship within half a mile which he could not have seen before from the poop, an offence under sect. 220 of the Merchant Shipping Act 1894. The words of that section are: "If a master, seaman, apprentice belonging to a British ship, by wilful or breach of duty or by neglect of duty or by reason of drunkenness, does any act tending to the immediate loss, destruction, or serious damage of the ship," and so on, he shall in respect of each offence be guilty of a misdemeanour. I point out that there was in this case no immediate loss at the time, which is material. The point made here is not that the master was negligent in not seeing the ship within half a mile, because, *ex hypothesi*, he could not see it. The point made is that either he was negligent himself in not keeping a better look-out when he ought to have seen any ship four or five miles away for at least half an hour, which he could not explain, or that he did not put a look-out man who would have seen the trawler before and would also have seen it during the time that the trawler was within half a mile of the ship's bows. In my judgment the decision of the magistrate that the offence charged had not been made out was right. I think that this section was not intended to make criminally liable a person who has been merely negligent in the discharge of his duty, which he is carrying out or purporting to carry out, in the navigation of a ship. If it had been intended to make simple neligence a criminal offence far stronger words would have been required. In my opinion the magistrate was right, and therefore the appeal must be dismissed.

HAMILTON, J.—I think it is to be observed that this section is the first of a group of sections which are described as "Provisions as to Discipline." It is followed by a section dealing with desertion and absence without leave from a vessel, and, after some provisions as to procedure, it is followed by a section—sect. 225—as to general offences against discipline, such as quitting the ship without leave before she is placed in security, wilful disobedience to any lawful commands, and so forth. For the purposes of this argument, and no further, counsel for the Board of Trade disclaims the contention that this section makes it a misdemeanour in any master, seaman, or apprentice, to do his duty negligently, and that being so, it appears to me, upon the facts of the present case, that the dismissal of the summons was right. The act in question charged in the information as the omission to do the lawful act proper and requisite to be done by him was omitting to place a look-out man in such a position on board the ship *Gladys* as to be able to see at least one point on either side of the bow. What the master did, according to the facts found, was to place himself as a look-out man in such a

position that he could have seen the vessel in question, which was causing the danger, four to five miles away, at least half an hour before the collision, but that either he closed his eyes or did not see it. That alone was the cause of the collision. It appears to me, on the facts of this case, that all the master did was to make himself a look-out man, which cannot in itself, in the circumstances, be said to be the omission of a lawful act proper and requisite to be done by him in doing the duty of a look-out man, which, it is not contended, by itself, would be sufficient to support the conviction. In my opinion the question should be answered in favour of the respondent.

AVORY, J.—I am of the same opinion. I think the negligence alleged against the master of the ship in this case was not a wilful breach of duty within the meaning of sect. 220 of the Merchant Shipping Act 1894.

Appeal dismissed.

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

Solicitor for the respondent, *F. A. S. Stern.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

May 12, 13, 30, *June* 25, *and July* 27, 1910.

(Before Sir S. EVANS, President, and Elder Brethren.)

THE MARÉCHAL SUCHET. (*a*)

Salvage — Practice—Towage contract—Right of tug engaged to tow to recover salvage—Breach of contract of tug causing damage to tow—Right of tug owners to salvage in respect of services rendered by their tugs other than that engaged to tow—Right of masters and crews to salvage —Counter-claim for damage by tow owners— Conditions of towage contract.

Where a contract of towage is for a tug to be supplied by tug owners and not for a named or specified tug, the tug owners must be taken to have contracted that the tug is efficient, and that her crew, tackle, and equipment are equal to the work to be accomplished in weather and circumstances reasonably to be expected; and that reasonable skill, care, energy, and diligence will be exercised during the towage. Tug owners do not warrant that the work of towage shall be done under all circumstances and at all hazards.

Where a tug is engaged to tow she ought to make a clear case before she can convert hersef into a salvor. It is essential in the public interest that a towage contract should not be easily set aside and a salvage service substituted for it.

Tug owners made a contract to tow a sailing ship and dock her for 80*l. The tug proved incapable of controlling the ship, which took the ground. The tug and three other tugs belonging to the same owners, together with other tugs and lifeboatmen, succeeded in getting the vessel off. The tug owners who had contracted to tow the sailing ship brought an action to recover salvage in respect of the services of all their four tugs, and the masters and crews of all four tugs joined in the action.*

The defendants denied that any effective services had been rendered by the four tugs, and alleged that if the services had been effective, the owners were not entitled to salvage by reason of their breach of contract or negligence in not providing a fit tug, but they did not in terms plead negligence, and they counter-claimed for the damages they had sustained. They also denied that the masters and crews of the tugs were entitled to salvage.

Held, that the burden of proof was upon the owners of the tug under contract to tow to show (1) *that they were not wanting in the performance of their obligations under the towage contract*; (2) *that the grounding was accounted for either by* vis major *or by an inevitable accident.*

That they had failed to do either, and were not entitled to salvage in respect of any of the three tugs.

Held, also, that the master and crew of the contracting tug were not entitled to salvage, as they performed no more than their duties in the service, and did not act with efficiency or skill or care on board their tug; but that the masters and crews of the other three tugs performed "engaged" services and were entitled to salvage reward, even though their services did not contribute to the ultimate safety of the vessel.

It is not necessary to plead negligence in order to defeat a salvage claim.

Held, with regard to the counter-claim for damages for breach of contract, that the special conditions in the contract of towage afforded a defence to the counter-claim, although they could not enure to the benefit of the plaintiffs in the salvage claim.

The Robert Dixon (4 *Asp. Mar. Law Cas.* 246 (1879); 42 *L. T. Rep.* 344; 5 *P. Div.* 54) *followed.*

The Ratata (8 *Asp. Mar. Law Cas.* 236, 427; (1897) *P.* 118; (1898) *A. C.* 513) *considered.*

Held, further, that the terms of the towage contract protected the tug owners from the claim made by the tow owners in their counter-claim for the damages sustained by them.

SALVAGE SUIT.

The plaintiffs were the owners, masters, and crews of the steam tugs *Guiana*, *Columbia*, *Vincia*, and *Badia*, *Sun II.* and *Sun III.*, and the *Champion*; and the coxswains and crews of the lifeboats *Friend to All Nations* and *True to the Core.*

The defendants' ship the *Maréchal Suchet* is a three-masted full-rigged steel ship of 1991 tons register, manned by a crew of twenty-five hands all told, and when the services were rendered to her was on a voyage from Japan to London *viâ* Falmouth with a cargo of oak. She drew 19ft. 6in. forward and aft.

On the 16th Feb. 1910 the *Marechal Suchet* left Falmouth in tow of the tug *Guiana* bound for London, the owners of the *Guiana* having undertaken to tow the ship to London and provide a second tug for docking for the sum of 80*l.* The contract was contained in a note dated the 14th Feb. 1910, the following being the conditions which are material to the issues raised in the salvage suit:

> The owners of the tug will not be responsible for any damage occurring to . . . vessels while in tow of the tug, and the owners of the tug will not be answerable or accountable for any loss or damage whatsoever by

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

collision or otherwise which may happen to . . . any vessel or any of the cargoes on board of the same while such vessel is in tow whether arising from or occasioned by any accident or by any omission, breach of duty, mismanagement, negligence, or default of them or their servants, or defect, or imperfection in the steam-tug or the machinery, and the owners or persons interested in the vessel so towed or the cargo on board the same undertake all liability for the above mentioned matters.

When the tug and tow were off Dungeness a compulsory pilot was taken on board the tow, and the towage then proceeded without incident until the morning of the 18th Feb. when the *Maréchal Suchet* took the ground on the Shingles Sand in the Thames estuary owing to the tug being unable to control her. The tide at the time was about high-water, and the wind a strong breeze to moderate gale from the south-west. After trying to get the ship off, the *Guiana* left her and went for further assistance, and that afternoon the tugs *Columbia*, *Sun II.*, *Gauntlet*, and *Rescue* arrived on the scene. On the afternoon tide of the 18th Feb. the *Guiana*, *Columbia*, and *Sun II.* towed at the vessel. On the morning and afternoon tides of the 19th Feb. the *Guiana*, *Columbia*, *Sun II.*, and *Badia* towed, and for a short time on the morning tide the *Champion* also towed, but the towage on the 19th Feb. did not prove effective. On the morning tide of the 20th Feb. the *Guiana*, *Columbia*, *Sun II.*, *Sun III.*, *Badia*, and *Vincia* all towed, and failed to get the *Maréchal Suchet* off, and as the weather got bad the crew were taken off. On the morning tide of the 22nd Feb., the weather having improved, the tugs *Guiana*, *Sun II.*, and *Sun III.* returned to the *Maréchal Suchet* and succeeded in towing her off, and she then proceeded to London in tow of two tugs.

The coxswain and crew of the lifeboat *Friend to All Nations* claimed salvage for taking the agents of the owners to and from the vessel to the shore, and for taking the crew to and from the ship to the tug which took them towards the land, and for taking them from the tug to the beach when they landed. They also took the crew from the shore to the tug and from the tug to the ship when they returned, and took soundings round the ship shortly before she came off.

The coxswain and crew of the lifeboat *True to the Core* claimed salvage for jettisoning cargo on the 21st Feb. when no other salvors were present, and for laying out an anchor on the 22nd Feb. before the tugs returned.

The owners of the *Maréchal Suchet* by their defence admitted that the owners, masters, and crews of the tugs *Sun II.* and *Sun III.* were entitled to salvage, and that the coxswain and crew of the lifeboat *Friend to All Nations* were entitled to salvage, and tendered them 50*l.* to satisfy their claim.

With regard to the services of the *Columbia*, *Vincia*, and *Badia*, which were all owned by the owners of the *Guiana*, the owners of the *Maréchal Suchet* alleged that they were of no value, and conferred no benefit on their vessel, but that if they were of benefit or value they were not entitled to any salvage award because they were only lessening the loss caused by the owners of the *Guiana* failing to provide a proper and efficient tug to tow the *Maréchal Suchet*. With regard to the claim for salvage by the *Guiana*, the owners of the *Maréchal Suchet* alleged that they were not entitled to any salvage, as the position and difficulty in which the *Maréchal Suchet* was placed was due to their breach of contract in failing to supply a reasonably fit and proper tug—namely, one of sufficient power to tow their vessel at that time of year in weather which was not exceptional.

The owners of the *Maréchal Suchet* also denied that the tug *Champion* was entitled to salvage, and alleged that her rope was only taken because those on board her pretended that she was the *Badia*, and that her rope was cast off when it was discovered that a mistake had been made. They also alleged that the services of the crew of the lifeboat *True to the Core* were of no value.

The owners of the *Maréchal Suchet* counter-claimed against the owners of the *Guiana* for the damage they had sustained by reason of the owners of the *Guiana* not providing a reasonably fit and proper tug to tow the *Maréchal Suchet* in the weather which prevailed, and claimed judgment against them for such damage and for any salvage and costs they might have to pay.

The crew of the lifeboat *Friend to All Nations* rejected the tender of 50*l.*

The owners of the *Guiana* by their defence to the counter-claim alleged that they were protected by the conditions of the towage contract, that they had been guilty of no breach of contract, that the *Guiana* was a reasonably fit and proper tug to tow the *Maréchal Suchet*, but that if she was not, the terms of the towage contract protected them from any liability. They also alleged that the stranding was due to the unexpected violence of the weather, or alternatively to an accident, for the consequences of which the terms of the towage contract expressly exempted them from liability.

The consolidated salvage suit was before the court on the 12th, 13th, and 30th May and the 25th June.

Laing, K.C. and *A. E. Nelson*, for the owners, masters, and crews of the steam tugs *Sun II.* and *Sun III.*, referred to

The Glengyle, 78 L. T. Rep. 139; 8 Asp. Mar. Law Cas. 341; (1898) P. 97; 78 L. T. Rep. 801; 8 Asp. Mar. Law. Cas. 436; (1898) A. C. 519.

A. D. Bateson, for the coxswain and crew of twenty-five of the lifeboat *Friend to All Nations*, referred to

The Cayo Bonito, 91 L. T. Rep. 102; 9 Asp. Mar. Law Cas. 603; (1904) P. 310.

H. C. S. Dumas, for the coxswain and crew of the lifeboat *True to the Core*, referred to

The Pickwick, 16 Jur. 669.

Baden-Powell, K.C. and *C. R. Dunlop*, for the owners, master, and crew of the tug *Champion*, referred to

The Undaunted, Lush. 98;
The Maude, 3 Asp. Mar. Law Cas. 338;
The Cambrian, 76 L. T. Rep. 504; 8 Asp. Mar. Law Cas. 263 (1897).

Aspinall, K.C. and *Raeburn* for the owners, masters, and crews of the *Guiana*, *Columbia*,

Vincia, and *Badia*.—The *Maréchal Suchet* did not go ashore through any fault of those on the tug *Guiana*. The cause of the disaster was the state of the weather and the condition of the tow. The contract was for a named tug, the *Guiana*, so there was no implied term in that contract that the tug was efficient, for the owners chose her themselves:

Robertson v. *Amazon Tug and Lighterage Company*, 46 L. T. Rep. 146; 4 Asp. Mar. Law Cas. 496 (1881); 7 Q. B. Div. 598.

The tug was in fact proper and efficient. Even if she was not proper and efficient, the services of the crews of the other three tugs were engaged, and they are entitled to an award.

Batten, K.C. and *D. Stephens* for the defendants.—This fine sailing vessel at anchor in Falmouth obtains a tug to tow her to London and gets ashore in moderate weather at the mouth of the Thames when in tow of the tug. Those facts show that there was negligence on the tug, or it was an inefficient tug. It is suggested that she got ashore because she had a foul bottom after her long ocean voyage, but the tug owners knew of her condition. [*Raeburn*.—That is disputed.] At all events the tug owners knew where the ship had come from. The sailing vessel is towed off, and the owner of the tug who had contracted to tow her in safety now claims salvage. The only plaintiffs entitled to salvage are the *Sun* tugs and the *Friend to all Nations*, but their services do not call for large awards as the peril was no longer imminent when the ship came off. This is not a case in which tugs were engaged to attempt to tow, or of tugs being engaged to salve and then being dispossessed to suit the purposes of the owner of the salved property. Even if the terms of the towage contract protects the owners of the *Guiana* from being sued for negligence, the tugs owned by him are not entitled to salvage, and the men on board them also are not entitled to salvage. If anyone on board the *Maréchal Suchet* was negligent it was the pilot, and that negligence, being that of a compulsory pilot, would not affect the owners of the *Maréchal Suchet*. A tug under contract to tow a ship is not entitled to salvage remuneration for saving her from a peril brought about by the tug's negligence:

The Robert Dixon, 42 L. T. Rep. 344; 4 Asp. Mar. Law Cas. 246 (1879); 5 P. Div. 54.

The tug must be fit for its purpose, properly equipped and handled. Usually it is the crew which is inefficient; in this case it was the engine power of the tug. The owners of the tug are liable if the coal was improper:

The Undaunted, 54 L. T. Rep. 542; 5 Asp. Mar. Law Cas. 580 (1886); 11 P. Div. 46.

There was no negligence on the part of the ship in not giving orders as in

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

Any negligence on the ship in this case was the negligence of the pilot. This case is covered by the decision in the case of *The Duc d'Aumale*, 89 L. T. Rep. 486; 9 Asp. Mar. Law. Cas. 502; (1904) P. 60), where neither the owner, master, nor crew were allowed salvage in similar circumstances. The negligence of a compulsory pilot cannot be used as an answer to an action by the owners in a case such as this:

Spaight v. *Tedcastle*, 44 L. T. Rep. 589; 4 Asp. Mar. Law Cas. 406 (1881); 6 App. Cas. 217.

There was no negligence on the *Maréchal Suchet* in fact, and no charge was made against those on board her till the trial. The tug owners are bound to send a suitable tug in a proper condition, and use reasonable care to see that that is done. This is not a contract for a specific tug. The tug owner ought to exercise the same skill and care as the owner of a carriage which is let on hire:

Hyman v. *Nye*, 44 L. T. Rep. 919; 6 Q. B. Div. 685.

The same standard of care is required of a wharfinger who lets a vessel take a berth alongside his wharf; he has to see that it is in a fit condition:

The Moorcock, 60 L. T. Rep. 654; 6 Asp. Mar. Law Cas. 373 (1889); 14 P. Div. 64.

Such a term will be implied in a contract where it is necessary to give efficacy to the contract intended by the parties:

Hamlyn v. *Wood*, 65 L. T. Rep. 286; (1891) 2 Q. B. 488.

The case of *Robertson* v. *Amazon Tug and Lighterage Company* (*ubi sup.*) is not in point, for there the contract was analogous to that of supplying a named tug.

Raeburn in reply.—The result of this case, if the defendants' contentions are right, will be that the owners of the *Guiana* will not only get no salvage, but may have to pay all the damage sustained by the vessel, about 4000*l*., and all the salvage paid to the other vessels. The first question to be determined is whether this was a contract for a named tug, and on the evidence it was a contract of hire of a named tug, the *Guiana*, and this case is governed by the case of *Robertson* v. *Amazon Tug and Lighterage Company* (*ubi sup.*). Assuming that the contract was not for a named tug, the owner ought to exercise reasonable care to send a fit tug. The fact is the bottom of the vessel was foul and rendered the towage difficult; the facts show that, for no actual defect can be shown in the tug. There is no evidence that the crew were negligent, so the plaintiffs have satisfied the onus that is cast on them. See the observations of Brett, L.J. in

The Robert Dixon (*ubi sup.*).

Further, the tug is under the control of the ship, and, if the tug was not taking proper measures to cope with the difficulty, the compulsory pilot or the master of the ship should have given some order. The negligence of those on the ship contributed to the disaster, and they cannot recover anything from the tug owners:

Smith v. *St. Lawrence Tow Boat Company*, 28 L. T. Rep. 885; 2 Asp. Mar. Law Cas 41 (1873); L. Rep. 5 P. C. 308.

Assuming there was negligence on the part of the compulsory pilot, if the counter-claim is based on contract the damage sued for is too remote, because it was not the natural result of the breach of contract by the tug owners. If it is based on tort, the negligence alleged is not the proximate cause of the loss. Even if Watkins, the owners, cannot recover salvage, the masters and crews of Watkins' tugs may, because they have not been guilty of negligence. No allegation was made

by the defendants up to the time of the delivery of the defence that the tug was unfit, and no weight should be attached to that allegation.

Judgment was reserved, and was delivered on the 27th July.

July 27.—The PRESIDENT.—In these consolidated actions various claims have been brought for salvage services rendered to the *Maréchal Suchet*, a French steel three-masted full-rigged ship of 1991 tons net register. The value of the ship, cargo, and freight has for salvage purposes been agreed at 9458*l*. This vessel got aground on the Shingles Sands at six o'clock of the morning of Friday, the 15th Feb. 1910. She remained aground, embedded in the sand, until the morning of the 22nd Feb., when she was towed away by the united efforts of some of the tugs. There are several claimants as salvors. The first set of claimants are the owners, masters, and crews of the steam tugs *Guiana*, *Columbia*, *Vincia*, and *Badia*, which belonged to Messrs. Watkins and Co. The second set of claimants are the owners, masters, and crews of the steam tugs *Sun II.* and *Sun III.* The next set are the coxswain and crew of the volunteer lifeboat *Friend to All Nations*; the next, the coxswain and crew of the volunteer lifeboat *True to the Core*; and the last set the owners, master, and crew of the steam tug *Champion*. Salvage services are admitted to have been rendered by the *Sun II.* and *Sun III.* practically as pleaded, and also by the *Friend to All Nations*. I will deal first of all with the claims of the plaintiffs other than those of Messrs. Watkins and Co., the owners of the four tugs first above mentioned. I need not go into all the facts. I have said that salvage services are admitted to have been rendered by the *Sun II.*, *Sun III.*, and by the *Friend to All Nations* substantially as pleaded, and I award the *Sun II.* 800*l*., the *Sun III.* 500*l*., and I overrule the tender in the case of the *Friend to All Nations* and award her coxswain and crew 275*l*. In my judgment (and I am also advised by the Elder Brethren whose valuable assistance I have here) the *True to the Core* did not render any services in respect of which salvage ought to be given. Therefore the claim of the *True to the Core* is not allowed. With regard to the *Champion*, I accept the story told by the witnesses for the *Maréchal Suchet* in preference to that told by the witnesses of the *Champion*. The result is that I am of opinion that the *Champion* is not entitled, either for "engaged" services or for any further services rendered, to any salvage compensation.

There remain the difficult questions with regard to the claims of the *Guiana*, the *Columbia*, the *Vincia*, and the *Badia*, all belonging to Messrs. Watkins and Co. The owners of those tugs are hereinafter called the plaintiffs. On the 14th Feb. 1910 the *Guiana* was engaged to tow the *Maréchal Suchet* from Falmouth to London for 80*l*. The tug and tow started from Falmouth about ten o'clock in the morning of the 16th Feb. and proceeded towards London. About 6 p.m. on the evening of the 17th Feb., when off Dungeness, the *Maréchal Suchet* took on board a compulsory pilot. The vessels passed the Prince's Channel Lightship about 1.50 a.m. on the 18th Feb., and not long afterwards the *Maréchal Suchet* and her tug were driven to leeward, the wind being south-west. The tug could not hold the vessel, and for two to three hours the ship and tug went to leeward, and very little headway was made towards the west. About 6 a.m. the vessel took the ground, and the tug became "impotent" to deal with her. The question is whether the towage contract was ended or superseded or suspended, and whether the *Guiana* is entitled to salvage remuneration for any services afterwards rendered. The towing contract was, as stated, to tow the vessel from Falmouth to London for 80*l*. The telegrams and letters referring to it were put in, as was also the contract note itself dated the 14th Feb. 1910. It was contended for the plaintiffs that the contract was for a specified or named tug, the *Guiana*, and that, as the *Guiana* was supplied, the tug contractors fulfilled their contract, and that the owners and master of the *Maréchal Suchet* undertook all responsibility as to the efficiency of the tug. I decide against that contention, after looking at the letters and telegrams. Moreover, the contract note of the 14th Feb., which is pleaded by the plaintiffs in their defence to the counter-claim, does not name or make any reference to the *Guiana*. The contract, therefore, was for the towage of the *Maréchal Suchet* by a tug to be supplied by the plaintiffs. This being so, the owners of the tug must be taken to have contracted that the tug should be efficient, and that her crew, tackle, and equipment should be equal to the work to be accomplished in weather and circumstances reasonably to be expected; and that reasonable skill, care, energy, and diligence should be exercised in the accomplishment of the work. On the other hand, they did not warrant that the work should be done under all circumstances and at all hazards, and the failure to accomplish it would be excused if it were due to *vis major* or to accidents not contemplated, and which rendered the doing of the work impossible. Did the owners of the tug in this case fulfil their contract or were they prevented from doing so by *vis major* or by any such uncontemplated accidents? These are the questions which arise on the claim for salvage. Other questions arise on the counter-claim, having regard to the special terms and conditions of the towage contract. The court is, and ought to be, careful to scrutinise a claim for salvage by a tug engaged to tow. It is essential in the public interest, for obvious reasons, that the towage contract should not be easily set aside, and a salvage service substituted for it. A tug ought to make a clear case before she can convert herself into a salvor. The vessel while in tow of the tug took the ground. The tug might have been in herself of insufficient power; or she might have become inefficient for the work by reason of an inefficient crew, or by reason of inadequate tackle or equipment, such, for instance, as an unclean boiler, or too little coal, or coal of too poor a quality; or by reason of the failure of the crew in the performance of their work—for instance, in working the engines, in stoking, or in keeping up steam. The burden of proof is upon the plaintiffs. It is a twofold burden. They must show that they were not wanting in the performance of the obligations resting upon them under the towage contract; and they must also account for the stranding of the vessel by showing something like *vis major* or an inevitable accident. In the words of Brett, L.J. in *The Robert Dixon*, "the plaintiffs,

being under a towage contract, bring this action, in which they assert that the towage service was altered into salvage; and it seems to me that the plaintiffs are in this position, that it lies on them to show that the change occurred without any want of skill on their part, but by mere accident over which they had no control. The burden of proof on both the affirmative and the negative issues is on the plaintiffs, that is, both that there was an inevitable accident beyond their control, and that they showed no want of skill." The very fact that the tug was unable to tow the vessel, that is, unable to do the work which the plaintiffs contracted to do, is evidence that she was inefficient or that there was inefficiency or want of care or skill or energy or diligence on the part of her master or crew: (see *The Ratata, sup.*). The plaintiffs entirely failed to account for the stranding by *vis major* or by any circumstances which could not reasonably be expected, or by any inevitable accident. The weather was not worse than or even as bad as was to be expected in the Channel at that time of the year. The master of the tug admitted this, and the owner of the tug also said, "She ought to expect bad weather in February. You may get very strong gales and often do." That is the result of all the evidence. I think that the best evidence as to the state of the weather at the place where the difficulties were encountered is to be obtained from the weather reports of the Prince's Channel Lightship. Those reports were produced, and they show that at midnight on the Friday the force of the wind was 4; at 3 a.m. force 6 to 7, with squalls; and at 6 a.m. also 6 to 7, with squalls. This means that at the worst the wind blew with a force between a strong breeze and a moderate gale. No great reliance was placed on the squalls—probably because for two or three hours the tug was continuously unable to prevent the tow going somewhat to leeward. The log of the *Guiana* makes no mention of squalls. There was a suggestion that the difficulty of the tug was due to the vessel having been on a long voyage and to her bottom being dirty. This was not pleaded, and I do not think that the state of the bottom of the vessel had anything to do with the stranding. It was argued that, apart from the allegation of insufficiency of power in the tug, the defendants did not allege negligence, but it is not necessary to plead negligence in such a case to defeat a salvage claim: (see *The Minnehaha*, Lush. Rep. 350). The tug was built in 1885, but she had been supplied with a new boiler about twelve or thirteen years ago. She used salt water in the boilers. She had been overhauled in Jan. 1910. There was no evidence when the boilers or tubes were last cleaned. Her indicated or effective horse-power was between 550 and 600, although she was put down as being 1100-h.p. in the plaintiffs' statement of claim—this having been pleaded, as Mr. Watkins said, for the purpose of a salvage claim.

The conclusion to which I have come is that the plaintiffs have completely failed to account for the accident by *vis major* or any outside cause, and therefore the *primâ facie* case against them has not been dislodged. In my opinion, therefore, the plaintiffs, having failed in their towage contract, cannot, in the circumstances of this case, claim as salvors. They attempted to tow off the vessel for five tides—*i.e.*, in all for thirteen hours—but did not succeed in rendering any valuable service. For the three tides following the *Guiana* did nothing on account of the weather having got much worse. Then on the morning tide of the 22nd Feb. she joined other tugs for about three-quarters of an hour in trying to get the vessel afloat; they succeeded, whereupon, at about 10.30 a.m. on that day, the *Guiana*, in the words of the statement of claim "resumed her towage contract." In my view what she did she ought to have done as the tug under the towage contract, in the circumstances of the case. It is admitted by counsel for the plaintiff owners that if they were not entitled to salvage as owners of the *Guiana*, they were not entitled as owners of their other three tugs—the *Columbia*, the *Vincia*, and the *Badia*. It was contended, however, that the masters and crews of all four tugs were entitled. In my opinion the master and crew of the *Guiana* are not entitled, as they performed no more than their duties in the towage service; and they have not satisfied me that they acted with efficiency, or skill and care, on board the *Guiana*. It is left in doubt whether the accident was due solely to the inefficiency of the tug supplied, or to her condition and management combined; (compare *The Duc d'Aumale* (1904) P. 60). As to the masters and crews of the other three tugs they did perform some "engaged" services, although they did not in my opinion contribute to the ultimate salvage. In respect of these services I allow in the case of the *Columbia* 55*l.*, in the case of the *Vincia* 20*l.*, and in the case of the *Badia* 35*l.* There remains the counter-claim of the defendants. The conditions which form part of the towage contract are very sweeping, but I cannot say they do not apply. I think it is for the defendants, who are plaintiffs upon the counter-claim, to establish the case which they have pleaded, namely, the inefficiency of the tug. There is no allegation other than that in the pleadings. As I have said, it is left in doubt in this case whether the accident was due solely to the inefficient condition of the tug and its equipment, or partly to that and partly to want of skill, care, and energy in its management by the master and crew. On the whole I think that, although the conditions cannot enure to the benefit of the plaintiffs in the salvage claim, when the contract is alleged by the defendants, as plaintiff on the counter-claim, and the counter-claim is for damages for a breach of the contract, the conditions must be looked at, and I think, in this case, they afford a defence to the counter-claim. The results accordingly are that (1) upon the claims of the owners, master, and crew of the *Guiana* there will be judgment for the defendants, with costs; (2) upon the claim of the masters and crews of the *Columbia*, *Vincia*, and *Badia* there will be judgment for them for 55*l.*, 20*l.*, and 35*l.* respectively, with costs; (3) upon the claim of the owners, masters, and crews of the *Sun II.* and *Sun III.* there will be judgment for them for 800*l.* and 500*l.* respectively, with costs; (4) upon the claim of the coxswain and crew of the *Friend to all Nations* there will be judgment for them for 27*5l.*, with costs, making together a total award of 1685*l.*; (5) upon the claim of the lifeboat *True to the Core* there will be judgment for the defendants, without costs; (6) upon the claim of the

owners, master, and crew of the *Champion* there will be judgment for the defendants, with costs; and (7) upon the counter-claim there will be judgment for the plaintiffs (the defendants on the counter-claim), with costs of the counter-claim.

Solicitors for the plaintiffs the owners, masters, and crews of the *Guiana*, *Columbia*, *Vincia*, and *Badia*, *Clarkson* and *Co.*

Solicitors for the plaintiffs the owners, masters, and crews of the *Sun II.* and *Sun III.*, and for the lifeboat *Friend to all Nations*, *Lowless* and *Co.*

Solicitors for the plaintiffs Arthur Polley and others, the crew of the lifeboat *True to the Core*, *Dubois* and *Co.*, agents for *Chamberlin* and *Talbot*, Great Yarmouth.

Solicitors for the plaintiffs the owners, master, and crew of the tug *Champion*, *C. J. Smith* and *Hudson.*

Solicitors for the defendants and counter-claimants the owners of the *Maréchal Suchet*, her cargo, and freight, *Stokes* and *Stokes.*

July 28, 29, 30, *Oct.* 12, *and Nov.* 2, 1910.

(Before BARGRAVE DEANE, J. and Elder Brethren.)

THE BIEN. (*a*)

Oyster beds — Damage — Navigable river — Negligence of harbour-master — Liability of Conservancy Board—Liability of shipowner—Trespass—Continuing authority.

A vessel foundered in the Medway and was then by the direction of the Medway Conservancy Board's harbour-master moved to a place where she could be repaired. The harbour-master was in charge of her when she was removed, and under his directions she was placed where there was an oyster bed. The vessel remained on the oyster bed for some time after the lessee of the oyster beds had given notice of their existence and made complaint about the position of the vessel to her owner and to the conservators; she damaged the oyster beds in several places.

In an action brought against the conservators of the river by the lessee of the oyster bed for damage caused by the negligence of the harbour-master and for trespass the owner of the vessel was added as a defendant.

Held, that the conservators were liable for the negligent act of their harbour-master in directing the vessel to be put where she was, as he had had special notice of the existence of the fishery, and knew or ought to have known of the fishery and might have placed the vessel in a position where no damage would have been done; that the conservators could not in the circumstances rely upon their statutory powers to remove wrecks; and that the defendant shipowner was not liable for any of the damage, as he was acting under the directions and under the continuing authority of the harbour-master.

The Octavia Stella (6 *Asp. Mar. Law Cas.* 182 (1887); 57 *L. T. Rep.* 632) *considered.*

ACTION for damage to oyster beds caused by negligence or trespass.

The plaintiff, Frank Raycraft, was the lessee of certain oyster beds at Sleede Ooze in Long Reach, river Medway; the defendants were the Conservators of the river Medway and Frank Rijsdijk, the owner of the Norwegian brig *Bien.*

The plaintiff, who originally brought his action against the conservators of the Medway only, alleged that in the month of Sept. 1909 the Norwegian brig *Bien* foundered in the fairway of the river Medway below Sleede Ooze; that the brig was then raised by the orders and under the superintendence of the conservators or their servants, and by their orders was moved to and permitted to ground on the plaintiff's oyster beds, which were damaged. He alleged that the conservators were guilty of trespass or were negligent in that they knew or ought to have known the position of the oyster beds, and ought not to have ordered the *Bien* to be moved into a place in which she was certain to damage them when she took the ground. He also alleged that the conservators knew or ought to have known that the *Bien* would have to be repaired before she could be removed from the position in which she was placed; that she would do further damage as she moved with the tide and while the repairs were being done, as in fact happened.

The conservators by their defence denied that the plaintiff was the lessee of the oyster beds or that the lease was granted in accordance with the Rochester Oyster Fishery Acts 1865 and 1867. They alleged that the bed, soil, and shores of the river Medway at the place where the brig grounded was vested in them by the Medway Conservancy Act 1881, and that the lease granted to the plaintiff was subject to the powers of the conservators. They admitted that the brig foundered, and that she was raised and grounded by the orders of the harbour-master, but they denied that she was caused or permitted to ground by them or their servants on any oyster bed, and also denied that they were guilty of trespass or negligence or that the plaintiff had suffered any damage. They alleged that they did not know and had no means of knowing of the existence or position of the alleged oyster beds; that they were not sufficiently marked out, and no proper notice was given of their existence or limits. They further alleged that, even if they knew of the existence and position of the oyster beds, and even if the plaintiff had suffered damage, both of which they denied, the place where the brig was grounded was the only place where she could be grounded for the necessary repair; that in so grounding her the conservators were lawfully and reasonably acting in accord with their statutory rights and duties under the Medway Conservancy Act 1881; that the conservators were lawfully using without negligence the place where the brig grounded in the reasonable exercise of their right of navigation and grounding; and that the brig was moved as soon as she reasonably could be from the position where she was grounded.

On the 18th Feb. 1910 the plaintiff delivered a reply joining issue.

On the 26th May 1910 the plaintiff obtained an order for leave to amend his writ by joining the owner of the *Bien.*

The writ was amended on the 27th May, and on the 4th June the plaintiff delivered an amended statement of claim. The amendment consisted in an alternative allegation that the defendant

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

Rijsdijk, the owner of the *Bien*, employed the conservators to raise and remove the vessel, and by himself and his servants conducted and assisted in the raising and removal, and failed to take necessary or reasonable precautions to prevent the vessel from grounding on the plaintiff's oyster beds in the course of the raising and removal, and negligently permitted her to ground thereon, and, after she grounded, negligently moved her or permitted her to be moved and carried out certain repairs while lying on the oyster bed, thereby causing damage. He also alleged that the owner and his servants had trespassed on the oyster beds, thereby doing damage.

On the 20th June 1910 the owner of the *Bien* delivered a separate defence, which was amended on the 29th June. The alleged owner in the main adopted the defence put forward by the conservators, but denied that he was the owner at any material time. He admitted that two tugs and twenty men were employed by the owners in raising and removing the *Bien*. He alleged that she was properly placed where she was by the harbour-master as where she lay after foundering she obstructed the fairway; that the grounding was done in the reasonable exercise of the rights of the *Bien* in a public navigable river; that until the *Bien* was placed on the ground it was not known to what extent she was damaged or that repairs would be necessary before she could be removed; that she was removed as soon as she reasonably could be; and that the repairs to enable her to be moved were done skilfully and without delay.

On the 9th July the plaintiff delivered a reply to the amended defence joining issue.

The action was tried on the 28th, 29th, and 30th July, when judgment was reserved.

Laing, K.C. and *Dawson Miller* for the plaintiff, the lessee of the oyster fishery.

Aspinall, K.C. and *J. B. Aspinall* for the defendants the Medway Conservators.

Bailhache, K.C. and *D. C. Leck* for the defendant Rijsdijk, the owner of the *Bien*.

BARGRAVE DEANE, J.—In Aug. 1909 the Norwegian brig *Bien*, owned by one Andersen, and laden with a cargo of ice, got ashore on the Mouse at the entrance of the river Thames, when on a voyage from Norway to Rochester, in the river Medway. She was damaged, but was got off the Mouse and proceeded to Rochester. On the 2nd Sept. 1909 she got aground again in the river Medway to the north of the channel, at a spot agreed upon as about a cable's length north of the channel, and near Oakham Ness. There she filled with water and remained on the ground, and her cargo of ice melted away. Captain Richards, the harbour-master, an official of the Conservators of the River Medway, received information about her on the 10th Sept. and went down to inspect her, and gave notice to her owner, Andersen, to have her removed, but Andersen did nothing in the matter. On the 22nd Sept. Captain Richards introduced the master of the *Bien* to one Rijsdijk, a shipbreaker, with the result that on the following day Rijsdijk bought the vessel and became her owner, and on that day, the 23rd Sept, Captain Richards served Rijsdijk, as her new owner, with a notice to remove her. Rijsdijk took steps to obey the notice—procured a tug, lighters, and pumps—and on the 27th Sept. all was ready for her removal. Captain Richards attended in his launch, which also had a pump on board, and pumping commenced at low water, the intention being to tow her, when she was freed from some of the water in her and afloat, to Upnor for repairs. She was cleared sufficiently to get her off the ground as the tide flowed, and she was towed, the pumps still going, for about a mile towards Rochester, along the shallow water north of the channel, smelling the ground as she went. The harbour-master was in charge of the operations, Rijsdijk obeying his orders, and, finding her a difficult tow owing to her instability through the absence of any cargo, the former determined to put her ashore above low-water mark at a place called Teapot Hard, on the north shore. She was eventually, about an hour before high-water, put ashore there on a bed of mud between two hards, which comprise what is called Teapot Hard. She was placed 150 yards above low water mark, bow on, with an anchor out ahead and one astern. The harbour-master then gave up charge to Rijsdijk and left, intending that necessary repairs should be done there to enable her to be taken up to Rochester. She remained there from the 27th Sept. till the 11th Nov., during which time as the tide rose and fell she on several occasions shifted her berth, and it is not disputed that a considerable area of the foreshore was broken and disturbed by her during that time. On the 11th Nov., having been sufficiently repaired at Teapot Hard, she was taken up to Rochester.

There is no doubt that Teapot Hard is situated in an ancient and well-known shell-fish fishery known as the Sleede Ooze Fishery, and belonging to the Oyster Fishery Corporation of Rochester, and that it had been leased by them to the plaintiff, Mr. Raycraft, a fishmonger of Rochester, his lease being for twenty-one years from the 24th June 1909 at a rental of 50*l.* a year, and purporting to be granted by the Chamberlain and three of the jury of the Rochester Oyster Fishery Corporation pursuant to the statute of 1865 (28 & 29 Vict. c. ccxxvii.) and other statutes in that behalf. The ground is described in the lease as all that piece or parcel of land covered with water (to ordinary high-water mark) being part of the Ooze, commonly called or known as Sleede Ooze, in the river Medway, as an oyster fishery, or oyster ground, or oyster laying. It is not disputed that the *Bien* was placed upon a portion of the land comprised within that lease, and it is not disputed that the lessors had the right and title to grant that lease; and it is not disputed that the *Bien* did whilst so laying on that land from the 27th Sept. to the 11th Nov. break up and disturb the surface in the way complained of. I need not refer to the history of the various fisheries in the river Medway, of which Sleede Ooze is only one. The Act referred to, of 1865, recites that "Time out of mind there hath been an oyster fishery in the river Medway and in many of the creeks and branches thereof," and proceeds to make regulations for the management of the fishery. This statute was a public statute, and was followed by 30 Vict. c. lxxii., and 31 & 32 Vict. c. 53, which confirmed the original statutes. This action was brought by Mr. Raycraft against the Conservators of the River Medway to recover damages for the injury done to the Sleede Ooze

Fishery through the conduct of Captain Richards, their servant, in placing the *Bien* on the land comprised in that fishery, and Mr. Rijsdijk was subsequently added as a defendant as having been a party to the wrongful act of Captain Richards. The conservators do not dispute that Captain Richards was their servant and acted as such in what he did. Indeed, they could not dispute it, bearing in mind the Medway Conservancy Act 1881, under which he was appointed. Their defence formally denies the plaintiff's lease; that the place was an oyster fishery; that the plaintiff has suffered any damage; and admits that they knew the *Bien* would have to be repaired before she was removed from Teapot Hard. But the real issues raised by them are as to their rights under their Act, as to their knowledge of the existence of the fishery, and particularly as to whether in the circumstances Captain Richards, in the exercise of his duty, was guilty of any negligence, and could have done differently from what he did. Mr. Rijsdijk's defence admits that he purchased the *Bien*, repeats the defence of the conservators as to their statutory rights, admits that he removed the *Bien* and placed her on Teapot Hard, but says he did it by direction of the harbour-master, Captain Richards; he denies negligence or trespass, denies knowledge of the oyster beds, and says that the *Bien* was repaired and removed as soon as possible after the grounding on Teapot Hard. The trial lasted over two days, and a considerable body of evidence was called by the plaintiff and the conservators, but no evidence was called in support of the defence of Mr. Rijsdijk, though his counsel stated that he was not in fact the purchaser of the *Bien*, but only acted on behalf of the company for whom he purchased her. As to this, I have already pointed out that in his defence as originally delivered he admits that he purchased her, and Captain Richards in his evidence before me says that he introduced Rijsdijk to the captain as a purchaser, and subsequently served him with notice as the owner. There is no evidence to make me doubt that Rijsdijk in fact became her owner, and was her owner at the time in question.

Let me first deal with the question as to the legal positions of the plaintiff and the conservators as regards this land where the *Bien* was placed near Teapot Hard. It is undoubtedly and undeniably a fishery, vested by statute in the persons who leased it to the plaintiff, and I am satisfied that it was a fishery in fact as well as in name. No question has been raised as to its producing shell-fish such as mussels, winkles, and cockles, but it is declared that no oysters did or do grow there, and that the plaintiff has both spoken and acted dishonestly in attempting to make out that oysters grew there, whereas in fact no oysters did. As against this allegation it was proved before me that it had been leased and cultivated as an oyster fishery for many years, and various leases were put in, covering nearly forty years past, and witnesses were called who satisfied me that the plaintiff's account was true, and the attempt on the part of the defendants to discredit him and his fishery failed. The witness whose evidence was to my mind conclusive on this point was called by the defendants, a Mr. Passby, who had been engaged in oyster culture all his life and had rented this particular fishery, Sleede Ooze, from the plaintiff's lessors for a period of twenty-eight years, and was the immediate predecessor of the plaintiff. He said that he had cultivated oysters there; that when he gave it up there were a large number of oysters there; that there was a great spat three years before he gave it up, and that it took three or four years for the spat to mature. It is true he threw doubt on whether there would be oysters at the spot where the *Bien* lay, but his evidence when he gave it did not satisfy me that the evidence of the plaintiff and his witnesses that there were in fact oysters there was untrustworthy. The whole of the evidence satisfied me that in fact there were oysters, though to what extent I must leave the registrar and experts to ascertain if necessary. The evidence of the expert witnesses established that oysters will not grow on mud, but that undisturbed mud gradually acquires a crust by the deposit on it of stones and other *débris* left by the tide, which is in time of such a character that oysters will lodge and breed upon it. So that in course of time a person can walk on it and gather the oysters—and witnesses were called whose evidence I accept that they themselves had gathered oysters on such a crust at and round the place where the *Bien* was placed on the 27th Sept. Such a witness was Henry King, who knew the Sleede Ooze Fishery well, and had worked on it for Mr. Williamson and Mr. Passby, the predecessors in title of the plaintiff. I am satisfied, and find as a fact, that there were oysters at and round the place where the *Bien* was placed, as well as other shell-fish, and that these oysters and shell-fish were damaged and destroyed by the *Bien* being placed there, and were further damaged and destroyed by reason of the *Bien* remaining there so long, shifting about and stirring up the mud, which was carried over and deposited on other ground for a considerable distance beyond the keel marks actually made by the *Bien*. The next question is who is responsible for placing the *Bien* on the land in question? The answer is easy, as Captain Richards admits that he selected Teapot Hard. He said in cross-examination, "I selected the spot near Teapot Hard as the most suitable spot"; and he further said, "If I had known it was an oyster fishery I should not have put her there," which shows that it was not a matter of necessity to put her there. As a witness he was perfectly candid, and accepted the responsibility for choosing the place, although he says that the grounding was in fact carried out by the other defendant and the tug and men working with him. It is true that he went on to say that he "could not have put her on Hoo Flat as she would have sunk in the mud"; but he, in fact, did put her in the mud according to his own evidence, and he relies on that fact in the part of the case where he says there could be no oysters where he placed her, as it was all mud. I am of opinion, and the Elder Brethren agree with me, that she could have been placed on Hoo Flat, which is less than two cable lengths higher up the river than Teapot Hard, and that she could have been repaired there quite as easily as she was repaired where she was placed. The truth is that Captain Richards either had forgotten all about this Sleede Ooze Fishery, or had never realised that it existed. It is pleaded that he had no notice of

this fishery. That is contrary to the fact. He was appointed harbour-master in 1895, fifteen years before these events. One witness called for the plaintiff was Mr. Apsley Kinnette, the town clerk of Rochester, who is also the registrar of the Oyster Fishery Corporation, and he stated in evidence that in 1896 he prepared a plan for the harbour-master showing all the fisheries of the corporation, which was kept in the harbour-master's office, and upon notice was produced in court before me. It shows the Sleede Ooze Fishery clearly defined and coloured on the plan. It was further sworn by the plaintiff's witnesses that a watch-boat was moored off this fishery with a man living in it, and that wands and notice boards were placed giving notice of it. There is much conflict of evidence about this, and although there was no dispute about the existence of the watch-boat, which Captain Richards must have seen every day that he passed in his launch up or down the river, I do not place so much reliance upon these demarcations of the fishery as upon the plan with which Captain Richards had been supplied, and which he must have had constantly under his observation. I am of opinion that Captain Richards had special notice given him of this fishery, and that the defence fails in that respect. What is the necessary consequence? It is that I must and do find that Captain Richards, without any necessity compelling him to do so, placed the *Bien* on land which he must or ought to have known was an oyster fishery, when he could easily have taken her on the flood tide 400 yards higher up the river and placed her on Hoo Flat, which was not a fishery, and has been described as "no man's" land, and where he would have occasioned no damage to anyone. I find that this was an act of negligence on his part which occasioned the damage which the plaintiff complains of. Although the amount of the damage is not for me to determine, still I am satisfied that some damage was done. Next as to the responsibility of the defendant Rijsdijk. He was with Captain Richards when all the moving of the *Bien* to Teapot Hard was in progress, and, in fact, moved her, but I am satisfied that the placing of her where she was placed was done on the sole responsibility and direction of Captain Richards, and that Rijsdijk only acted at the time pursuant to those directions. But Captain Richards says, and it is not disputed, that having seen her placed on the ground and moored he left her and gave no further orders about her. From that time Rijsdijk was in possession of her. She was placed there about 10 p.m. on the 27th Sept., and on the following morning notice was given to those on board—Rijsdijk being one—by King, the watchman, that she was on the plaintiff's fishery. The watchman was referred to the conservators, and Rijsdijk took no steps to move the vessel, and kept her there until the 11th Nov., and it is needless to say that while she was being repaired at that place, with a lighter and men and materials, much further damage was done; and the question is who is responsible for that further damage.

This brings me to the law and decided cases. First, it is undoubted that the Medway at the material part, namely, from the sea to Rochester, is a navigable river, and that previous to the Medway Conservancy Act 1881 (44 & 45 Vict. c. clxxiv.) the mayor, aldermen, and citizens of Rochester were, or claimed to be, owners of the bed, soil, and foreshore of that river, and by sect. 75 of that Act all the estate, rights, title, and interest of the corporation in the bed and soil and shores of the river became and were transferred to and were vested in the conservators, brought into existence under that Act as the Medway Board of Conservancy. Sect. 114 gave authority to the harbour-master appointed by the board to regulate the time and manner in which any vessel shall enter into, go out of, or lie in the river, and the position, mooring or unmooring, placing or removing any vessel within the same. Sect. 120 gave the harbour-master the usual full authority as regards the removal or destruction of vessels sunk or stranded in the river. But by sect. 153 it was enacted that nothing in this Act shall alter, abridge, or affect the provisions of the Act 2 Geo. 2, c. 19, or of the Rochester Fishery Act 1865, or of the Rochester Fishery Act 1867, or the Medway Regulation Continuance Act 1868, or any estate, right, title, interest, power, or privilege acquired thereunder or saved thereby. The conservators in this case plead that the bed, soil, and shores of the river are vested in them. That is true. They plead further that any lease granted is subject to their powers. I do not think so if they mean that they may ignore the lease at their pleasure. I am of opinion that they are bound to recognise these fishery leases and abstain from ignoring them; and do their utmost in the exercise of their powers to avoid trespassing upon or injuring these fishery grounds; and if they or their servants by an act of negligence do injury, then they are liable to make good the damage resulting from such negligence. It is not suggested in this case that the *Bien* was placed on this fishery ground in the ordinary course of navigation, or by any *force majeure* which put it out of the power of the harbour-master to avoid the injury he occasioned. His own evidence negatives that, as he admits that he selected the spot. It is not a case of public right, so as to bring the case within *Mayor of Colchester* v. *Brooke* (1845), 7 Q. B. 339) or *Gann* v. *Free Fishermen of Whitstable* (1 Mar. Law Cas. O. S. 386 (1864); 11 H. L. Cas. 792), but it is a case where a public servant having a statutory right to move a ship so negligently conducts himself as to cause damage to the property of an individual towards whom, by the same statute under which he exercises his powers, he is bound to exercise every caution and diligence, and not, as in this case, wilfully to ignore the notice he had received of the existence of this fishery, and intentionally to place a ship there in preference to placing her a few hundred yards further on, where there was no fishery to injure. The result is that I find that the plaintiff has established his case against the conservators. But this does not conclude the matter.

There is still the claim against Mr. Rijsdijk. As to this I am in a difficulty owing to that gentleman not having been called and no other evidence having been offered on his behalf. As I have said, Captain Richards left the ship on the night of the 27th Sept., and was not there on the morning of the 28th, when the watchman informed Rijsdijk that his ship was on the fishing ground and was doing damage. There is no statement by Mr. Rijsdijk that then or thereafter he was acting

under the orders of Captain Richards. Mr. Rijsdijk has not given us any explanation of why, when he had notice that his ship was doing damage to this fishery ground, he did not take immediate steps to remove her the short distance necessary to abate that damage as soon as possible. Either he or Captain Richards is, or both are, responsible for this further damage. No evidence has been offered to the court to show that it was impossible to shift the *Bien* on the next flood tide some 400 yards up river on to Hoo Flats, and considering that on the night of the 27th she was moved a mile on the flood, there seems no reason why she could not have been moved that short distance further on the 28th or the 29th. This part of the case comes, according to the argument of counsel for the defendant Rijsdijk, within the judgment of Sir J. Hannen in *The Octavia Stella* (57 L. T. Rep. 632; 6 Asp. Mar. Law Cas. 182 (1887). In that case the pilot who was in charge negligently placed a ship on an oyster fishery and was held to blame. The master, as soon as he found his ship was in a position where she was doing damage to an oyster fishery, did everything in his power to remove his ship so as to minimise the damage as much as possible. Sir J. Hannen, in his judgment, says: "In this case we must have regard to the fact that the captain by no negligence of his own, but by the negligence of someone else for whose acts he was not responsible, was brought into this position, and he therefore had only the duty imposed upon him of getting out of that position by reasonable efforts. His duty was to extricate himself from the position in which he was by the ordinary means of navigation, and he was not bound to take extraordinary measures not in the nature of ordinary navigation, but in the nature of extra exertions, for the purpose of preventing damage to the oysters." Unfortunately, however, the facts and positions of the two defendants do not correspond with the facts of *The Octavia Stella*, and the positions of pilot and master in that case. The position of Captain Richards as the harbour-master and officer of the Medway Conservancy Board carried with it a much greater and more enduring authority than that of a pilot, whereas the position of Mr. Rijsdijk in the circumstances was far short of that of the master in *The Octavia Stella*. The *Bien* was placed on Teapot Hard by the authority of the harbour-master, and undoubtedly with the intention that she should remain and be repaired there, and I have no doubt (although Mr. Rijsdijk has not been called to say so) that that object and intention was conveyed to Mr. Rijsdijk by the harbour-master, because when warned by the watchman that the *Bien* was on the oyster ground, the former at once referred the watchman to the conservators as the persons by whose authority he was there. The harbour-master in due course appeared on the scene, and there was an interview at the vessel between the plaintiff, the harbour-master, and Rijsdijk. The latter at that interview suggested first that there were no oysters there, and then, when the plaintiff picked up some and showed them, deliberately imputed to the plaintiff that he had fraudulently placed them there. In my opinion there is no evidence in fact in support of this imputation, and I regret that it was made, and still more do I regret that the imputation was renewed in the course of the trial. But apart from this conduct of Rijsdijk's at this interview, it is quite clear from the evidence that so far as the position of the ship was concerned, and her repair where she was, the harbour-master was at that time looked to as the person responsible, that it was made clear to his mind then, if not before, that he had placed the vessel on the ground forming part of the oyster fishery known as Sleede Ooze, that a complaint was made to him that his act in placing her there had caused and was causing damage, and that it was his duty then to have had her moved from there. On the other hand, Rijsdijk, in my judgment, could not properly have moved and placed her elsewhere without the harbour-master's authority, which was a continuing authority, and further, that Rijsdijk could not properly (and here I am assisted by the strongly-expressed opinion of the Elder Brethren) have taken upon himself without the advice and direction of the harbour-master the responsibility of attempting to move this wrecked vessel, full of water, and without stability, from the place where she was. I am clearly of opinion that the responsibility of the harbour-master was a continuing responsibility, and that Rijsdijk's position as owner was throughout subordinate to the harbour-master's authority. For these reasons I am of opinion that the plaintiff is entitled to judgment in this action with costs against the Medway Conservancy Board, and that Rijsdijk is entitled to judgment with such costs as may be found due on taxation. As to the damages, there must be a reference if the parties desire it, but as I have heard the whole of the facts I am willing (to save the expense of a reference) to say what sum I think would be a reasonable compensation to the plaintiff in the circumstances, if both parties are willing that I should do so.

On the 2nd Nov. 1910 the learned judge, with the consent of the parties, assessed the damages at 155*l.*

Solicitors for the plaintiff, *W. A. E. Headley*, for *Norman* and *Stigant*, Chatham.

Solicitors for the defendants the conservators, *Dollman* and *Pritchard*, for *Hayward, Smith*, and *Challis*, Rochester.

Solicitor for the defendant Rijsdijk, *Robert Greening*.

HOUSE OF LORDS.

July 1, 4, 5, 1910, *and Feb.* 20, 1911.

(Before the LORD CHANCELLOR (Loreburn), Lords MACNAGHTEN, JAMES OF HEREFORD, and SHAW.)

LINDSAY AND OTHERS *v.* KLEIN. (*a*)

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

Unseaworthiness — Burden of proof — General average.

The burden of proving that a ship was unseaworthy rests, as a general rule, upon the party who alleges it, but presumptions that she is unseaworthy may be raised and will be given effect to in certain cases.

Where the feed pumps of an old ship, upon the

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

repairs of which very little had been spent, broke down, in ordinary weather, within a few hours of the commencement of the voyage, and her cargo was damaged, the House of Lords held that it might be presumed that the ship was not seaworthy at the commencement of the voyage, and that the cargo owners were not liable to a general average contribution in respect of the necessary repairs.
Judgment of the court below reversed.

APPEAL from a judgment of the First Division of the Court of Session in Scotland, consisting of the Lord President (Lord Dunedin), Lords Kinnear and Dundas, with nautical assessors, reported 1910, Sess. Cas. 231; 47 Sc. Law Rep. 177, who had affirmed a judgment of the Lord Ordinary (Lord Salvesen) in favour of the respondent, a shipowner, in an action brought by him to recover a general average contribution from the appellants, who were holders of bills of lading for two parcels of oats which were part of the cargo.

The respondent was the owner of the steamship *Tatjana*, which sailed in April 1905 from Libau in the Baltic to Leith with a cargo of grain. There was evidence that she was an old ship, that she had been bought by her present owner for a low price, and that very little had been spent on her in repairs. A few hours after starting on the voyage the engines broke down owing to a fracture of the valve casing of the feed pumps which supplied the boiler with fresh water. This made one of the pumps useless, but the other was not disabled, and the donkey pump, which was not in fact connected with the hot well, might have been connected temporarily without difficulty so as to supply the boiler with fresh water. The engineer, believing erroneously that both feed pumps were disabled, and that the donkey pump could not be connected with the hot well, used the donkey pump to supply the boilers with salt water, and the master decided to put into Elsinore, a port which could be reached without any serious deviation from the voyage, for repairs. On her way there the vessel encountered stormy weather, in which the coaming of one of the ventilators of the forehold, which was of an obsolete pattern, was broken, and sea water got into the hold and damaged the cargo.

On the arrival of the vessel at Leith the cargo owners made a claim in respect of this damage, which was settled by a payment of 50*l.*, and no question was raised in this appeal as to it.

The vessel was repaired at Elsinore, and two years afterwards, in May 1907, the owner made a claim against the cargo owners for a general average contribution in respect of these repairs, and for particular average in respect of unloading and drying the cargo.

The defenders pleaded that the vessel was not seaworthy at the commencement of the voyage, and that consequently they were not liable, but the courts below decided in favour of the pursuer as above mentioned.

R. S. Horne, K.C. and *C. E. Lippe* (both of the Scottish Bar) appeared for the appellants.

C. Murray, K.C. (of the Scottish Bar) and *G. C. Rankin* for the respondents.

In addition to the cases cited in the judgments, *Australasian Steam Navigation Company* v. *Morse* (1 Asp. Mar. Law Cas. 407 (1872); 27 L. T. Rep. 357; L. Rep. 4 P. C. 222) was referred to.

Horne, K.C. was heard in reply.

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

Feb. 20, 1911.—Their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Loreburn.)—My Lords: This is a case in which both the Lord Ordinary and the Inner House, not without doubts, have held that the steamship *Tatjana* was seaworthy when she sailed from Libau on the 8th April 1905, and upon that the order appealed from wholly rests. Your Lordships hesitate long before differing from any finding of fact concurred in by both courts, and especially so when it hinges upon the credibility or effect of evidence given orally by witnesses. In the present instance nearly all the material evidence was given on commission. Still, I hesitate to differ from learned judges whose opinion carries so great an authority. I can, and do, almost entirely agree with them upon the actual facts, but I do not think that those facts point to a conclusion of seaworthiness. If this ship was seaworthy, what occurred to her almost immediately after she left port is quite unaccountable, and it is the shipowner's business to account for it if he can in some way which shall displace the natural inference. The *Tatjana* sailed on the 8th April, and within a few hours her feed pumps broke down, with the result that the boilers had to be fed with sea water by means of the donkey pump. She met with bad weather, and put in at Elsinore for repairs, after suffering some damage both to ship and cargo. Manifestly, this occurrence called for explanation. In ordinary circumstances, a ship which starts seaworthy on her voyage is not driven to feed her boilers with sea water in three or four hours. When the explanation given by the shipowner, who had all the information in his hands, is examined, it seems to me highly unsatisfactory. The immediate cause of the breakdown was that a pipe, forming part of the valve casing of the feed pumps, cracked. Was it sound when the voyage commenced? Upon that point a good deal of conflicting evidence was given. I greatly suspect that it was not sound. The Lord President found it difficult to answer this question with certainty, and his colleagues concurred in his opinion. But assume that the pipe was sound when the ship sailed from Libau. The fracture put the after feed pump out of action. There was also a fore feed pump. Why did it not serve to feed the boilers with fresh water from the hot well? No really satisfactory answer was given. During a great part of the controversy it was asserted by the shipowner that the fracture of the pipe necessarily put both feed pumps out of action. Then it was discovered, or thought to be discovered, that this was not so. Upon which the defendants naturally argued that, if the fore feed pump did not work properly, it must have been itself defective, and there was evidence in support of that view. No, replied the shipowner; it would have worked well enough if the engineer had put a blind flange on both the discharge and delivery side of the broken pipe, whereas he put it only on one side, for which piece of negligence

the shipowner is not liable under the contract of carriage. After reading the evidence, I am not at all satisfied that the fore feed pump was in efficient order when the voyage commenced. Let me, however, again assume that it was in good order, and that its failure to do its work was due to the negligence of the engineer. There was still a third pump, the donkey pump, which, as I understand the evidence, might have supplied the boilers from the hot well. Why did the donkey pump not do this? Here also there are contradictory statements. When the vessel was built there was a connection between the donkey pump and the hot well, which would have enabled water to be pumped from the well into the boilers, and so have dispensed with the need for salt water altogether. But it was said that the connecting pipe had been stolen while the vessel lay up at Libau. It seems to me very important to know whether the connecting pipe was there, and in order. The Lord Ordinary says: "It is admitted that when the vessel started from Libau the original connection to the hot well was no longer there." The Lord President does not express any view, thinking it immaterial. It seems to me distinctly, from the evidence, that there was in fact no connection with the hot well. That might not affect the case if the two feed pumps were in good order; but it is not proved that they were so; and here is the third and last contrivance for getting fresh water into the boilers unserviceable at a crisis, like the other two, within a few hours of leaving port. Abundance of suggestions and excuses are offered in each case, but no solid explanation of the surely singular occurrence that three pieces of mechanism, all asserted to have been in good condition at the commencement of the voyage, all failed to do their duty three or four hours later. I am satisfied that the shipowner has not met the strong *primâ facie* case of unseaworthiness that is made against him by these facts. Let me add that other parts of the evidence confirm this view. The *Tatjana* was an old ship, and had been laid up for eighteen months at least before April 1905. She then was bought by the respondent for little more than breaking-up value. Very little was spent upon repairs by the respondent, and practically nothing on the engines. No proper or sufficient survey was made before she sailed. These are antecedents which not only explain the existence of defects, but actually conduce to them and hinder their detection. I think that this appeal should be allowed. I may say, on behalf of Lord Macnaghten and Lord James of Hereford, who are unavoidably absent, that they concur in the view that the appeal should be allowed, and the judgment of the courts below reversed.

Lord SHAW.—My Lords: I am of the same opinion. [After going through the facts of the case as set out above, his Lordship continued as follows:] What are the probabilities which the facts raise as to where the truth of this case lies? The learned Lord Ordinary, who does not take the serious view of some of them that I do, makes an observation at the close of his own *résumé*, which, if I may say so, appears to me to be of much cogency. "*Primâ facie* it would therefore not seem improbable that the engines were defective at the time when the vessel started from Libau, and that their breakdown within three hours (or one and a half hours as the second engineer says) of full speed having been got up, was attributable to this initial defect. In a question of seaworthiness due to initial defect, it is, of course, immaterial whether the defect was latent or was capable of being discovered on a careful examination of the engines. The warranty of seaworthiness is absolute unless qualified by contract between the parties; and there is nothing in the contract here which qualifies the obligation to provide a seaworthy ship." It remains upon the narrative, however, to be said that the position of the appellants must have been to some extent prejudiced by the delay of two years which occurred between the arrival of the vessel at Leith on the 4th May 1905 and the signeting of the summons in this action on the 16th May 1907. Speaking for myself, I do not doubt that valuable evidence as to the state of the pipes before mentioned has, by reason of this delay, been destroyed or lost. When to this is added the pursuer's own misconception as to the nature and extent of the breakdown of machinery which had occurred, I express no surprise that there has been much difficulty in the courts below on that subject. After considering and reconsidering the evidence in this case, I am of opinion that the *Tatjana* was unseaworthy when she left port. The probabilities referred to by the Lord Ordinary are that this is the fact; but I feel also entirely satisfied that such fact has been proved. In view, however, of the frequent references to the burden of proof, and to the manner in which, and the standpoint from which, the evidence in this case has been examined by the learned judges of both of the courts below, I think it right to state what I hold to be the well-established rules bearing on those topics in cases like the present. In the judgments stress is repeatedly laid upon the fact that the onus of proving unseaworthiness is upon those who allege it. This is, of course, a sound doctrine; and it is none the less sound although the vessel break down or sink shortly after putting to sea. That is the principle of law. But the enunciation of that proposition does not impair or alter certain presumptions of fact, such presumptions, for instance, as those which are raised by the age, the low classing, or non-classing, the non-survey of ship or machinery, the refusal to insure, the laying up, the admitted defects, and generally the poor and worsening record of the vessel, together with finally the breakdown, say, of the machinery immediately, or almost immediately, on the ship putting to sea. It would be a very curious and, in my opinion, an unreasonable and dangerous thing if circumstances like these did not raise presumptions to which, especially taken cumulatively, effect were not to be given in courts of law. The last circumstance mentioned is a very familiar example. In the language of Lord Redesdale in *Watson* v. *Clark* (1 Dow. 336), decided nearly a century ago, "I have always understood it to be a clear and distinct rule of law that if a vessel in a short time after leaving the port where the voyage commenced was obliged to return, the presumption was that she had not been seaworthy when the voyage began, and that the *onus probandi* was in such cases thrown upon the assured." Lord Eldon, L.C., in the same case, was even more emphatic. In view of the manner in which the evidence in this case has been regarded in the

court below, I think it right to give the distinction between the proposition in law that those alleging unseaworthiness have the burden of proof of it and the presumptions arising on facts, and to do so in the language of Brett, L.J. in *Pickup* v. *Thames and Mersey Marine Insurance Company* (4 Asp. Mar. Law Cas. 43 (1878); 39 L. T. Rep. 341; 3 Q. B. Div. 594): "A good deal has been said on the argument about the 'burden of proof' and 'presumption.' The burden of proof upon a plea of unseaworthiness to an action on a policy of marine insurance lies upon the defendant, and so far as the pleadings go it never shifts; it always remains upon him. But when facts are given in evidence, it is often said that certain presumptions, which are really inferences of fact, arise and cause the burden of proof to shift, and so they do, as a matter of reasoning and as a matter of fact; for instance, where a ship sails from a port, and soon after she has sailed sinks to the bottom of the sea, and there is nothing in the weather to account for such a disaster, it is a reasonable presumption to be made that she was unseaworthy when she started." The same proposition was laid down by Lord Lindley in *Ajum, Goolam, Hossen, and Co.* v. *Union Marine Insurance Company* (9 Asp. Mar. Law Cas. 167 (1901); 84 L. T. Rep. 366; (1901) A. C. 362). In short, the whole evidence in the case must be weighed, and when those alleging unseaworthiness prove a mass of facts such as I have mentioned, and such as appear in this case bearing upon the record of a vessel which founders or breaks down shortly after setting sail, they start with a body of evidence raising a natural presumption against seaworthiness, which presumption, however, may, of course, be overborne by proof that the loss or damage to the vessel occurred from a cause or causes of a different character. I venture humbly to think that had due effect been given to the above-mentioned principles, certain of the difficulties which appeared to the learned judges below would have been found less formidable, and that the review of the evidence would have resulted in a verdict for the defenders. [His Lordship discussed the evidence before the Lord Ordinary, and continued:] When the case reached the Inner House great difficulty appears to have been experienced by the learned judges of the First Division. The learned Lord President, dealing with the point as to the break in the pump casing, thinks that "it is difficult to say that the onus of fixing that the crack or weakness existed at the start has been discharged." This is precisely one of the difficulties which I incline to think is removed, and most reasonably and properly removed, by the considerations and authorities to which I have referred. As to the point in the Lord Ordinary's judgment—namely, the condition of the donkey engine pump and the want of pipes connecting it with the hot well — quite a different ground is taken from that adopted in the Outer House. The Lord Ordinary's view appears to have amounted to an affirmation that although this connection, originally designed and highly useful and necessary, was wanting, the vessel was seaworthy. This view is not affirmed in the Inner House, as I am glad to recognise. On the contrary, however, a view wholly unsupported by the evidence, and one upon which neither party seems to have relied in argument—a view of fact —is stated thus: "The fact is certain that the donkey had a nozzle connection, fit and proper for connection with the hot well, and even if the copper connection pipe were gone, nothing would have been simpler than to have substituted for it an ordinary piece of hose, which, as the pipe was purely for suction, and had no pressure, would have acted perfectly well. I therefore come to the conclusion that *de facto* the unseaworthiness of the ship was due solely to the fault of Lange." Lange was the first engineer, and whether this theory be accurate or not, it was certainly never put to him. Nor was it suggested or submitted to anybody else. It might, no doubt, sometimes be the case that slight defects occurring or discovered would suggest, in the practical management of a vessel, ordinary and easily adopted remedies; but it would, according to my humble view, be necessary in such cases to submit the suggestions to the test of approval or scrutiny by evidence, and, in the absence of such evidence, what has to be relied upon here is that which is at the foundation of the whole story—namely, that the vessel put to sea lacking essential portions of her machinery or equipment. Lords Kinnear and Dundas did not deliver separate judgments, but concurred in the Lord President's judgment. For the reasons above indicated, and after much anxious consideration, I have felt compelled to come to a different conclusion.

Judgment appealed from reversed. Respondent to pay to the appellants their costs in this House and in the courts below.

Solicitors for the appellants, *W. A. Crump* and *Son*, for *Boyd, Jameson*, and *Young*, Leith.

Solicitors for the respondent, *Botterell* and *Roche*, for *Beveridge, Sutherland*, and *Smith*, Leith.

Supreme Court of Judicature.

COURT OF APPEAL.

Wednesday, Nov. 9, 1910.

(Before VAUGHAN WILLIAMS, BUCKLEY, and KENNEDY, L.JJ.)

BRITISH AND MEXICAN SHIPPING COMPANY LIMITED *v.* LOCKETT BROTHERS AND CO. LIMITED. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Charter-party—Construction—Detention by surf—Custom—Surf days not working days—Demurrage.

A charter-party provided that goods should be carried by the plaintiffs' ship to Iquique, and that discharge was "to be given with dispatch according to the custom of the port of discharge, but not less than 30 mille per working day."

In an action for demurrage brought by the plaintiffs against the defendants, who were the holders of a bill of lading which incorporated the provisions of the charter-party, it was pleaded in defence that the defendants had used all reasonable diligence in taking delivery of the

(*a*) Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.

cargo according to the custom of the port; that the plaintiffs or their agents or brokers well knew or ought to have known each and every custom of the port, or alternatively that they had notice thereof, either at the time of signing the charter-party or at the time of loading the ship.

It was stated in the particulars that vessels discharging at Iquique lay in the bay, and were unloaded by means of lighters which took the cargo from the ship and landed it on to the beach; that between the commencement of the lay days and the completion of the discharge there were a number of Sundays, holidays, and strike days, and certain "surf days," i.e., days on which the surf on the beach was so heavy that the operation of unloading vessels in the bay was not only dangerous to life and property, but was in fact commercially impracticable; that by the established custom of the port surf days were not working days, and persons who had undertaken to take delivery of cargo from vessels in the bay were not bound to do so on surf days, i.e., days which appeared as surf days in the register book kept by the captain of the port at his office, that the decision of the captain of the port as to which days were surf days or not was conclusive and binding on all parties, and that the customary interpretation put upon such a charter-party by those engaged in the trade of importing lumber was that it incorporated the custom at Iquique as regards surf days.

An order having been made for the trial of a preliminary point of law—namely, whether the above defence with the particulars thereunder (assuming for the purpose of the preliminary point of law only that all allegations of fact therein were true) constituted any defence in law to the claim of the plaintiffs—on the trial on the question of law Hamilton, J. followed the ruling of Walton, J. in Bennetts and Co. *v.* Brown (11 *Asp. Mar. Law Cas.* 10; 98 *L. T. Rep.* 281; (1908) 1 *K. B.* 490), *and gave judgment for the plaintiffs upon the ground that the alleged custom was too uncertain and unreasonable to be admissible to vary the ordinary meaning of the words "working day" in a charter-party.*

Held, on appeal, reversing this decision, that assuming the allegations of fact in the defence to be true, the alleged custom was not void for uncertainty, and that the words "working day" in the charter-party must be read having regard to that custom, and that consequently the preliminary point of law must be decided in favour of the defendants.

Appeal by the defendants on a preliminary point of law directed by an order of Hamilton, J. to be set down for trial. The point of law was this:

"Whether pars. 7 and 8 of the defence with the particulars thereunder (assuming for the purpose of the preliminary point of law only that all allegations of fact therein are true), constitute any defence in law to the claim of the plaintiffs in this action either in whole or in part."

The statement of claim was as follows:

1. The plaintiffs claim is for demurrage under a bill of lading dated the 2nd July 1907, which provided that the goods therein mentioned should be carried by the plaintiffs in the ship *Deanmount* from Vancouver, B.C., to Iquique in Chili, and there delivered to the British Columbia Mills Timber Trading Company or their assigns he or they paying freight for the said goods and all other conditions as per charter-party.

2. By the terms of the said charter-party which was dated the 4th Jan. 1907, discharge was to be given with dispatch according to the custom of the port of discharge but not less than 30 mille per working day, that for every day's detention by default of the charterers or their agents threepence sterling or its equivalent was to be paid as therein mentioned.

3. The said bill of lading was indorsed by the said company to the defendants and the property in the said goods passed to the defendants upon the said indorsement.

4. The said goods were carried by the plaintiffs in the said ship from Vancouver to Iquique, and there delivered to the defendants, who kept the said ship forty-five days on demurrage at that port.

Particulars of the demurrage were then given and the plaintiffs claimed 1007*l.* 8*s.* 9*d.*, being the amount thereof.

By their defence the defendants said there was no demurrage due or payable by them; there was no detention of the ship *Deanmount;* there was no default of the charterers or their agents. They said they were not the charterers or the agents of the charterers, and there was no default of the defendants or of any persons for whom the defendants were responsible. If there was any detention of the ship at Iquique, it was not by default of the defendants. They also said that the terms of the bill of lading and of the charter-party had not been fully set out.

They denied the allegations contained in pars. 3 and 4 of the statement of the claim.

7. The defendants contend that on the true construction of the said bill of lading and (or) charter-party no fixed time for taking delivery of the cargo in the said ship was specified in the charter-party, and that the only obligation upon them was to take delivery of the said cargo with all reasonable dispatch having regard to the actual state of things at the Port of Iquique at the time of discharge and in particular to the custom of the said port, and the defendants say that they duly fulfilled the said obligation. The defendants used all reasonable diligence in taking delivery of the said cargo according to the custom of the said port. The defendants further say that the plaintiffs well knew or ought to have known each and every custom of the said port or alternatively that they had notice thereof either at the time of signing the said charter-party or at the time of loading the said ship, and that by signing the said charter-party and loading the said ship for the said port they agreed to be bound thereby. The defendants further say that the plaintiffs' agents or brokers, through or by whom the said ship was chartered, well knew, or ought to have known, each and every custom of the said port. The said charter-party is in the standard form of charter-party for lumber carried to the West Coast of South America, and such form has been in regular and universal use in that trade for at least thirty years last past. The said custom and the customary interpretation put upon the said charter-party, has for at least thirty years last past, been universally and habitually known to, and observed by, all shipowners, shipbrokers, merchants, and charterers engaged in that trade.

Particulars.—All vessels discharging at Iquique lie in the bay about a mile or a mile and a half from the beach. There are no wharves or piers alongside which vessels can lie.

All vessels are unloaded by means of lighters, which take the cargo from alongside and land it on the beach or at one of the moles on the beach. By the invariable practice of the port each lighter is manned by two, and only two, launcheros. Lumber is dutiable at the port of Iquique, and can only be landed at places specified by the customs authorities, and only by special labourers under the control of the customs authorities. The

place specified by the customs authorities for landing the cargo of lumber on board the *Deanmount* was the little cove or caleta which lies between the moles of Inglis, Lomax, and Co. and Gibbs and Co., and which is under the control of the customs authorities and the said lumber who landed at that place.

The *Deanmount*, which carried a cargo of lumber measuring about 1,510,890 superficial feet, arrived at Iquique on the 8th Oct. 1907, and the lay days commenced on the 11th Oct. 1907. The discharge was completed on the 25th Jan. 1908.

Between the 11th Oct. 1907 and the 25th Jan. 1908 there were (*a*) fifteen Sundays [here follow dates], (*b*) five holidays [here follow dates], (*c*) fifteen strike days [here follow dates].

By the established custom of the port of Iquique, strike days are not working days even though on such days vessels in the bay may be discharging cargo into lighters, and persons who have engaged to take delivery of cargo from vessels in the bay are not bound to do so on strike days.

(*d*) Two martial law days—*i.e.*, days on which martial law was in force in the port.

(*e*) Twenty and a half surf days—*i.e.*, days on which the surf on the beach and (or) at the moles on the beach is so heavy that lighters cannot land cargo, and it is dangerous and often impossible for the lightermen to get from the shore to the lighters which are moored in the bay. Upon surf days the operation of unloading vessels in the bay is not only dangerous to life and property, but is in fact commercially impracticable, and ought not to be and would not ordinarily be attempted in the port, although if the lighters can be reached through the surf it may not be absolutely impossible to perform that portion of the operation which consists in getting the cargo from the ship into the lighter; but this partial performance of the operation does not in fact accelerate the discharge, because even if a lighter can be and is filled with cargo on a surf day, it is impossible to empty it on a surf day, and the lighter must remain moored in the bay until the surf abates.

The operation of unloading a vessel is not complete until the cargo has been landed from the lighters on the beach or at one of the moles on the beach. Further, by the established custom of the port of Iquique, surf days are not working days, and half surf days are half working days, even though on such days vessels in the bay may be discharging cargo into lighters; and persons who have engaged to take delivery of cargo from vessels in the bay are not bound to do so on surf days—*i.e.*, days or part days which appear as surf days or part surf days in the register book kept by the captain of the port at his office, or in the alternative days or part days which are in fact surf days as above described. The decision of the captain of the port as to which days are or are not surf days or part surf days is conclusive and binding upon all parties.

The following days were surf days [here follow dates].

The customary interpretation put upon a charter-party in the said standard form by all shipowners, shipbrokers, merchants, and charterers engaged in the trade of importing lumber to the West Coast of South America is, and has for at least thirty years last past been, that the charter-party embraces, includes, and incorporates each and every custom of the port of discharge, and in particular, where the port of discharge is Iquique, the custom of that port as regards strike days and surf days as above set forth; that if the port of discharge be Iquique, the words "working day" in the charter-party mean what they mean at Iquique according to the custom of that port; and that all parties thereto are bound by such customs. The said customary interpretation has been regularly recognised in practice by all shipowners, shipbrokers, merchants, and charterers engaged in the said trade for at least thirty years last past, and is notorious in the said trade.

8. If, contrary to the contention of the defendants, it shall be held that the defendants were under an obligation to take delivery of the said cargo at the rate of 30 mille per working day, or at some other fixed or calculable rate, the defendants say that they in fact did so.

The material clauses of the charter-party dated the 4th Jan. 1907 were the following:—

A. The party of the second part shall be allowed for loading and discharging said vessel at the respective ports aforesaid lay days as follows: Thirty working days for loading, to commence twenty-four (24) hours after vessel is at loading place designated by charterers or their agents, her inward and (or) unnecessary ballast discharged, and she is ready to receive cargo and captain has notified them in writing to that effect.

B. Discharge to be given with dispatch according to the custom of the port of discharge, but not less than 30 mille per working day, at such safe wharf dock, or place as charterers or their agents shall designate.

K. Cargo to be received and delivered within reach of vessel's tackles.

N. Vessel to load and discharge where she can safely lie afloat; but lighterage, if any, to be at the risk and expense of receiver of cargo.

Hamilton, J. held that the custom referred to was unreasonable and uncertain, and was inadmissible by reason of the words interpolated in clause *B.* of the charter-party, and he followed the decision of Walton, J. on a similar state of facts in *Bennetts and Co.* v. *J. and A. Brown* (11 Asp. Mar. Law Cas. 10; 98 L. T. Rep. 281; (1908) 1 K. B. 490).

The defendants appealed.

Bailhache, K.C. (*Stewart-Brown* with him) for the defendants.—The real question in dispute on this appeal is as to the meaning of clause (*e*) of the particulars—that is to say, whether "surf days" are to be treated as working days or not. Hamilton, J. was of opinion that the custom which the defendants are contending for was not applicable to this form of charter-party by reason of the words interpolated in clause *B.* thereof. It is contended by the appellants that the custom of the port of Iquique as regards surf days governs the whole clause. It was further said on behalf of the plaintiffs that there was uncertainty as to the meaning of "surf days," either at the time of the execution of the charter-party or on the arrival of the ship at Iquique. But that custom has been clearly established. The very question which is in controversy here has already been before the court in the case of *Bennetts and Co.* v. *J. and A. Brown* (*sup.*), where Walton, J. held that it was a matter of evidence as to what constituted a surf day. The actual decision in that case turned on the meaning of "weather working day" in the charter-party. The custom for which the defendants are contending is not inconsistent with the terms of the charter-party. Thus, it has been held that plain ordinary words may have a special meaning by the custom of the country, or in the sense in which they are understood in the place where the contract was made: (see *Smith* v. *Wilson*, 3 B. & Ad. 728). In this case both parties to the contract knew what the custom at Iquique was—namely, that surf days were not to be included as working days. He also referred to

Holman v. *Peruvian Nitrate Company*, 5 Sess. Cas. (4 Ser.) 657;

Saxon Steamship Company v. *Union Steamship Company*, 8 Asp. Mar. Law Cas. 574 (1899); 9 Asp. Mar. Law Cas. 114 (1900); 83 L. T. Rep. 106;
Norden Steam Company v. *Dempsey*, 1 C. P. Div. 654;
Nelson and Sons Limited v. *Nelson Line, Liverpool, Limited; Re Arbitration between same*, 10 Asp. Mar. Law Cas. 544, 581; 97 L. T. Rep. 661; (1907) 2 K. B. 705.

Langdon, K.C. and *Keogh* for the plaintiffs.—The judgment of Hamilton, J. was right. He held that a working day included every day except days appointed for prayer or play. It is submitted that if the language of the charter-party is such that the words have a clear natural meaning, that meaning must stand. See

Saxon Steamship Company v. *Union Steamship Company* (*sup.*).

This is a common form of charter-party into which a special clause has been introduced which is for the protection of the shipowner, and which definitely prescribes the time for unloading. If questions of weather are to be introduced, uncertainty at once arises. The words "according to the custom of the port of discharge" refer only to the methods of the port as to discharge. See

Castlegate Steamship Company Limited v. *Dempsey and Co.*, 7 Asp. Mar. Law Cas. 108, 186 (1892); 65 L. T. Rep. 755; (1892) 1 Q. B. 854.

The words "not less than 30 mille per working day" interpolated in the charter-party specify the minimum rate of discharge, and put something definite upon what would otherwise be vague. The custom sought to be set up is inconsistent with the other clauses of the charter-party, and it is too uncertain and unreasonable to be allowed to control the meaning of working day. They also referred to

Postlethwaite v. *Freeland*, 4 Asp. Mar. Law Cas. 129, 302 (1880); 42 L. T. Rep. 845; 5 App. Cas. 599;
Nielsen and Co. v. *Wait, James, and Co.*, 5 Asp. Mar. Law Cas. 553 (1885); 54 L. T. Rep. 344; 16 Q. B. Div. 67;
Niemann v. *Moss*, 29 L. J. 206, Q. B.
Carver's Carriage by Sea, 5th edit., s. 614*a*.

Bailhache, K.C. was not called upon to reply.

Vaughan Williams, L.J.—In my opinion this appeal must succeed. I think that Hamilton, J. has arrived at a wrong conclusion on this point of law. One has to bear in mind the order under which this preliminary point of law was raised, and I do not think that the learned judge quite kept that in his mind. The order is as follows: "It is ordered that the following question be set down for trial as a preliminary point of law, viz., whether pars. 7 and 8 of the defence, with the particulars thereunder (assuming for the purpose of the preliminary point of law only that all allegations of fact therein are true), constitute any defence in law to the claim of the plaintiffs in that action in whole or in part. And that the costs of this application be costs in the action." I think that the particulars make it reasonably clear that there is a custom which prevails in this port of Iquique under which the port-master has the power, for the purpose of saving life and property, of declaring a day to be a "surf day" or a part "surf day." Then, as soon as he has done that, in my judgment, according to the statements in the defence, it follows that the workmen and those who were employed to discharge cargo are under no obligation to work on a day which the port-master has declared to be a surf day, or, if it is a part surf day, during that part of the day. Looking at the pleadings and allegations in the pleadings, and looking at everything which it is right to look at in this case, I do not see any reason to suppose, as Mr. Langdon argued, that the port-master makes this declaration as to its being a surf day as arbitrator between the different parties. He makes the declaration as to its being a surf day with regard to all those who are concerned with shipping and the loading and discharging of vessels in that port, and under these circumstances, in my judgment, we ought to hold that, so far as this alleged custom is concerned, it is proved to be a custom under which the port-master has the duty in this exposed situation to declare on a particular day when the surf is running high, "This is a day on which we will not have loading or discharging done to the ships." That being so, the only other matter I have to deal with is the question whether such a custom is bad for uncertainty. I have no reason to say it is bad for uncertainty. It is no more uncertain than the question whether there will be a strike in existence in a case where there is a strike clause, and under the strike clause the loading or discharging is to be suspended during the continuance of the strike. People do not know beforehand that a strike is going to take place, although a great many, no doubt, are hopeful that a strike will not take place. But that sort of uncertainty does not in my mind justify me in holding that the custom is too vague and too uncertain because it is a custom under which, if the port-master declares a certain day to be a surf day, the consequences will follow which are set out in the pleadings. That being so, what is said further in order to prevent this custom applying? It is said if you look at the statements in the pleadings you will see that a good deal of reliance is placed upon the fact that this is a standard charter, and, on the other hand, it is said this is not a standard charter. It is a charter which introduces a special clause—namely, the clause containing the words "not less than 30 mille per working day." It is said that that fixes the rate of discharge, and that that, being so fixed, is inconsistent with the custom that is alleged. I do not think that it is inconsistent with the custom that is alleged. I asked Mr. Langdon the question whether, supposing it was a day that was admitted to be a non-working day, what would happen with reference to that clause? In calculating the consequences, he said, you arrive at nineteen days, and you arrive at nineteen days after deducting the days for Sundays. I do not see any reason in logic, or commerce, or otherwise, why you should not do just the same thing in respect of days which the port-master declared to be surf days. I do not think I need say any more. What will happen in the action of course I do not know, but this is only a preliminary point of law. The appeal will therefore be allowed.

Buckley, L.J.—For the determination of this point of law I have to assume that all the allega-

tions of fact in par. 7 of the defence and the particulars thereunder are true. Those allegations of fact group themselves under heads. First, there are allegations of knowledge on the part of the two contracting parties as to at least two subject-matters; first, the custom of the port of Iquique, and, secondly, the customary interpretation which has been placed upon what has been called the standard form of charter for that and like ports. Then there are allegations as to what the custom of the port is, and in that is involved a question as to what is meant by "a surf day." The pleader tells us what he means by "a surf day," and puts it in two alternative forms. Lastly, there are allegations as to what is the customary interpretation which has been put for more than thirty years upon what is called the standard form of charter. The particular form of charter here, it is quite true, is not the standard form in a circumstance which is material. There are words added which are not in the standard form. I will take the words upon which the whole contest arises. The contest arises upon particular words —the added words which are found elsewhere in the charter-party, namely, the words "working days." They are introduced in manuscript in the form of "not less than 30 mille per working day," but they are to be found above in the clause which provides that the charterer shall be allowed thirty working days for loading. If, therefore, a particular meaning has been attributed to the words "working days" in this particular charter it seems to me it must mean the same throughout, and whatever it means in the context, the same meaning must be given wherever it is introduced. Under the circumstances the first thing to do is to see what knowledge and facts I am to assume to be true. From par. 7 I am to assume this to be true: "That the plaintiffs well knew, or ought to have known, each and every custom of the said port, or, alternatively, that they had notice thereof." Then, "That the said custom," which I am coming to presently, "and the customary interpretation put upon the said charter-party, has, for at least thirty years last past, been universally and habitually known to, and observed by, all shipowners, shipbrokers, merchants, and charterers engaged in that trade"; in which class, of course, are included the plaintiffs. Lastly, on the particulars I am to assume this to be true. It is very much repetition. "The said customary interpretation has been regularly recognised in practice by all shipowners, shipbrokers, merchants, and charterers engaged in the said trade for at least thirty years past, and is notorious in the said trade." Those are allegations of knowledge. I assume them to be true, and these plaintiffs entered into this charter-party with that knowledge which I have read. The next thing that is alleged is alleged as regards the custom. First, I must read what the pleader means by a "surf day." He tells us the meaning he attaches to it. He says: "Surf days, *i.e.*, days on which the surf on the beach and (or) at the moles on the beach is so heavy that lighters cannot land cargo, and it is dangerous and often impossible for the lightermen to get from the shore to the lighters which are moored in the bay. Upon surf days the operation of unloading vessels in the bay is not only dangerous to life and property, but is in fact commercially impracticable." So that I may take it to be a fact that on a surf day, meaning such a day as he is there describing, it is commercially impracticable to load, or rather, in this context, to unload vessels. Then, lower down, in describing the custom of the port, he does it in this way: "Further, by the established custom of the port of Iquique, surf days are not working days, and half surf days are half working days, even though on such days vessels in the bay may be discharging into lighters, and persons who have engaged to take delivery of cargo from vessels in the bay are not bound to do so on surf days." Then he breaks surf days into two classes—that is, days or part days "which appear as surf days or part surf days in the register book kept by the captain of the port at his office, or, in the alternative, days or part days which are in fact surf days as above described." There he sends you back to what he has above described. That is an allegation of custom, and I must treat that as true. Then he goes on to say what the customary interpretation is, and without reading it all I see: "The customary interpretation put upon a charter-party in the said standard form by all shipowners, shipbrokers, merchants, and charterers engaged in the trade of importing lumber to the West Coast of South America is, and has for at least thirty years last past been, that the charter-party embraces, includes, and incorporates each and every custom of the port of discharge, and in particular where the port of discharge is Iquique, the words 'working day' in the charter-party mean what they mean at Iquique, according to the custom of that port." So all that I am to assume to be true.

I have to deal, therefore, with the contract entered into between two parties, both of whom knew that according to the custom of this port, upon surf days, upon which loading was commercially impracticable, work was not carried on. Surf days might be either such as the captain of the port declared to be such, or such as in fact were such having regard to the description given, a matter which might have to be investigated. Then the allegation is that these plaintiffs, knowing that, according to the custom of the port, such a day as that was a day upon which cargo could not be loaded, entered into a charter-party which spoke of working days, being a document the customary interpretation of which for the last thirty years had been that working day meant what it meant at Iquique. It seems to me that I am not involved in any general investigation of what working day means. I am bound by authority for the proposition that "working day" without a context means a working day as distinguished from a Sunday or holiday or something of that sort. It does not mean, *primâ facie*, a day upon which the operation of working can safely be carried on; but upon these allegations of the defence, which are admitted to be true, it seems to me that that is excluded. I may here state that these contracting parties contracted with the knowledge that, in such a contract as they were entering into, working day had not that meaning, but it had another meaning—namely, it meant that which, according to the custom of the port, was there known as a working day. As regards the allegation that the custom of the port is uncertain, and therefore void, I confess I do not understand the contention. There may be a difficulty in ascertaining what a

surf day is, but there is no ambiguity or difficulty in saying that when you know what a surf day is it may be a perfectly good custom that you should not work on a surf day. It is only in the former respect that there is said to be any difficulty; but, upon the allegation admitted to be true in this pleading, I do not think the difficulty arises at all. The pleader has told us perfectly plainly what he means by "surf day"—namely, such a day as when the sea is in a certain condition which results in making it commercially impracticable to load and unload. Upon these allegations, admitted as they are for the purposes of the point of law, I am of opinion that Hamilton, J. arrived at a wrong conclusion. I do not think he has determined the right point. Upon the allegations the point which arises is that which it seems to me I have endeavoured to state, and upon that, it appears to me, the appeal must be allowed, and the determination of the point of law is in favour of the defendant.

Kennedy, L.J.—I agree, upon grounds somewhat less wide than those which have been stated by Buckley, L.J., but I wish very carefully to limit them, because in my judgment any other view than that which I express cannot be reconciled with that of authority of many years' standing. I may be wrong in that view; but, taking that view, it is my duty to state why I cannot agree with my brother Hamilton's statement of the law. It is, I agree, to start with, not an easy matter to decide, and to my mind it is rather an instance of a well-meaning attempt, in the interest of economy, to get by a short cut to a result; and it is one more instance, to some extent, of obtaining an unreal decision, because these facts, or most of the material facts, will be traversed. We have to accept as true all the allegations of fact in par. 7 of the defence and the particulars thereunder. A great deal that is pleaded here, I quite agree with Hamilton, J., is entirely immaterial. It is no use referring to a standard form of charter-party, because the very words that we have to deal with here, as, indeed, I understood Mr. Bailhache at once to admit, do not appear in the standard form of charter-party, and all these allegations in the pleadings and particulars, so far as they relate to the standard form, are absolutely irrelevant. But I quite agree with Hamilton, J. that the real point of the case, which I entirely agree it is unnecessary to decide, is the meaning of the words "per working day" as used in the phrase "not less than 30 mille per working day." Now, that is not in the standard form at all so far as regards Iquique. It may be, and is, in the standard form with regard to the port of loading. I approach the subject for myself, determined to bear in mind certain principles, and one is clear, namely, that, apart from any custom, risks and contingencies of weather generally lie upon the charterer; in other words, that where you have got working days, working days cannot, according to the law of England, be read so as to relieve the charterer in regard to weather happening which prevents him, unfortunately for himself, from fulfilling his obligations under the charter-party. Of course, you may have special words to bring in something else, but it is important to bear the principle in mind. To take one case, going back thirty-four years, Blackburn, J. and Lush, J. in *Thiis* v. *Byers* (34 L. T. Rep. 526; (1876) 1 Q. B. Div. 244, at p. 249) pointed out and laid this down in their considered judgment which was delivered by Lush, J. He there said: "We took time to look into the authorities, and are of opinion that, where a given number of days is allowed to the charterer for unloading, a contract is implied on his part that, from the time when the ship is at the usual place of discharge, he will take the risk of any ordinary vicissitudes which may occur to prevent him releasing the ship at the expiration of the lay days." A little earlier on he says: "The bad weather caused a delay of four days in discharging the ship; and the contention of the defendant was, that, as he was not in default, but was ready to receive the timber, but the master was not ready to deliver it, the time lost in consequence of the bad weather ought not to be reckoned as part of the fourteen days." Then in the last paragraph he says: "The obvious convenience of such a rule" (which I have just read) "in preventing disputes about the state of the weather on particular days, or particular fractions of days, and the time thereby lost to the charterer in the course of the discharge, makes it highly expedient that this construction should be adhered to, whatever may be the form of words used in the particular charter-party." Therefore I agree that you must start with a view that when one has got "working days" it will not include days on which work is not done on account of the conditions of the weather affecting that particular port of discharge. Then I also start with this, that when I get words at the beginning "discharge to be given with dispatch according to the custom of the port of discharge," that does not affect the case in any way in favour of the present defendants' contention upon the pleading as to the meaning of working days, it being, I think, quite clearly laid down that those words refer to dispatch according to the manner of discharge, the character of the port, and the appliances therein contained. I think the law is qui e correctly summarised by the late Judge Carver in his work Carriage of Goods by Sea, 5th edit, ss. 614*a*-618, referring to the decision in the Scottish case of *Gardiner* v. *Macfarlane, McCrindell, and Co.* (20 Sess. Cas. 4th ser. 414) and the judgment of Lord Blackburn in *Postlethwaite* v. *Freeland* (42 L. T. Rep. 845; 5 App. Cas. 599). That being so, I have got this question as to which I have the statements of the pleader in the particulars, namely, that this charter-party was made out—true, made in this country, but, on its face, for performance at Iquique—and that both parties to that charter-party knew that according to the port of Iquique a "working day," when referred to in a charter-party or contract of that description, included at any rate a day which was said by the captain of the port to be a "surf day." Therefore, although it is true that one has no authority for construing this charter-party apart from custom so as to exclude such days, it may nevertheless be the case that, if the facts alleged are proved, by virtue of a custom of the port such days must be excluded from the category of working days. I have to assume for the purposes of this question that the customary meaning of the term "working day" at Iquique is as alleged in the defence. If the allegation of the custom had rested simply on the fact that according to the custom of the port of Iquique on certain days when some of the

work, or what is called a partial performance of the operation, took place yet still there is such a serious drawback in point of safety to life and property in unloading a lighter and getting it to sea through the surf or in a loaded lighter coming back through the surf to the shore that such days are to be excluded—in other words, weather so bad which is dangerous to life and property is, by the custom, to be excluded from working days—I think my brother Hamilton's criticism on that point would be sound. I think this clause, which would upset the law which would otherwise apply, which says that whenever the weather is in a certain condition it is not a working day, although part of the work of loading and discharging can go on, would be too vague for me to give effect to it. But then I do not see that this criticism applies to the alternative statement which is put—namely, that by the custom of the port of Iquique there is a person, a captain of the port presumably, who keeps a register of working days so far as they are affected by surf, and who says if it is a surf day, or half surf day. It seems to me there is no uncertainty in that. I think the alternative which is put there, "days which are in fact surf days," is much too vague, and I think a custom which would make working days mean weather working days, and not merely weather working days, but days upon which a certain class of work cannot be done at all—because that is what it really comes to—would be too vague and would be, as I should say, too unreasonable to be read by the light of custom into this definite contract. That difficulty is enhanced by the fact that where they wish to bring in what I may call difficulties in the discharge, which would have to be proved as facts, such as commotions, floods, fire, strikes, lock-outs, and so on, there is a separate and express clause dealing with them in the charter-party. But here, if they were to have a definite registered, so to speak, non-working day, there would be a dispute, and I do not know how it could be settled, because on the facts found it is stated some of the vessels are working and some are not, and, therefore, the objection which Hamilton, J. felt strongly, that it ought to be something which would affect the particular ship, and not some ships, would apply. For these reasons I think the decision ought to be reversed, because I do not see why if both parties must be taken, as I think they must, to have contracted, in view of this definite custom of the port of Iquique, to treat as non-working days what the captain of the port registers as such that custom is not one which may and ought to be imported into the charter, if the facts with regard to the custom are proved as stated.

I come to this conclusion, I confess, with some hesitation, because not only is it a judgment of Hamilton, J., with whom I should be very slow indeed to differ on a matter of this particular kind, but I should also have to differ from Walton, J., whose judgment was referred to by my brother Hamilton. As Walton, J. said, even taking the fact that there was a captain of the port who did make a register, that would be too vague and would be too unreasonable to form the basis of a contract. Walton, J. says in the case of *Bennetts and Co.* v. *Brown* (98 L. T. Rep. 281; (1908) 1 K. B. 490): "But although that is so" (that is referring to certain facts), "and although I do not think that the charterers can rely upon the custom which would give any meaning different from their natural sense to the words 'weather working days'—they certainly cannot rely upon any custom which would make the captain of the port a kind of arbitrator who should settle conclusively what was a weather working day and what was not." And then he goes on to say, "Yet they may rely upon some special terms in that charter-party." No one would pay more respect to a considered judgment, as that was, of my brother Walton, than I should, but I confess I am unable to follow the reasoning which says that that would be absolutely an unreasonable term. One must remember that in this case, which differs from *Bennetts and Co.* v. *Brown* (*sup.*), we are upon the allegations in the defence to assume that the contract was made in reference to Iquique and to a discharge there by parties who were cognisant, not only of the custom by which the captain of the port determined what days were "surf days," but also that, if the charter were made in the terms which they used, the term "working day" would not as regards Iquique by the custom be read as applicable to a "surf day" registered as such in the register kept by the captain of the port. Under these circumstances, where you have a custom which was understood to exist by both contracting parties, and the result of which is known to both contracting parties, so that in the charter-party the words will have the special sense in accordance with that custom, it appears to me that there were days which were surf days, and as such ought not to be counted as working days.

Appeal allowed.

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

Solicitors for the defendants, *W. W. Wynne* and *Sons,* for *Evans, Lockett,* and *Co.,* Liverpool.

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Tuesday, Dec. 20, 1910.

(Before CHANNELL, J.)

LONDON JOINT STOCK BANK LIMITED *v.* BRITISH AMSTERDAM MARITIME AGENCY LIMITED. (*a*)

Bill of lading—Wrongful delivery to consignee—Indorsement of bill of lading by consignee to bank—Title subsequently accruing—Trover.

A contract provided for the sale of certain oil to P. and Co. on the terms of cash against documents, P. and Co.'s name being inserted in the bill of lading at their request as shippers, and the bill of lading provided for the oil to be delivered to them or to their order. The draft attached to the bill of lading was then sold by the sellers to certain bill brokers, who subsequently sold the same on exchange to a bank at Amsterdam.

On the arrival of the oil in London, P. and Co. obtained from the defendants, who were the agents of the owners of the ship carrying it, delivery of the oil, without delivery of the bill of lading, on an indemnity being given by

(*a*) Reported by LEONARD C. THOMAS, Esq., Barrister-at-Law.

P. and Co. P. and Co. then approached the plaintiffs, who as London correspondents of the Amsterdam bank, were holding the bill of lading as against the draft, and arranged with them to advance the money to take up the draft on condition that the plaintiffs should retain the bill of lading, which P. and Co. thereupon indorsed.

In an action for trover:

Held, that the plaintiffs were entitled to succeed as although P. and Co. were not entitled to the possession of the bill of lading, the plaintiffs took over the rights of the Amsterdam bank on crediting them with the amount of the draft, which rights were perfected by the indorsement by P. and Co. of the bill of lading.

Commercial Court.

Action tried by Channell, J. sitting without a jury.

The plaintiffs claimed 258*l.* 8*s.* 10*d.* damages for wrongful conversion and non-delivery of linseed oil, which they alleged was their property. By their defence the defendants denied that the plaintiffs had or had ever acquired any property in the linseed oil.

The facts of the case were as follows: The oil in question was shipped by Messrs. J. E. de Beer and Zoon on the steamship *Maastroom*, for carriage from Amsterdam to London, under bill of lading dated the 29th April 1910, given in favour of P. H. Palmer and Co., their order or assigns, by the Holland Steamship Company of Amsterdam, who were the owners of the vessel. The said goods were sold subject to payment against documents, and it was arranged that the vendors should retain possession of the bill of lading until the draft was paid.

When the vessel arrived in London Messrs. Palmer approached the defendants, who were the London agents of the shipping company, and informed them that although they had not got the bill of lading, yet if they would deliver the goods they (Messrs. Palmer) would give an indemnity, and on these terms delivery of the goods was duly given.

After Messrs. Palmer had thus obtained possession of the oil, they went to the plaintiffs, who, as correspondents of the foreign bank, were holding the bill of lading as against the draft (and with which bank it happened that Messrs. Palmer had business connections), and arranged with them that they should advance the money to take up the draft, the bank retaining the bill of lading, which Messrs. Palmer endorsed.

Atkin, K.C. and *Crawford* for the plaintiffs.—The bill of lading is the symbol of the property in the actual goods, and that right passed to the bank with the delivery and indorsement of the bill of lading. The buyers never had the right to possession at all. That right was vested in the sellers, who passed it on, and when the buyers got delivery of the goods, they had no right of possession. Where a person gets a title accruing subsequently to the delivery of the goods, he may notwithstanding maintain trover against a person wrongfully delivering the goods:

Bristol and West of England Bank v. *Midland Railway*, 7 Asp. Mar. Law Cas. 69; 65 L. T. Rep. 234; (1891) 2 Q. B. 653.

Leslie Scott, K.C., *Maurice Hill*, K.C., and *Mackinnon*, for the defendants.—The contract between the sellers and buyers was to sell oil, unappropriated goods, to be poured into the receptacles of the buyers at Amsterdam, and then put on board a ship. *Primâ facie* either of these acts would amount to an appropriation of the goods so as to pass the property to the buyers. [Channell, J.—We have got the fact that the contract was for cash against documents; that it was the purchasers who asked that the bill of lading should be in their own name, and that if the bill of lading had been in the seller's name there would not have been any difficulty at all.] The contract provided that the oil should be put into the sellers' drums. [Channell, J.—I am inclined to think that the property was in the buyers, but the arrangement appears to have been that the sellers should have a lien upon it until it was paid for, and the retention of the bill of lading is the same as the retention of the possession of goods, and preserves that lien.] Assuming that the sellers had a lien, the answer is twofold: (1) that the bank getting the bill of lading made out in the name of the buyers, get no title to the bill of lading at all; and (2) as against the shipowner, the carrier, the bank, if they made any title to that lien through the sellers are estopped, as the sellers would be, from saying to the carrier, "You had no right to deliver to the person who on the bill of lading was, through our conduct, represented to you to be the person solely entitled to receive the goods." A bill of lading does not represent the goods unless it is indorsed, and at the time the goods were delivered to the buyers it was unindorsed. The bill of lading was presented to the bank unindorsed, and was therefore not a notice that there was no intention by the person entitled to the document to transfer it and the property represented by it. Acts which are done in *bonâ fide* ignorance of the plaintiff's title are excused, although if done in disregard of a title of which there was notice they must amount to a conversion:

Hollins v. *Fowler*, 33 L. T. Rep. 73; L. Rep. 7 H. L. 757.

Channell, J.—The defendants are the agents of shipowners running a line of ships from Amsterdam to this country, and Messrs. Palmer came to them and said, "Has the ship arrived?" and the defendants replied, "Yes; the ship has arrived." Then, Messrs. Palmer said, "There are certain drums of oil for us. We have not yet got the bill of lading for them; it has been delayed in the post. Will you kindly deliver the goods to us, notwithstanding we cannot present to you the bill of lading, but we will give you an indemnity?" and they so got the goods. The defendants who gave them the goods undoubtedly may be taken to have known from their captain's copy of the bill of lading that the bill of lading had been taken in Palmers' name as shippers, and that the bill of lading made it deliverable to their order here, but they did not have that bill of lading. What risk did they thereby take? If Palmers were the persons entitled at that time to have the goods delivered to them, then it seems to me that the bill of lading would be exhausted, its function would be over by the delivery to the right person, and that, when that right person afterwards got hold of the bill of lading, he could

not by that document convey an effective title to the goods. Supposing it be true that this bill of lading had been delayed in the post, that it came to Palmers the next day after they had, in fact, got the goods, it seems to me that they could not after that, by indorsement of that bill of lading to a bank or anybody else, have conveyed any title to the goods, because the bill of lading would have been exhausted and done with; but whether it would be exhausted and done with depends entirely upon whether the delivery had been to the persons entitled to the delivery. We have got to see whether they were entitled to the delivery. When this case was before me in the first instance, all we knew was that the bill of lading had come from a foreign bank attached to a draft in a letter without special instructions except to place the draft to the credit of the foreign banker, and coming without special instructions, the draft and the bill of lading being attached to each other, of course the instructions would be to collect the draft, and not to part with the bill of lading except against payment of the draft. That would be the mercantile understanding about it. I believe that it has been the subject of decisions —I do not quite know—but it is a matter which is familiar to anybody with any sort of knowledge of commercial law at all, that that is the effect of attaching such documents to each other. We had, in addition, the invoice for the goods. Now, it turns out upon the evidence which the defendants very fairly and properly admitted to save the further expense of getting witnesses from abroad that the fact is here that Palmers had bought the oil from a Dutch firm upon the terms that they should pay for it against documents—that is to say, that this very practice that one was speaking of should be followed, that the documents should be sent over here, and against those they should pay. Then they also requested that the bill of lading should be made in their own name, and either they requested, or it was arranged between the parties, that the oil should be put into drums of theirs which happened to be over at Amsterdam, having been sent there, I suppose, for the purpose of such use. Now, under those circumstances the sellers shipped the goods themselves, but they took the bill of lading in the name of Palmers, and they put the oil into the drums of Palmers. Under those circumstances it rather seems to me—I do not feel sure about it, having regard to the arrangement that Palmers should pay against documents—that the effect of that would be to pass the property in the oil when it was put into Palmers' drums and shipped in their name in that way, but the arrangement then was that although the bill of lading was to be taken in Palmers' name as shippers, yet the vendors were to retain the physical possession of that bill of lading until the draft was paid. The object of doing that, and the meaning of it, was that Palmers would not be able to get possession of the goods because they were not to have possession of the bill of lading until they had paid for them. Therefore the effect would be if the property had passed that, notwithstanding the passing of the property, the vendors were to have a lien upon oil which they could give effect to by seeking not the possession of the goods, but the possession of the bill of lading which they were to have a lien upon for their purchase money. The general result, therefore, was upon those facts that when Palmers got the oil in London, they were not entitled to have it because they were not entitled to have possession of that oil as between themselves and the vendors, or as between themselves and the foreign banker who had bought their draft they were not entitled to have possession of that oil until they had paid the draft. These were the facts that took place. After they had got possession of the oil they went to the bank, and it happened by accident—I do not think there is any materiality in that—that the bank which was the correspondent of the foreign bank, and was holding the bill of lading as against their draft, and holding that draft for collection, was a bank with which they had connections. I think their banking account was with another branch of the same bank, but it was a bank with which they had connections. Palmers made this arrangement with the plaintiffs that they the plaintiffs should advance them the money to take up that draft, and accordingly they did so, and they did so on the understanding that they (the plaintiffs) were to retain the bill of lading. They had already got physical possession of the bill of lading, and they never parted with it, but they did get Palmers to indorse it. If the bank's title had been derived solely by that indorsement I cannot help thinking there would be some difficulty about it. I was referred to the case of *Bristol and West of England Bank* v. *The Midland Railway* (*sup.*), where somewhat similar circumstances had taken place, and where it is clear that the outstanding bill of lading had been indorsed, so that at the time of the delivery of the goods it had been indorsed to somebody else. The point that was decided there was that the persons who had got a subsequent title, a title the date of which accrued subsequently to the delivery of the goods under the bill of lading, could nevertheless maintain trover against the person who had wrongfully delivered the goods, because the carrier who had wrongly delivered the goods was not entitled to set up his own wrongful delivery. He ought still to have had the goods, and as he had not got the goods, but had parted with them, he was not allowed to say that he had parted with them, because he had parted with them wrongfully. Obviously if that is the reason it could not apply if the person had parted with them rightfully, and therefore if Palmers in this case had really been the persons who were entitled to have the oil delivered to them, it seems to me that the plaintiffs could not have got any subsequent title which would have been good against the shipowners, but inasmuch as the delivery was in point of fact wrongful in my view, because Palmers were not entitled, in fact, to the possession of the bill of lading, and therefore not entitled to the delivery of the goods, it seems to me that that was wrongful, and therefore this case does apply. Under those circumstances I think the substance of this transaction with the bank was not that the plaintiffs acquired an independent title from Palmers by the indorsement, but that they, in point of fact, took over such title as there was and was always intended to be: the bill of lading was in their physical possession held by them as against the draft. A firm who happen to be their customers come to them and say: "You find the money for us to take up this bill of lading and you keep the bill of

lading," and they keep the bill of lading. I do not think that they acquired their title solely from them; they took over also the title which they at the time had merely for the foreign bankers for whom they were agents, they took over that title as well as taking an independent title from Palmers. Of course, that depends to a certain extent upon the view of the facts. One is familiar, and lawyers are aware, that there is a difference between taking a transfer of a mortgage in which you get all the rights of the mortgagee allowing the mortgage to be paid off, and taking a new mortgage from the mortgagor in which you do not get the right, and possibly do not get so much, although perhaps it is sometimes convenient to do it. It all depends on the transaction. It has been held that where a person advanced money for the purpose of taking over a loan, that in substance he was in the position of the former lender and stood in his position notwithstanding that the form in which it went through was an advance of money to the person who cleared himself from his previous liability. I think the substance of the case here was that the bank took over the rights of the foreign bank upon crediting them with the amount, they took over those rights and they perfected them by taking an indorsement of Palmers to put the matter in regular form. The general result, therefore, is that I think the plaintiffs are entitled to succeed in their action of trover. My recollection of the authorities is that in an action like this between parties each of whom have got an interest in the subject-matter, the plaintiff is not necessarily entitled to the full value of the goods. In this case the amount having been reduced by payments off on other securities the plaintiffs are only entitled to the amount for which they would hold that bill of lading. I think I am right in saying that *Chinnery* v. *Viall* (5 H. & N. 288) is one case, but at any rate, the decisions establish the rule that although *primâ facie* the value of the goods is the measure of the damages in trover, it is not so between parties who have each got an interest in the subject matter. Consequently there will be judgment for the plaintiffs, but for the amount for which they would hold the bill of lading.

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

Solicitors for the defendants, *Cattarns* and *Cattarns.*

Tuesday, Jan. 17, 1911.

(Before Lord ALVERSTONE, C.J., HAMILTON and AVORY, JJ.)

HALLIDAY (app.) *v.* TAFFS (resp.). (*a*)

Prohibited immigrant entering Commonwealth of Australia—Desertion of seaman from ship in harbour—Fine imposed on master of ship—Right to deduct fine from wages—"Expenses caused by the desertion"—Immigration Restriction Act 1901, *ss.* 3, 9—*Merchant Shipping Act* 1894 (57 *&* 58 *Vict. c.* 60), *ss.* 221, 232—*Merchant Shipping Act* 1906 (6 *Edw.* 7, *c.* 48), *s.* 28, *sub-s.* 1 (*b*).

The Immigration Restriction Act 1901 *of the Commonwealth of Australia prohibited the immigration into the Commonwealth of persons described as prohibited immigrants, and in sect.* 9 *provided that the master, owners, and charterers of any vessel from which a prohibited immigrant entered the Commonwealth should be liable to a penalty of* 100*l. for each prohibited immigrant so entering the Commonwealth.*

A ship in the course of her voyage arrived at Brisbane in the Commonwealth of Australia, having on board a Chinaman as a member of the crew. While the ship was in Brisbane the Chinaman, without the knowledge, complicity, or negligence of the master, deserted or was guilty of an offence under sect. 28, *sub-sect.* 1 (*b*) *of the the Merchant Shipping Act* 1906, *and at the time of such desertion or offence certain wages were due to him. By reason of such desertion the master was summoned at Brisbane and fined the sum of* 100*l*, *and he also incurred the expense of sending a cablegram to his owners in England. In his reimbursement account, furnished to the proper officer upon the return of the ship to the United Kingdom on the termination of the voyage, the master, who was appellant, sought to deduct these two sums from the seaman's wages. The proper officer, who was respondent, disallowed the two sums in the reimbursement account as being sums not properly chargeable against the wages and effects of the Chinaman.*

Held, that the fine of 100*l. and the cost of the cablegram were not "expenses caused by the desertion" of the Chinaman within sect.* 232 *of the Merchant Shipping Act* 1894, *nor "expenses caused to the master or owner of the ship by the absence of the seaman due to desertion" within sect.* 28, *sub-sect.* 1 (*b*), *of the Merchant Shipping Act* 1906, *and could not be deducted as expenses foom the wages due to the seaman at the time of his desertion.*

CASE stated by the stipendiary magistrate for the borough of West Ham, being a court of summary jurisdiction.

At the West Ham Police-court an appeal was entered by John Halliday (the appellant) under the statute 6 Edw. 7, c. 48 (the Merchant Shipping Act 1906), s. 28, against the decision of Edwin Taffs (the respondent), for that the respondent had wrongfully refused to allow the appellant, being the master of the steamship *Crown of Galicia*, to be reimbursed out of the wages and effects of one Cha Ah Ching, a member of the crew of the ship who had deserted from the ship at Brisbane, in the Commonwealth of Australia, in respect of a fine of 100*l.* imposed upon the master (being the appellant), or the owners of the ship under the laws of the Commonwealth of Australia, together with the sum of 1*l.* 7*s.* 6*d.*, being the expenses of a cable sent by the appellant to the owners in consequence of and arising from the desertion of the said Cha Ah Ching aforesaid.

The appeal was heard before the magistrate on the 4th July 1910, when he decided and adjudged that the appellant was not entitled to be reimbursed in respect of the said two sums, amounting in all to 10*l.* 7*s.* 6*d.*, out of the wages and effects of Cha Ah Ching.

Upon the hearing of the appeal the following facts were admitted and proved before the magistrate:—

The appellant was at all material times the master of the steamship *Crown of Galicia.*

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

The respondent was the superintendent of the Mercantile Marine Office, Connaught-road, Victoria Docks, London.

On the 15th April 1909 one Cha Ah Ching, a Chinaman, signed articles (a copy of which was appended to the case) at Glasgow for a voyage on the ship at 3*l.* 10*s.* per calendar month wages.

In the course of the voyage under these articles the ship arrived at Brisbane, Queensland, in the Commonwealth of Australia, with Cha Ah Ching on board.

On the 13th Nov. 1909 Cha Ah Ching, without the knowledge, complicity, or negligence of the appellant, deserted from the ship or was guilty of an offence within the meaning of sect. 28, sub-sect. 1 (*b*), of 6 Edw. 7, c. 48.

On the date of his desertion or of the offence aforesaid there was due to Cha Ah Ching wages to the amount of 16*l.* 15*s.* 7*d.* He left on board the ship the following effects, two blankets, one shirt, one pair of Chinese pants, one white jacket, two pairs of underpants, one clock, and one box.

The fact of the desertion or offence, together with the amount of wages due to Cha Ah Ching, and a list of his effects were duly entered in the official log, in accordance with the provisions of the Merchant Shipping Acts.

Under the Immigration Restriction Acts 1901-1905, which are and at all material times were in full force and effect in the Commonwealth of Australia, the master or owner of any ship from which a prohibited immigrant enters the Commonwealth of Australia, is liable to be summoned before a court of summary jurisdiction and upon conviction to be fined the sum of 100*l.* or to be bound by a bond to pay that sum.

By reason of the desertion or offence of Cha Ah Ching, and as a consequence thereof, the appellant was summoned before a court of summary jurisdiction at Brisbane under the said Immigration Restriction Acts, was convicted and fined the sum of 100*l.*, which has been paid. The following expenses were caused to the appellant by reason of the desertion or offence aforesaid, and in consequence thereof: (*a*) The said sum of 100*l.*; (*b*) the sum of 1*l.* 7*s.* 6*d.*, for cabling to the owners informing them of the desertion or offence aforesaid, and asking for instructions; (*c*) the sum of 10*s.* for carriage hire making inquiries for Cha Ah Ching; (*d*) the sum of 11*s.* 6*d.*, in respect of a warrant issued at Brisbane for the arrest of Cha Ah Ching; and (*e*) the sum of 1*s.* 7*d.* for a telegram from Sydney to Brisbane.

Upon the return of the ship to the United Kingdom on the termination of the voyage during which Cha Ah Ching was left behind, the appellant furnished to the respondent, who was the proper officer under the terms of 6 Edw. 7, c. 48, s. 28, (*a*) A delivery account showing the effects left by and the wages due to Cha Ah Ching when he left the ship; and (*b*) a reimbursement account showing the expenses, being those items above set out, which were caused to the appellant by the absence of Cha Ah Ching, and which were due to the desertion or offence aforesaid. [Copies of these accounts were appended to and formed part of the case.]

The respondent disallowed the two sums of 100*l.* and 1*l.* 7*s.* 6*d.*, in the reimbursement account, as being sums not properly chargeable against the wages and effects of Cha Ah Ching.

Upon the part of the appellant it was contended that the two sums of 100*l.* and 1*l.* 7*s.* 6*d.* were expenses within sect. 28, sub-sect. 1 (*b*), of 6 Edw. 7, c. 48, caused to the master or owner of the ship by reason of the desertion, neglect to join his ship, or other conduct of Cha Ah Ching, constituting an offence within sect. 221 of the Merchant Shipping Act 1894, and it was further contended that the same were properly chargeable by the appellant in his reimbursement account against the wages and effects of Cha Ah Ching, and that the respondent should have allowed the same.

On the part of the respondent it was contended that the said two sums were not properly chargeable against the wages and effects of Cha Ah Ching.

The magistrate was of opinion that the above two sums were not properly chargeable against the wages and effects of Cha Ah Ching, and should not have been allowed.

The Immigration Restriction Act 1901 of the Australian Commonwealth—an Act to place certain restrictions on immigration and to provide for the removal from the Commonwealth of prohibited immigrants—provides:

Sect. 3. The immigration into the Commonwealth of the persons described in any of the following paragraphs of this section (hereinafter called "prohibited immigrants") is prohibited, namely [then follow the several classes of prohibited immigrants]. But the following are excepted: . . . (*j*) The master and crew of any public vessel of any Government; (*k*) the master and crew of any other vessel landing during the stay of the vessel in any port in the Commonwealth: Provided that the master shall, upon being so required by any officer, and before being permitted to clear out from or leave the port, muster the crew in the presence of an officer; and if it is found that any person who, according to the vessel's articles, was one of the crew when she arrived at the port, and who would in the opinion of the officer be a prohibited immigrant but for the exception contained in this paragraph, is not present, then such person shall not be excepted by this paragraph, and until the contrary is proved shall be deemed to be a prohibited immigrant and to have entered the Commonwealth contrary to this Act.

Sect. 9. The master, owners, and charterers of any vessel from which any prohibited immigrant enters the Commonwealth contrary to this Act shall be jointly and severally liable to a penalty not exceeding one hundred pounds for each prohibited immigrant so entering the Commonwealth. Provided that in the case of an immigrant of European race or descent no penalty shall be imposed under this section on any master, owner, or charterer who proves to the satisfaction of the court that he had no knowledge of the immigrant being landed contrary to this Act, and that he took all reasonable precautions to prevent it.

Sect. 10 gives the Minister for External Affairs, or any collector of customs specially empowered by him, power to authorise any officer to detain any vessel from which any prohibited immigrant has, in the opinion of the officer, entered the Commonwealth contrary to the Act. The detention is to be for safe custody only, and shall cease if a bond with two sureties be given by the master, owners, or charterers for the payment of any penalty that may be adjudged under the Act to be paid for the offence or default; and if default is made in payment of such penalty, the

officer may seize and sell the vessel; and by sect. 16 the Governor-General may make regulations for carrying out the Act and for empowering officers to determine whether any person is a prohibited immigrant.

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

Sect. 221. If a seaman lawfully engaged, or an apprentice to the sea service, commits any of the following offences he shall be liable to be punished summarily as follows: (*a*) If he deserts from his ship he shall be guilty of the offence of desertion and be liable to forfeit all or any part of the effects he leaves on board, and of the wages which he has then earned, and also, if the desertion takes place abroad, of the wages he may earn in any other ship in which he may be employed until his next return to the United Kingdom, and to satisfy any excess of wages paid by the master or owner of the ship to any substitute engaged in his place at a higher rate of wages than the rate stipulated to be paid to him; and also, except in the United Kingdom, he shall be liable to imprisonment for any period not exceeding twelve weeks with or without hard labour; (*b*) if he neglects, or refuses without reasonable cause, to join his ship, or to proceed to sea in his ship, or is absent without leave at any time within twenty-four hours of the ship's sailing from a port, either at the commencement or during the progress of a voyage, or is absent at any time without leave and without sufficient reason from his ship or from his duty, he shall, if the offence does not amount to desertion, or is not treated as such by the master, be guilty of the offence of absence without leave, and be liable to forfeit out of his wages a sum not exceeding two days' pay, and in addition for every twenty-four hours of absence, either a sum not exceeding six days' pay, or any expenses properly incurred in hiring a substitute; and also, except in the United Kingdom, he shall be liable to imprisonment for any period not exceeding ten weeks with or without hard labour.

Sect. 232 (1). Where any wages or effects are under this Act forfeited for desertion from a ship, those effects may be converted into money, and those wages and effects, or the money arising from the conversion of the effects, shall be applied towards reimbursing the expenses caused by the desertion to the master or owner of the ship, and subject to that reimbursement shall be paid into the Exchequer, and carried to the Consolidated Fund. (2) For the purpose of such reimbursement, the master or the owner, or his agent, may, if the wages are earned subsequent to the desertion, recover them in the same manner as the deserter could have recovered them if not forfeited; and the court in any legal proceeding relating to such wages may order them to be paid accordingly. (3) Where wages are forfeited under the foregoing provisions of this Act in any case other than for desertion, the forfeiture shall, in the absence of any specific provision to the contrary, be for the benefit of the master or owner by whom the wages are payable.

The Merchant Shipping Act 1906 (6 Edw. 7, c. 48) provides:

Sect. 28 (1). If a seaman belonging to any British ship is left behind out of the British Islands, the master of the ship shall subject to the provisions of this section—(*a*) as soon as may be, enter in the official log-book a statement of the effects left on board by the seaman and of the amount due to the seaman on account of wages at the time when he was left behind; and (*b*) on the termination of the voyage during which the seaman was left behind, furnish to the proper officer, within forty eight hours after the arrival of the ship at the port at which the voyage terminates, accounts in a form approved by the Board of Trade, and (in this section referred to as the delivery account) of the effects and wages, and the other (in this section referred to as the reimbursement account) of any expenses caused to the master or owner of the ship by the absence of the seaman in cases where the absence is due to desertion, neglect to join his ship, or any other conduct constituting an offence under sect. 221 of the principal Act. The master shall, if required by the proper officer, furnish such vouchers as may be reasonably required to verify the accounts. (2) The master of the ship shall deliver to the proper officer the effects of the seaman as shown in the delivery account, and subject to any deductions allowed under this section, the amount due on account of wages as shown in that account, and the officer shall give to the master a receipt, in a form approved by the Board of Trade, for any effects or amount so delivered. (3) The master of the ship shall be entitled to be reimbursed out of the wages or effects any sums shown in the reimbursement account which appear to the proper officer or, in case of an appeal under this section, to a court of summary jurisdiction to be properly chargeable, and for that purpose the officer, or, if necessary, in the case of an appeal, the Board of Trade, shall allow those sums to be deducted from the amount due on account of wages shown in the delivery account, and, so far as that amount is not sufficient, to be repaid to the master out of the effects. The proper officer, before allowing any sums to be deducted or repaid under this provision, may require such evidence as he thinks fit as to the sums being properly chargeable to be given by the master of the ship, either by statutory declaration or otherwise. Where the master of a ship whose voyage terminates in the United Kingdom is aggrieved by the decision of the proper officer as to the sums to be allowed as properly chargeable on his reimbursement account, and the amount in dispute exceeds ten pounds, he may appeal from the decision of the proper officer to a court of summary jurisdiction. (4) Where during the voyage of a ship two or more seamen have been left behind, the delivery and reimbursement accounts furnished as respects each seaman may at the option of the master of the ship be dealt with, as between him and the proper officer, collectively instead of individually, and in that case the master of the ship shall be entitled to be reimbursed, out of the total amount of the wages and effects of the seaman left behind, the total of the amounts allowed under this section as properly chargeable on the reimbursement accounts, and shall be required to deliver to the proper officer on account of wages only the sum by which the total of the amounts shown on the delivery accounts to be due on account of wages exceeds the total of the amounts allowed as properly chargeable on the reimbursement accounts. (5) The proper officer shall (subject to any repayment made under this section) remit the effects, and any amount received by him on account of wages under this section, at such time and in such manner as the Board of Trade require, and shall render such accounts in respect thereof as the board direct. (6) In this section the expression "effects" includes the proceeds of any sale of the effects if these effects are sold under this section, and the effects shall be sold by the proper officer in such manner as he thinks fit when they are delivered to him, unless the Board of Trade direct to the contrary, and, if not so sold, shall be sold by the board as and when they think fit unless they are delivered to the seaman. . . . (9) Any sums remitted under this section or arising from the sale of effects under this section shall be paid into the Exchequer, and any sums payable by the Board of Trade under this section shall be paid out of moneys provided by Parliament. . . . (11) The proper officer for the purpose of this section shall be—(*i*) at a port in the United Kingdom, a superintendent. . . . Sect. 86 (1) This Act . . . shall be construed as one with the principal Act [that is, the Merchant Shipping Act

1894] and the Merchant Shipping Acts 1894 to 1900. . . .

Atkin, K.C. (*Alexander Neilson* with him), for the appellant.—By the desertion of the seaman the wages were forfeited, and the question is whether the Exchequer should get the wages due to the seaman or whether the master or owner of the ship is entitled out of the forfeited wages to get payment *pro tanto* of these two sums as being expenses caused by the offence of the seaman. The magistrate has allowed certain expenses, but he has disallowed the 100*l.* fine, and the cost of the cablegram, though he has found three times over that these expenses were caused to the appellant by the desertion of the seaman. It must be taken that the decision of the Australian court was a good decision, that this man was a prohibited immigrant. The statute which deals with it is the Immigration Restriction Act 1901. In sect. 3 it prohibits the immigration into the Commonwealth of prohibited immigrants, and it defines them. Then sect. 9 imposes a penalty on the master, owners, and charterers of a vessel from which a prohibited immigrant enters the Commonwealth, with a proviso at the end of the section which somewhat explains the section. This Chinaman was not of European race, and therefore that proviso does not apply in his case. If it is proved that an Asiatic has left the ship and entered the Commonweath the master is liable. The master has to keep him from entering at his own risk. Sect. 28 of the Merchant Shipping Act 1906 is the section which deals with the wages and the effects of a seaman who is left behind. Sect. 221 of the Merchant Shipping Act 1894, which is referred to in sect. 28, is the provision which deals with the forfeiture of the wages on the desertion of the seaman. Then sect. 232 deals with the forfeited wages and effects. Those are the material provisions of the Acts dealing with the matter. The man deserts and causes certain expenses to the master, and whatever expenses he does cause the master, the master can recover under these provisions. The 1*l.* 7*s.* 6*d.*, the cost of sending the cablegram, stands in the same category as the 100*l.* fine. It was a reasonable thing for the master to do. The vessel could have been detained under sect. 10 of the Commonwealth Act, and that would have been sufficient to expose the owners to certain risks and liabilities, so that it was reasonable and necessary to communicate with the owners. The magistrate has found the facts correctly—namely, that by reason of the desertion and as a consequence thereof the appellant was summoned, convicted, and fined, and that these and other expenses were caused to the appellant by reason of the desertion and in consequence thereof. On that finding of fact, and on the construction of these sections, having regard to the plain meaning of the words, it is difficult to see why these sums are not expenses within the meaning of these sections. They are within sect. 28 (1) (*b*) "expenses caused to the master or owner of the ship by the absence of the seaman, where the absence is due to desertion" and so on. "Absence" there means all categories of absence therein referred to which are made offences, and not merely desertion, but it includes absence without leave and failure to join the ship, or any other conduct constituting an offence under sect. 221 of the Act of 1894. This fine was an expense caused by the seaman's absence as defined in the Act. By sect. 221 if the seaman deserts his ship he shall forfeit his wages, but what has to be done with the forfeited wages is not declared in that section, but is provided for in sect. 232, which says that forfeited wages and effects are to be applied towards reimbursing "the expenses caused by the desertion to the master or owner of the ship"; and expenses caused by desertion must come within sect. 28 of the Act of 1906, which is merely the machinery for carrying out these sections. There was here "absence" of the seaman due to desertion within sect. 28 (1) (*b*) of the Act of 1906; there was forfeiture of the wages in consequence of such desertion under sect. 221 of the Act of 1894, and those wages and effects forfeited for desertion are to be applied under sect. 232 to reimbursing the master or owner for the expenses caused by the desertion. The appellant very strongly relies upon sect. 232 as showing his right to be reimbursed these expenses as being "expenses caused by the desertion," as if there had been no desertion no such expenses would have been caused.

Sir *Rufus Isaacs*, A.-G. (Sir *John Simon*, S.-G., *Rowlatt*, and *Hamar Greenwood* with him) for the respondent. The question is whether this 100*l.* fine is "expenses" caused to the master or owner of the ship by the absence of the seaman. That is the whole point, subject to this, that the absence of the seaman must be due to something for which the seaman is at fault. That is a qualification of "absence." The answer to the appellant's argument is very short. It is this: that it is not the absence of the seaman from the ship, but the presence of the seaman on shore which has caused this fine to be inflicted on the owner. The appellant fails entirely to meet that point, and his case has been argued as if all he has to do is to prove desertion. The only finding he has got in his favour is desertion, and he says that because he has the fact that the man deserted, therefore he is entitled to recover this 100*l.* as expenses caused to the owner by the absence of the man due to misconduct. Therein lies the fallacy. The master or owner of the vessel cannot be fined for the absence of the seaman from his ship, whether it is due to misconduct or not. The absence of the man from the ship is wholly immaterial to the Commonwealth of Australia in reference to this Act. The Act was passed to prevent the landing of a prohibited immigrant, and the fine is imposed, not only because the man has landed, but because the master or owner of the vessel has chosen to come to the Commonwealth carrying in his ship one of those who are known to be prohibited immigrants. That involves upon him the obligation to prevent the immigrant from landing, and, if he fails in it, the liability to be fined the sum of 100*l.* under sect. 3 of the Act. By clause (*k*) of that section, the master must, if so required by the officer, muster the crew in the presence of the officer before the ship leaves the port, and, if it is found that one of the crew is not present, then, until the contrary is proved, that absent member of the crew shall be deemed to be a prohibited immigrant, and to have entered the Commonwealth contrary to the Act. The court must assume that there has been a landing on the shores of the Commonwealth if a man does not answer to the muster and no evidence is given of what has happened to him. That shifts the burden of

proof, and instead of the burden being on the prosecutor it shifts the burden on to the owner or master of the ship to satisfy the court why it is that the man does not answer the muster-roll; but it does nothing more than that. The statement in the case that "by reason of the said desertion the appellant was summoned and convicted" is quite consistent with the case being that the muster on the ship was called, that the man did not appear, and no explanation could be produced. The statute imposes the obligation that the master must not allow one of these prohibited immigrants to land, and, in order to get over any difficulty as to evidence, it says that if the seaman does not answer the muster-roll he shall be presumed to have landed unless an explanation is given as to what has become of him. The Merchant Shipping Act 1906 was never intended to deal with a case of this kind; what it meant to deal with was the liability as it existed before this Act, and what it meant to do was this, that if a seaman was absent through a fault of his own and not through something over which he had no control, then the master might bring in certain expenses in his reimbursement account which he has to submit to the Board of Trade, and say that he has had to incur certain expenses through the absence of the man, that he has had to hire a substitute—an expense referred to in sect. 221 (*b*)—and that he has had to hire day labourers until he could get a seaman, and, as in sect. 221 (*a*)—dealing with what is to be done with the wages and effects—the seaman is "to satisfy any excess of wages paid by the master or owner of the ship to any substitute engaged in his place at a higher rate of wages." That is not exhaustive of the expenses, as there may be expenses of advertisements or sending a man ashore, and so forth. But these all properly come within "expenses caused by his absence." [He was stopped.]

Atkin, K.C. in reply.

Lord ALVERSTONE, C.J.—I do not express any opinion as to whether or not this sort of claim ought to be resisted. We have only to deal with the law of the matter. It has been contended by those who represent the Board of Trade that the fine of 100*l.* which has been imposed upon the master in the circumstances which I will presently mention, does not come within the provisions of sect. 28 of the Merchant Shipping Act 1906, and I think, if we are right in the view we take, it equally does not come within the provisions of sect. 232 of the Merchant Shipping Act 1894. The Act of the Commonwealth of Australia—the Immigration Restriction Act 1901—which has prohibited the immigration into the Commonwealth of certain persons, has provided in sect. 9 that where a prohibited immigrant, such as this Chinese seaman was, enters the Commonwealth from any vessel, the master, owners, and charterers of that vessel are jointly and severally made liable to a penalty not exceeding 100*l.* I think that but for the next clause it would have been quite possible to contend that entering the Commonwealth from a ship meant entering the Commonwealth from a ship which had brought the person there either as a passenger with the intention of landing there, or as a person who had no connection with the ship, so that if that had been the only provision in the section I should have wanted some further consideration before I came to the conclusion that this seaman had entered the Commonwealth in such circumstances as to render the master, owners, and charterers of the ship liable to this penalty, when he had only deserted from the ship. But if we look at the proviso which follows, it appears to me that it is not possible to take that view, because it provides that, "in the case of an immigrant of European race or descent no penalty shall be imposed under this section on any master, owner, or charterer who proves to the satisfaction of the court that he had no knowledge of the immigrant being landed contrary to this Act, and that he took all reasonable precautions to prevent it." Therefore it is quite plain that the Legislature of the Commonwealth considered that in the case of a man who was not intended to be landed and who in a particular case was an immigrant of European race or descent whom the master of the ship had taken all reasonable precautions to prevent landing, he would still but for this proviso be a person entering the Commonwealth within the meaning of the earlier words of sect. 9. Therefore it seems to me that for the purposes of this case we must assume that a deserter from a ship does enter the Commonwealth within the meaning of sect. 9. The next thing to be considered, although there are no sections and no language in any section to which our attention has been called specifically dealing with the matter, is, What really caused this fine? It is that somebody has taken proceedings against the ship, or against the master of the ship, because the Chinaman has entered the Commonwealth. I cannot assume that the penalty must be taken to be automatically due. It is a penalty for the recovery of which proceedings have to be taken. The master, owners, or charterers are liable to a penalty, and in one particular case, as I have already pointed out, they have a defence. Therefore it seems to me that the fine which has been imposed depends upon two states of things, one that a prohibited immigrant has entered the Commonwealth, and the other that proceedings have been taken against the master in respect thereof. I quite agree that the magistrate in stating this case has more than once used an expression which I think may be construed in favour of the appellant's contention, if it were to be assumed that there was evidence on which he could come to the conclusion that this fine was an expense within the meaning of the Act, because he has said that by reason of the desertion of the Chinese seaman, and as a consequence thereof, the appellant was summoned before a court of summary jurisdiction at Brisbane and was convicted and fined this sum of 100*l.* It does not seem to me to follow of necessity that, because he was summoned, as a consequence this fine was an expense within the statute to which I am about to refer, and in the same way I have no doubt that this case was stated frankly and perfectly fairly by the magistrate to raise the point. I think he has stated it in the clearest possible way. The case states: "The following expenses were caused to the appellant by reason of the said desertion or offence and in consequence thereof." He has found that in every part of the case, and if he could find that fact in favour of the appellant he has so found it. But in my opinion we cannot take that as a finding of fact which precludes the

argument addressed to us on behalf of the Crown. In order to justify this deduction, taking the law as it at present stands, we must refer to sect. 28, sub-sect. 1, par. (*b*), of the Merchant Shipping Act 1906: "If a seaman belonging to any British ship is left behind out of the British Islands"—I quite agree that that includes other causes than those of desertion—"the master of the ship shall, . . . (*b*) on the termination of the voyage during which the seaman was left behind, furnish to the proper officer within forty-eight hours after the arrival of the ship at the port at which the voyage terminates, accounts in a form approved by the Board of Trade, one . . . of the effects and wages, and the other of any expenses caused to the master or owner of the ship by the absence of the seaman in cases where the absence is due to desertion." Now, counsel for the appellant has contended that this expense was an expense caused to the master of the ship by the absence of the seaman due to desertion. In one sense he is undoubtedly right. In one sense it cannot be disputed that but for the man's desertion there would have been no ground for imposing any fine at all, and therefore, if it is an expense, properly so-called, it would be an expense due to the desertion of the man following upon his going ashore. I do not know that the particular mode of proof in the Commonwealth under this statute of the Commonwealth affords much help to the argument on the one side or the other. Counsel for the appellant has used it in argument, and the Attorney-General has used it, but the fact that in the particular case specified in exception (*k*) in sect. 3 of the Immigration Restriction Act 1901, where the master examines the crew and musters the crew and finds that one of the crew is absent, such absent member of the crew is to be deemed, until the contrary is proved, to have entered the Commonwealth, does not seem to me to help us very much in this particular consideration. In that case it would not follow of necessity that there would be a prosecution, and it would still leave open the question whether the fine following upon the prosecution is an expense within the meaning of the Act. Counsel for the appellant has called our attention to the provisions in the Merchant Shipping Act of 1894, as they stood before the Act of 1906. Sect. 221 of the Act of 1894 provides: "If a seaman lawfully engaged . . . commits any of the following offences . . . (*a*) if he deserts from his ship he shall be guilty of the offence of desertion and be liable to forfeit all or any part of the effects he leaves on board, and of the wages which he has then earned." It seems to me that the fact that he has forfeited them, supposing he was making a claim for them, again does not enable us to say whether a particular payment is an expense which is to be set off against the wages. The seaman has also "to satisfy any excess of wages paid by the master or owner of the ship to any substitute engaged in his place." That section is not so important in this connection as sect. 232, because counsel for the appellant has contended that under sub-sect. 1 of sect. 232 there is a provision that is still in force at the present time, "where any wages or effects are under this Act forfeited for desertion from a ship, those effects may be converted into money, and those wages and effects, or the money arising from the conversion of the effects, shall be applied towards reimbursing the expenses caused by the desertion"; and he says that these expenses were expenses "caused by the desertion." Speaking for myself, I should rather be disposed to agree with that contention for the appellant, if these sums were expenses within the meaning of the Act. I am not disposed to decide this case against the appellant upon any distinction between sect. 232 of the Act of 1894 and sect. 28 of the Act of 1906. It seems to me that if counsel's contention is right under the words "expenses caused by the desertion" in sect. 232 of the Act of 1894, it is also right under the words "expenses caused to the master. . . . by the absence of the seaman in cases where the absence is due to desertion" in sect. 28, sub-sect. 1 (*b*), of the Act of 1906. The words are not quite so strong, because possibly it may be urged in favour of the view contended for by the Attorney-General, that "expenses caused to the master by the absence of the seaman . . . due to desertion" are a little narrower than the words "expenses caused by the desertion." However that may be, as at present advised, my view would have been the same under both sections. I only refer to the later section because it does not, in my opinion, afford any stronger argument for the appellant than the words in sect. 232 of the Act of 1894. When fairly looked at, there is no evidence of this 100*l.* being an "expense caused by the desertion," within sect. 232 of the Act of 1894, or an "expense caused to the master by the absence of the seaman" from the ship by reason of the desertion, within sect. 28 of the Act of 1906. It seems to me that if the man had deserted to another ship and had sailed away in that ship, as constantly happens, the expense to the appellant or owners of the ship would have been the same, and rightly understood, in my opinion, this 100*l.* was an expense caused because this man had entered the Commonwealth, and because the master had broken the provisions of the Commonwealth statute, which in its wisdom imposed a penalty upon the master or owner of the ship where a man had succeeded in getting away from the ship and has entered the Commonwealth, even in those cases where the master is absolutely innocent. In my opinion, therefore, there was no evidence on which the magistrate could come to the conclusion that this fine when imposed on the appellant was an expense which was caused to the master or owner of the ship by the absence of the seaman within sect. 28, sub-sect. 1 (*b*), of the Merchant Shipping Act of 1906, and I also think that the same reasoning would have prevailed under sect. 232 of the Merchant Shipping Act of 1894. I had some doubt at first as to whether the telegram stood in the same category, but as far as one can judge from past experience, I think for the master of a ship to go to the expense of telegraphing home that a Chinaman had deserted from his ship would be quite an unusual thing, and I think the magistrate meant to put the two things in the same category. Counsel for the appellant does not really dispute that the telegram was only wanted because there was this possible liability upon the ship of having to pay the fine if the proceedings were taken. In my opinion, therefore, we can draw no distinction between the 100*l.* and the 1*l.* 7*s.* 6*d.*, and, although it may be hard upon the owners of the ship, I think that the decision of the magistrate must be affirmed.

HAMILTON, J.—I quite agree. For the purposes of this case I will read the finding of fact in the manner most favourable to the appellant, such apparently having been the intention of the magistrate. When he says: "By reason of the said desertion or offence of the said Cha Ah Ching, and as a consequence thereof, the appellant was summoned, convicted, and fined the sum of 100*l.*," and "the following expenses were caused to the appellant by reason of the said desertion or offence and in consequence thereof," namely, first, the fine of 100*l.*, and, secondly, the cost of the cablegram, 1*l.* 7*s.* 6*d.*, I will assume that the desertion there spoken of was a desertion which in itself consisted in and involved the Chinaman's getting ashore so that his presence on the soil of the Commonwealth, as well as his absence from the ship, was intended to be found by the magistrate Still it does not seem to me that the sums which the master of the ship claimed to be allowed to deduct were sums which he should have been allowed in fact to deduct, because I do not think that the fine of 100*l.* and the cost of the cable are matters which the Legislature intended to describe by the expression "any expenses caused to the master or owner of the ship by the absence of the seaman" in sect. 28, sub-sect. 1 (*b*), of the Act of 1906. Reading this section in the light of the sections in the Act of 1894, that conclusion is strengthened. "Expenses" is not in itself an apt word to cover a penalty imposed for a breach of the law. The causation of this penalty involves the determination of some officer to prosecute, and the determination of a court to inflict a fine; and when we look at the use of the word "expenses" both in sect. 221 (*b*) of the Act of 1894 and in sect. 232, sub-sect. 1, of the same Act, it seems to me to be clear from the context that the expenses in those sections refer to disbursements in the nature of payments for substituted labour for that which the deserter ought to have rendered. That view, which can only be stated and is not susceptible of elaborate justification, seems to me, however, to be corroborated by sect. 225 of the Act of 1894, a section which, in dealing with a matter very closely analogous to the present one, uses a different expression from "expenses." Sect. 225, sub-sect. 1 (*g*), says: "If he"—that is, the seaman—"is convicted of any act of smuggling, whereby loss or damage is occasioned to the master or owner of the ship, he shall be liable to pay to that master or owner a sum sufficient to reimburse the loss or damage." I cannot help thinking that if the Legislature in 1906 in passing the new Act in substitution for the sections in the Act of 1894 to be construed as one with the Act of 1894, had intended "any expenses caused" to include a fine imposed upon the master of a ship because the result of the seaman's offence—namely, desertion—is to entangle him in a liability under the laws of the Commonwealth, it would not have used the expression which is used, but would have said, "If by reason of the desertion loss or damage is occasioned to the master, then the seaman's wages shall be made liable to reimburse that loss or damage." I agree, therefore, that the appeal fails.

AVORY, J.—I am of the same opinion. I doubt whether a fine such as this could be properly called an expense within the meaning of this Act of Parliament, or any other Act. If a servant or commercial traveller were entitled to charge his employer with his expenses when away from home, I doubt whether he could properly include in those expenses a fine which had been imposed upon him for getting drunk while he was away. But, assuming for the moment it could be called an expense, I am clearly of opinion that it is not an expense caused by the absence of the seaman within the meaning of this section of the Act.

Appeal dismissed.

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

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

Monday, Jan. 30, 1911.

(Before SCRUTTON, J.)

HUTCHINS BROTHERS *v.* ROYAL EXCHANGE ASSURANCE. (*a*)

Marine insurance — Inchmaree clause — Damage to hull through any latent defect—Latent defect becoming patent.

A policy of marine insurance insuring a ship for twelve months from the 8th Dec. 1908 *to the 8th Dec.* 1909 *against the ordinary Lloyd's perils, contained the following clause: "This insurance also specially to cover . . . loss of or damage to hull . . . through any latent defect in the . . . hull . . . provided such loss or damage has not resulted from want of due diligence by the owners of the ship, or any of them, or by the manager." Before the policy came into existence there was a defect in the stern frame of the ship which had been covered up by the makers and remained undiscoverable by reasonable inspection. The defect became visible during the currency of the policy owing to ordinary wear and tear. In an action by the assured to recover under the policy the cost of replacing the stern frame:*

Held, that the assured were not entitled to recover, as there had been no loss or damage from the perils insured against during the currency of the policy.

Remarks as to what is recoverable under the Inchmaree clause.

COMMERCIAL COURT.

Action tried by Scrutton, J. sitting without a jury.

The plaintiffs claimed to recover a loss under a policy of marine insurance on the hull and machinery of the steamship *Ellaline* dated the 8th Dec. 1908.

The facts and arguments are sufficiently indicated by the writtten judgment.

Bailhache, K.C., *Dunlop*, and *C. H. Carden Noad* for the plaintiffs.

George Wallace, K.C. and *Chaytor* for the defendants.

SCRUTTON, J.—In this case, heard before me without a jury, the owners of the steamship *Ellaline* claimed against the defendants as underwriters a sum of 137*l.* odd, being the defendants' proportion of an expense of about 2300*l.* incurred by the plaintiffs in replacing a stern frame condemned because of a crack or fissure. The claim

(*a*) Reported by LEONARD C. THOMAS, Esq., Barrister-at-Law.

was made under a policy dated the 10th Dec. 1908, insuring the plaintiffs in respect of the *Ellaline*, subject to the Institute time clauses as attached, for twelve months, from noon, the 8th Dec. 1908, to noon, the 8th Dec. 1909, against the ordinary Lloyd's perils. The Institute time clauses included a clause known as the "Inchmaree clause," which runs as follows: "This insurance also specially to cover (subject to the free of average warranty) loss of or damage to hull or machinery through the negligence of masters, 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 ship, or any of them, or by the manager, masters, mates, engineers, pilots, or crew not to be considered as part owners within the meaning of this clause should they hold shares in the steamer." The directly relevant words for the purposes of the present case are, "This insurance also specially to cover . . . loss of or damage to hull . . . through any latent defect in the . . . hull." The defendants alleged there was no loss by perils insured against within the period of the policy. I find the facts to be as follows: The *Ellaline* was built in 1906 by Messrs. Redhead in the north of England. They obtained the casting of her stern frame from the Skoda Pilsea works, a well-known continental firm. When stern frames are cast in a mould the metal shrinks in cooling. To make good the shrinkage, headers, or receptacles opening into the mould, are kept full of heated metal, which, as the metal in the mould contracts, runs down into the mould and fills it. As the metal round the edge of the header cools quicker than the centre, a sort of pit or hollow is formed in the header, as the metal sinks. Should enough metal not be placed in the header, this pit or hollow may extend down into the casting in the mould. As it will be some twenty minutes after the mould is filled before this sinking due to cooling is observed, if the depression is then filled with a heated metal, it will be of a different charge to the original mould, and probably of different composition; and it may or may not unite perfectly with the original metal. Further, these headers are placed at the thickest parts of the mould; the narrowest parts cool first; and two cooling narrow parts, one on each side of the thick part beneath the header, may exercise in contracting a pull or strain on the warmer part in the middle, and may cause a cooling crack there, which, according to the evidence, has marked characteristics, differing from those of a crack caused by violence to a cold and finished stern frame. After considering the evidence I find as a fact that at Skoda, in casting this stern frame, owing to the sinking of the metal in the header and mould, a V-shaped wedge of metal of different composition from the original mould was run in. This wedge substantially united with the old metal; I am not certain that it completely united at all points where it touched the old metal. But in this V-shaped wedge a cooling crack took place, showing on the surface of the stern frame. Some of the witnesses think the crack was confined to the V-shaped wedge; I am not satisfied as to this, and am disposed to think it spread into the original material. But it showed markedly on the surface; and the Skoda people filled it up with metal, welded by some heating process, and covered it with some steel wash. In this condition the stern frame was passed by Lloyd's surveyor at Skoda, who did not discover the concealed defect. It was sent to Redheads, and neither their officials nor Lloyd's surveyors, who classed the ship, discovered the defect, nor did any of the plaintiffs know anything about it. The ship went to sea and suffered a series of minor damages. After stranding in Jan. 1907 and encountering ice in Feb. 1907, when rivets in the stern frame were started, she was examined in April 1907 by Lloyd's and the underwriters' surveyors, but nothing was seen of the defect. In Nov. 1907 she was examined, after taking the ground at one of the Greek islands, by Lloyd's and the underwriters' surveyors, but nothing was seen of the defect. On the 25th Nov. 1908 she was examined for damage by stranding in the Dardanelles in Oct. 1908 and heavy weather in Aug. 1908 by Lloyd's and underwriters' surveyors, who recorded damage to the stern frame riveting and rudder strap, but though she was scraped this defect was not found. I find that it was then there; that if a minute examination had been made of this particular spot it would have been found; but that in the absence of anything to direct attention to that precise spot there was no negligence on anyone's part in not discovering it. The policy in question began to cover the ship on the 8th Dec. 1908; she went on a voyage, in the course of which she met with the ordinary winter incident of ice in the Black Sea, and is said to have grounded near Bremerhaven, and on returning to England she was docked for painting at Barry on the 8th and 9th March 1909. The defect was then found. Lloyd's surveyor says he saw a suspicious line, and directed the workmen to scrape; others say the workmen found the defect first in scraping, and called the surveyor's attention to it. The underwriters' surveyors were then looking for ice damage along the water line, and did not at first see the crack. Anyhow, the defect once minutely scraped was clearly visible. Apparently the metal welded in the crack had corroded or come off, and a fissure was obvious. I accept the view that it had all the appearance of a cooling crack, and not of a violent fracture of the originally sound casting. The stern frame was condemned, removed, and broken; it broke not at the join of the original metal with the V-shaped wedge, but along the line of the fissure; and the appearances of the broken metal were said by several witnesses, and I accept their view, to have all the appearance of a cooling crack or flaw. The plaintiffs' witnesses suggested that the ice in the Black Sea or the grounding near Bremerhaven had either cracked the stern frame or made a latent defect visible. They disagreed as to which event had had this effect; and as to each event respectively some of them thought that it had not had this effect. I am not satisfied that there was any stranding near Bremerhaven. The chief officer's log does not mention this stranding at all; and the mate and captain first mention the stranding after the fissure was discovered, when their signatures appear on a letter to their owners, though the mate had forgotten he had signed such a letter. The chief engineer's log does mention the grounding, but the chief

engineer's log is, in my opinion, not a contemporary document, but has been all written up at the same time from some earlier document. The chief engineer was not examined in court, and I regret this point was not put to him, but I can only state the impression I have formed on looking at the document. Further, the suggested stranding and list to starboard will not account for a fracture on the starboard side of the plate. I am not satisfied that the alleged stranding had anything to do either with the fracture or its discovery. In the Black Sea the vessel appears to have forced her way through ice on going into and out of Odessa. She was undamaged, unless this fissure was due to ice. It was on her keel far below the water line. It was suggested that the propeller jammed ice on to the stern frame, but the propeller, which is far weaker than the stern frame, is undamaged. I am not satisfied that the ice either made the fracture or increased it. In the result I find that there was an obvious defect in the stern frame at Skoda; that it was covered up by the makers and remained undiscoverable by reasonable inspection until after the commencement of the policy; and that its becoming visible was due to the ordinary wear and tear of a ship's life. Was this "loss or damage to the hull through a latent defect"? The clause I have to construe is commonly known as the "Inchmaree clause." The machinery of the *Inchmaree* was damaged by an explosion, either through a valve becoming salted up, not in ordinary wear and tear, and the closing not being discoverable by reasonable care, or by the valves being closed by negligence of the engineers. The House of Lords in *Thames and Mersey Marine Insurance Company* v. *Hamilton, Fraser, and Co.* (6 Asp. Mar. Law Cas. 200 (1887); 3 Times L. Rep. 764; 12 App. Cas. 484) held that such a damage was not recoverable either as a peril of the sea or under the general words in a Lloyd's policy. The Inchmaree clause was introduced to give the protection denied by this decision. It covers the negligence of servants, it covers explosion and bursting of boilers, it mentions breakage of shafts, which is rather a damage in itself than a peril causing damage, and it then covers loss or damage through latent defects. I have some though rather an embarrassing amount of guidance on the meaning of the clause in the decision in the case of *Oceanic Steamship Company* v. *Faber* (10 Asp. Mar. Law Cas. 303 (1906); 95 L. T. Rep. 607; 97 L. T. Rep. 466). The *Zealandia* was insured against port risks in San Francisco for twelve months from the 8th May 1902 with an Inchmaree clause. She had been last examined in Oct. 1900, when her shaft was in order. She was on a voyage till the 10th July 1902, when the port risk commenced. She lay in port till Oct. 1902, when on being docked a fracture in the shaft was discovered and it was condemned. It was found that there had been a latent defect in the shaft since 1891. On these facts Walton, J. and the Court of Appeal all agreed that there was no claim on the policy either for breakage of a shaft or loss or damage through latent defect, as there was no evidence that the shaft had broken, or the latent defect had first become visible during the period of port risk, and mere discovery during the period, though followed by condemnation, did not give a claim. This disposed of the case, but Walton, J. had held that the latent defect becoming patent was not damage to the machinery through a latent defect. The Court of Appeal stopped the respondents' counsel on his raising the point on which all the judges concurred, but proceeded to express their opinions on the points which he had been stopped from arguing, and on these in my view they differed. I have considered the judgments in the Court of Appeal carefully; one at least of them, as reported, is difficult exactly to appreciate; but I read Fletcher Moulton, L.J.'s judgment as differing sharply from Buckley, L.J.'s, and I think Lord Alverstone, C.J.'s judgment is on the same lines as Buckley, L.J.'s. Under the circumstances I do not think I am bound either by the views of Walton, J. (whose views on any questions of marine insurance will always be read by the Profession with the deepest respect), for his views on this question were doubted by the members of the Court of Appeal. Nor am I bound by the opinions of the Court of Appeal on a question that they had not heard argued I therefore state my own views, formed after the most careful and respectful consideration of the opinions in that case. The Inchmaree clause is, in my view, an extension of the list of perils insured against in an ordinary Lloyd's policy, and only the actual loss or damage to hull from the named perils is recoverable. Loss to the shipowner's pocket is only recoverable as the measure of the actual loss or damage to hull. Thus, if under two consecutive time policies the hull was damaged during the period of the first policy, but repaired and paid for during the second, the shipowner would recover under the first policy for damage to hull, not under the second when he suffered the cost of replacing the damage. For an elaboration of this point I refer to the judgments of the Court of Appeal in *Field Steamship Company Limited* v. *Burr* (8 Asp. Mar. Law Cas. 384, 529; 80 L. T. Rep. 445; (1899) 1 Q. B. 579). A ship was injured by sea perils; water entered the hold made by a collision and converted the cargo into a putrid mass. The shipowner claimed, under the ship's policy, the cost of removing the cargo. It was held that there was no loss or damage to the ship the subject-matter insured, but only to the pocket of the shipowner. This was not recoverable under a policy against loss of the ship. In the present case has any damage to the hull occurred during the currency of the policy through latent defect? The only damage is, in my view, the latent defect itself, which by wear and tear has become patent. But the latent defect did not arise during the currency of the policy; it existed in 1906, and the underwriter does not insure against ordinary wear and tear and its consequences. Has any part of the hull been lost in fact during the currency of the policy? The stern frame has not been lost in fact; it is there as it was before the policy began; the only change is that a previous latent defect has by wear and tear become patent. It has not been constructively lost during the currency of the policy; it was constructively lost in 1906, if the true facts had been known; what has happened during the currency of the policy is the discovery of the true facts. If it is said there is a loss of hull, because the shipowner has had to replace it and suffered loss during the currency of the policy, it is true that the expense is

incurred during the currency of the policy, but the damage repaired by the policy, as a latent defect, came into existence in 1906, and must have been repaired then, if discovered. For these reasons I hold that no loss or damage to hull has happened during the currency of the policy from perils insured against, and that the discovery of pre-existing loss or damage, though impossible on reasonable examination before the date of the policy, is not enough to give them a claim. In my view what is recoverable under this part of the Inchmaree clause is: (1) Actual total loss of a part of the hull or machinery, through a latent defect coming into existence and causing the loss during the period of the policy. This was the kind of latent defect alleged in the *Inchmaree* case. (2) Constructive total loss under the same circumstances, as where, though a part of the hull survives, it is by reason of the latent defect of no value and cannot be profitably repaired. (3) Damage to other parts of the hull happening during the currency of the policy, through a latent defect, even if the latter came into existence before the period of the policy. The pre-existing latent defect itself is not damage indemnity for which is recoverable, even if by wear and tear it becomes visible during the policy. I think that is substantially the result arrived at by Fletcher Moulton, L.J. and Walton, J., and it is not uninteresting to note that it was the result arrived at by the plaintiffs' arbitrator, who wrote making a claim on behalf of his clients or a third party: "We have exhaustively inquired into the question as to whether or not the cost of renewing the stern frame can be recovered from underwriters, and it was with much regret that we came to the conclusion that no claim could possibly be asserted." Arriving by independent investigation at the same conclusion, I give judgment for the defendants, with costs.

Solicitors for the plaintiffs: *Holman, Birdwood, and Co.*

Solicitors for the defendants, *Coward and Hawksley, Sons, and Chance.*

Wednesday, Feb. 8, 1911.

(Before Scrutton, J.

Glasgow Assurance Corporation Limited v. William Symondson and Co. (*a*)

Marine insurance—Broker and underwriter—Relations between—Disclosure of material facts.

Where a contract of marine insurance is entered into between a broker and underwriter the material facts to be disclosed by the former are as to the subject-matter of the insurance, that is, the ship, and the perils to which she is exposed. On these facts the underwriter must form his own judgment of the premium, the judgment of other people being quite immaterial. It is not necessary that the broker should disclose the name of the assured, unless he is requested to do so.

Commercial court.

Action tried by Scrutton, J. sitting without a jury.

The plaintiffs claimed to set aside a treaty or contract dated the 10th Nov. 1908, made between themselves and the defendants, and to have all policies of insurance effected by the plaintiffs with the defendants in pursuance of the said treaty or contract set aside and delivered up to be cancelled.

Sir *Edward Carson*, K.C., *Bailhache*, K.C. and *Morle* for the plaintiffs.

Leslie Scott, K.C. and *Mackinnon* for the defendants.

The facts and arguments are sufficiently stated in the judgment.

Scrutton, J.—This action was brought by the plaintiffs, an insurance company at Glasgow, against the defendants, four gentlemen carrying on the business of marine insurance brokers in London, to avoid a document described in the claim as a contract of obligatory reinsurance and certain marine policies issued thereunder as being obtained (1) by fraudulent representations, and (2) by concealment of material facts. There was also an allegation that either under the contract in question or certain collateral contracts to it the defendants were, as the plaintiffs' agents, bound to use reasonable care and skill, and that they had not used such care and skill, and had made profits as principals without making full disclosure of their position to the plaintiffs, who employed them as agents. The case was heard by me without a jury on parts of six days. The length of time is sufficiently explained by a thousand pages of correspondence, many policies, slips, *bordereaux*, audit notes, and other insurance documents, and a good deal of oral evidence. I only propose to summarise the facts before stating the contentions and my findings of facts and law thereon. Before referring to the special facts it is necessary to say something about the course of business in marine insurance in London, for to persons unfamiliar with it much of the business transacted there is unintelligible and suggests many conclusions as to the legal effect. When one finds a broker paid commission by an underwriter and preparing documents for an underwriter, one is tempted to treat him as the underwriter's agent, and owing a legal duty to the underwriter. But for the reasons stated in the judgment of Kennedy, J. in *Empress Assurance Corporation* v. *Bowring* (11 Com. Cas. 112) this conclusion would generally be erroneous, and the broker personally under ordinary circumstances knows no duty to the underwriter in respect of erroneous but honest statements made by him. Similarly, when one finds, as one frequently does at Lloyd's, A. agreeing to reinsure B. against every risk insured by B at a premium based on a percentage of the premiums received by B., and always therefore smaller, one is naturally inclined to think that as B. has a temptation to accept every risk, however bad, and pass it on to A. at a smaller premium, and therefore at a certain profit, such a system is absurd and cannot work. But, as Bowen, L.J. said in *Sanders* v. *Maclean* (5 Asp. Mar. Law Cas. 160 (1883); 49 L. T. Rep. 464; 11 Q. B. Div. 343), "anyone who attempts to follow and understand the law merchant will soon find himself lost if he begins by assuming that merchants conduct their business on the basis of attempting to insure themselves against fraudulent dealing. Credit, not distrust, is the basis of commercial dealings. Mercantile genius con-

(*a*) Reported by Leonard C. Thomas, Esq., Barrister-at-Law.

sists principally in knowing whom to trust and with whom to deal." In the insurance market large quantities of risks are pressed on well-known underwriters of high standing, whether companies or Lloyd's men. They have more risk in a particular interest than they wish to take, and they desire to reinsure part of thir lines. On the other hand, original lines of insurance will not be placed with new companies, or foreign companies who are not well known, and if they are to get business they must accept reinsurances of the lines of the popular underwriters. They compete eagerly for these, and are ready not only to accept less premium than the original underwriter can get, but also to make agreements with him to reinsure a part of all his risks at a lower premium, leaving the selection of risks to him. This dealing is based on confidence in him; he might abuse it, but he rarely does; and this explains many open covers which at first sight seem odd and unbusinesslike. The defendants were a firm of four gentlemen of the Symondson family, W., W. H., A C., and Ernest, carrying on business as brokers. The first three were underwriting members of Lloyd's. Mr. William Symondson had originally underwritten for names at Lloyd's; he now did not personally write, but engaged at a salary Mr. Herbert Symondson, not a member of the brokerage firm, who underwrote risks for seven "names," W., W. H., A. C., and Herbert Symondson, the late Mr. Freeland, Mr. Colvin, and Mr. Phillipps. The three Messrs. Symondson, W., W. H., and A. C., also underwrote policies as "Symondson's names"; the profit or loss in this underwriting was divided between these three gentlemen, Mr. Ernest Symondson, the fourth partner in the brokerage firm, getting none of it; but he did receive a share of some of the brokerages earned by the brokerage firm in respect of such policies. As many underwriters of original risks desired only to reinsure with members of Lloyd's, Mr. Herbert Symondson's names, seven, and the three Messrs. Symondson wrote a good many reinsurance risks, generally on the lines of reinsuring the total loss, and certain heavy partial losses, such as those caused by stranding. This form of reinsurance was known as "f.p.a. unless, &c." referring to the well known clause beginning in that way. It is very usual in insurance circles for an underwriter before he accepts a risk to find out if he can reinsure it, before he accepts it; and this security is sometimes obtained by open covers, binding an underwriter to accept reinsurances of all risks of a certain class at a certain premium. Messrs. Symondson desired both as underwriters to provide a certain reinsurance for risks they underwrote, and as brokers to provide a certain market for risks they were instructed to place; and in 1908 they effected a series of open covers with new or foreign companies The Law Car Insurance Company, now in liquidation, was one of the Eng ish companies; the Providenza was one of the foreign companies. Messrs. Symondson wanted more covers, and through a Mr. Fiumi, whose exact legal position is in controversy, they signed in December 1908 a document described as a contract of obligatory reinsurance with the plaintiffs, the Glasgow Assurance Company. One of the questions in this case is how far the provisions of the Stamp Act enable me to enforce, or even to look at, this document. Following the procedure of Kennedy, J. in *Empress Corporation* v. *Bowring* (*sup.*), where the same question arose. I reserved the decision of this question till I dealt with the whole case. The document purported to be an agreement by the plaintiffs to reinsure all risks offered them by the defendants against certain named perils, generally "f.p.a. unless," at a premium of 60 per cent. of the original all-risk rate. Claims for losses were to be paid on the certificate of the "reassured." The premiums due to the plaintiffs, as to 90 per cent., were to be banked in the defendants' name as security for claims. The remaining 10 per cent. was to be paid to the plaintiffs. The agreement was stated to be made between the plaintiffs and "Messrs. William Symondson and Co. and (or) as agents for other parties." The plaintiffs were a recently formed company intended primarily to deal with accident, fire, and other forms of insurance not marine. Their chairman was interested in shipping and well acquainted with it. Their general manager, Mr, Pole, knew nothing about marine insurance. He did know that the defendants' firm or members thereof had experience as underwriters. He understood very little of the meaning of the treaty or agreement he signed, but had confidence in Messrs. Symondson. On the treaty being signed, the defendants, as they had intended to do, pursued their previous course of business. Their underwriting members accepted reinsurances of "f.p.a. unless" risks at rates higher than 60 per cent. of all-risk rates. and desired to reinsure them. The brokerage firm received orders to place reinsurances with underwriters. Both classes of risks were under the treaty declared by the defendants to the plaintiffs by provisional *bordereaux*, which as usual did not disclose who the persons were who were reassured, but only the vessel which was the subject-matter of the risk, the period of the risk, and the premium. The risks were closed by closing *bordereaux* of the same character. Each risk was then expressed in a policy in Messrs. Symondson's usual form, the terms of which were taken from the *bordereaux*. Each policy was expressed to be made with "William Symondson and Co. and (or) as agents as well as in their own name and for and in the name and names of all and every other person to whom the same doth, may, or shall appertain." Each policy contained a marginal clause, "Being a reinsurance of the lines underwritten by Lloyd's underwriters," with a blank in which their names might be, but were never in practice, inserted. In fact, on a very large number of reinsurances the three Symondsons, partners in the brokerage firm, were mainly interested, but other underwriters than these three partners in the brokerage firm had a substantial though minor interest in some of the policies. As an example, one very large declaration of some 915 ships, known as batch P, was put forward at an early stage of the treaty. In it a large number of ships originally insured against all risks by the Premier Association were on their giving up business reinsured by them with the British Dominion Insurance Company. The latter in turn wished to reinsure their liability "f. p. a. unless" with Lloyd's underwriters, and accordingly reinsured not exceeding 1000*l.* on each steamer. Of this 1000*l.* the Symondson names

wrote 400*l.*, one Peech 100*l.*, and Green's names 500*l.*, all at 80 per cent. of the original all-risk premium. Green's names desired to retire from business, and their 500*l.* was taken over by the seven names for whom Herbert Symondson wrote, in consideration of a money payment by the brokerage firm, who had got Green's names to write, and had to replace them; it was reinsured with the Law Car Insurance Company, and does not enter into this case. The 500*l.* reinsured by the Symondson names and Peech was declared to the Glasgow Association by the brokerage firm at 60 per cent. of the original all-risk premium. The figures would thus roughly stand in this way: If 100*s.* was the original all-risk premium, the British Dominion would pay 80*s.* to Symondson's names (the three partners), who could return 5 per cent., 4*s.*, or, I think, under a special arrangement 2*s.*, to the brokerage firm (four partners), and 10 per cent., 8*s.*, to the British Dominion, getting 68*s.* themselves. They (the three names) would then pay 67*s.* to the Glasgow company, who would return 5 per cent., 3*s.*, to the brokerage firm (four partners), and 10 per cent., 6*s.*, to the three names, leaving 51*s.* for themselves. The difference between 68*s.* and 51*s.* would go as to 14*s.* to the three names and as to 3*s.* to the brokerage firm (four partners). This, though a little complicated, would represent a large part of the business carried on under this treaty, and would be ordinary business at Lloyd's.

In March 1909 claims for losses began to be put forward by the defendants to the plaintiffs. Each claim stated the names of the reassured; those under the "P batch" stated the reassured as "Symondson's names" and "Peech." Some eighteen claims, beginning in Sept. 1909, stated the reassured as the seven names written for by Herbert Symondson, which included four Symondsons. These claim notes told anyone familiar with marine insurance with perfect clearness that the partners in the brokerage firm were themselves underwriting, and reinsuring their own risks with the plaintiffs. The plaintiffs' "marine department" was at first one Semple, who had had eight years' previous experience in marine business some time before, but at this time, having been in other business for some years, his knowledge was rather rusty. He said with modesty he was surprised to be appointed, and still more surprised to be retained; but he did show great industry in checking premiums, duplicate ships declared, and other details, and he knew of the terms of the "treaty." He told me that, looking at the claim notes now, he could understand that the names were those of the underwriters he was reassuring, but at the time he was not curious whom he was assuring or reassuring. He was succeeded in June 1910 by Mr. Watson, who had had previous marine insurance experience; he said that as soon as he saw the first claim notes he knew that they were reinsuring Symondsons. This did not surprise him, but it did surprise him that Mr. Pole did not seem to know it. What had happened meanwhile was that in May or June 1909 the plaintiffs had terminated the first treaty, it being agreed that risks provisionally declared might be completed under that treaty, and had entered, through Symondsons, into a second treaty reinsuring certain risks written by the British and Foreign Marine Insurance Company, one of the leading London companies. Two more treaties were entered into with that company, and in the last the plaintiffs were reinsuring an all-risk line on all ships insured by the British and Foreign Company at a smaller percentage of the original premium. Such a treaty, of course, assumes confidence in the British and Foreign as underwriters. From March 1909 to June 1910 claims kept coming in, and were paid by Symondsons out of the 90 per cent. of premiums retained. But 1908 and 1909 were bad years in marine insurance; rates were cut low by competition, and losses were heavy; and in May-June 1910 it became necessary to ask the plaintiffs for cheques for losses above the 90 per cent. of premiums retained and now exhausted. Mr. Pole apparently had not suspected that marine underwriters ever made losses. When asked to pay he became suspicious, and by a correspondence, to which I need not refer, he found out what he would have found out fifteen months before if he had looked at his claim notes, that Symondsons had been themselves reinsured; and when at last the defendants threatened a writ to obtain payment the plaintiffs replied by a writ asking rescission on the ground of fraud.

This is a short history of the case, and I now proceed to state the various contentions put forward by the plaintiffs, assuming that no difficulty under the Stamp Act stands in the way. The plaintiffs first asked to avoid, rescind, or cancel the treaty and the policies effected thereunder on the ground of fraudulent representations inducing the conclusion of the treaty. These representations mixed up with alleged collateral promises were set out in pars. 4 and 5 of the claim, and a general averment of their untruth was contained in par. 9 of the claim. The representations were alleged to be made by Fiumi and one Brown, the defendants' manager, to Mr. Pole, the plaintiffs' manager. Pole and Brown were examined before me; Fiumi was examined on commission. As to the credit I attach to these witnesses, Mr. Pole gave evidence before me with great bitterness against the defendants, and when I could check him with documents his memory was obviously inaccurate. I acquit him of any intention to mislead the court, but I was unable to rely on his evidence as to conversations two years before unless it was corroborated by documents. He was a very busy man, attending to a large mass of other business, and ignorant of marine insurance, and I have no confidence that he either understood what was said to him or remembered it accurately. While on one or two minor points I was not satisfied with Mr. Brown's evidence, I accept it in substance as an accurate account of what took place. I did not see Fiumi in the box; he was a foreigner, knowing very little of marine business; his evidence was on several points obviously exaggerated and inaccurate. Mr. Pole said that he did not think Fiumi was intentionally dishonest; and Fiumi in his turn gave Symondsons a character for honesty and correctness in all their dealings with him. The representations alleged to be made by Brown were made at an interview which Pole put before the signing of the treaty, Fuimi between the signing of the treaty and the execution of the guarantee under it, and Brown after the signing of the treaty and the giving of the guarantee. I accept Brown's evidence as to the date, which I think was between the 4th Jan. and the 11th Jan.

1909, and I accept his account of the interview; I find that no untrue statements of fact were made by Brown, and all his statements were honest. As to Fiumi's alleged misrepresentations I am relieved of some difficulty in sorting out what exact untrue statements of fact he was supposed to have made by Mr. Bailhache's relying in his reply only on one matter, the written statement of figures referred to in par. 6 of the claim. This was a document given by Symondsons to Fiumi to show to Pole. This document was headed "Cash payments to London and foreign offices for insurances effected by Symondson and Co.," and it correctly showed the premiums paid over a named period and the claims received during a named period, and on the face of it it showed a surplus of 48,000*l.*; claims being under 40 per cent of premiums. No person in his senses would take it to be, as alleged in the claim, "the final result of the business," and Mr. Pole did not so take it. He did a calculation for himself based on his own experience of other insurance business, not marine, and quiet erroneous as applied to marine business, and thought it showed a substantial profit as probable in the future. This was an honest but mistaken prophecy. I daresay Fiumi also made an honest but mistaken prophecy. But the facts in the document were correct, and not put forward as anything but what they proposed to be; and I am quite unable to find any untrue, still less fraudulent, statement of fact by Fiumi. This finding applies also to the other alleged misrepresentations not relied on by Mr. Bailhache in his reply. These findings relieve me from the necessity of investigating the rather complicated dealings of Fiumi to find out whose agent he was; he thought he was the agent of both parties, and there is a good deal to be said for his view; but if I had found that he had made fraudulent representations I think I should have found he was Symondsons' agent. The claim, so far as it is based on fraud, fails, and should, in my opinion, never have been made.

I next come to the allegation of concealment of material facts, which has given me more trouble than any other part of the case, and on which I can quite understand other minds coming to a different conclusion from that at which I have arrived. For reasons I am about to give I think the less experience of marine insurance a man has the more likely he would be to think that material facts had been concealed. Concealment is alleged in pars. 6, 7, and 8 of the claim. As to par. 6 of the claim, there is no evidence that at this time the other treaties had resulted in a loss; there is evidence, and I find they had not. It would not, in my view, have been material if they had. As to par. 7 I find that the defendants did not know, and no one did, that the treaty must result in a loss to the plaintiffs; and if the defendants had known, in my opinion it would not be material. Par. 8 is the allegation on which I have had some difficulty in making up my mind, and is the one in which the plaintiffs say: "This was a treaty under which I was to underwrite risks which you, the defendants, selected; at that time you had a system, of which I did not know, of yourselves underwriting and then reinsuring your own risks, and as this deprived you of the power of selection it was material to me to know it; and you should have disclosed it to me." It was the fact that the defendants had such a system, and that, unless the terms of the treaty state it, they did not at the time of concluding the treaty state it to the plaintiffs. I think an ordinary person unacquainted with marine insurance would think it a material fact to be stated; and I think that, though Mr. Pole would probably have made the treaty even if he had known it, he would on its disclosure in effect have said, "Yes, I must think about this, and I am glad you told me." But the test I have to apply is not materiality to the ordinary business man or to Mr. Pole. By sect. 18 of the Marine Insurance Act every circumstance is material which would influence the judgment of "a prudent insurer," who, however, is deemed to know and need not be told matters which in the ordinary course of business he ought to know, or has waived being informed of; although in recent practice evidence has frequently been admitted of underwriters to state whether in their opinion certain facts would influence the judgment of a prudent insurer, no such evidence was tendered by either party in this case. I am therefore left to form my own judgment on the question from such knowledge as I have of insurance matters. The ordinary man in the street would, I am sure, think it material to know that the risk he was offered had been previously refused by six other underwriters; and many life insurance offices expressly ask the question: "Has your life been refused by any other office?" But it is elementary marine insurance law that such refusals need not be disclosed to another underwriter. The ordinary business man would, I am sure, think it material to know that the underwriter wanting to reinsure thought so badly of the risk that he was ready to pay a higher premium than he received to get rid of it; but no one has ever suggested that this need be disclosed. The material facts are as to the subject-matter, the ship, and the perils to which the ship is exposed; knowing these facts the underwriter must form his own judgment of the premium, and other people's judgment is quite immaterial. In this case, indeed, the underwriter contracts to take 60 per cent. of the original all-risk premium, without inquiring and waiving all inquiry as to who was going to fix that all-risk premium. Again, if true disclosure is made as to the ship and the perils affecting her, no one has ever suggested that it is necessary to disclose the name of the person interested in her who is desiring to insure or reinsure his interest. It is never done in practice; the underwriter, when he enters into a policy insuring the broker as well in his own name as for and in the name of any other person, must expect to find the broker declaring his own interest or the interest of any other principal. If the underwriter wants to know who is the assured he must ask. What would a prudent insurer acquainted with business know in making the treaty in this case? He would know what is common knowledge in marine insurance—that many brokerage firms in London have partners who are also underwriters at Lloyd's, and that when he contracted with the brokers and (or) as agents he might find them putting forward their own risks or those of their underwriting members as principals or other people's risks as agents. Mr. Bailhache, I think, admitted this for the plaintiffs, but argued that as, where the assured has an option with regard

to the subject-matter insured, if he knows at the time of insuring which option he is going to exercise, he must tell the underwriter; here, when the broker knew at the time of the treaty he was going to declare as principal, he must disclose it. This is true where the option affects the ship or the risks to which the ship is exposed, but I am not aware of any authority for it where the option affects the rate of premium or name of the assured, which are, in my view, either not material to the risk or matters of which the underwriter by the terms of the policy waives knowledge. I therefore find that the intention of the broker to declare his own underwriting partners as assured, who would make a profit by difference of premiums, was not a fact material to be disclosed. I do not agree with Mr. Scott's contention for the defendants that the treaty, if a contract at all, was not a contract *uberrimæ fidei* involving an obligation of disclosure. The circumstance that the brokers did make full disclosure of the names of the assured by their claim notes without objection seems to me, first, to show their honesty, and, secondly, to prevent the plaintiffs, if the fact was material, from avoiding the contract and policies after the expiration of a reasonable time from first disclosure, which I find had elapsed before the issue of the writ. If I had found concealment of a material fact, the plaintiffs would have had to face the question, to which in my opinion they gave no satisfactory answer, as to how they could cancel the policies when underwriters parties to them such as Freeland, the Blaibergs, Peech, and Sheppard were not before the court; for non-disclosure is not a breach of a contract giving rise to a claim for damages, but a ground of avoiding a contract. The next allegation, apparently made in pars. 6 and 7 of the claim, was that there were various promises collateral to the treaty which had been broken by the defendants. I am relieved from dealing with these, for Mr. Bailhache, in his reply, admitted that there was no evidence on which he could ask me to find collateral agreements not expressed in the treaty. Lastly, the plaintiffs alleged that under the treaty the defendants were agents for them to select risks, and that as agents they had violated the fundamental principle of agency that an agent must not make a profit out of his agency, whether as principal or otherwise, without full disclosure to his principal. I have no desire to weaken this principle at all; it is of vital importance to commerce, and should be strictly observed as well at Lloyd's as elsewhere. As an instance, a broker employed to place an insurance cannot himself underwrite part of the risk unless he makes full disclosure to the principal who employs him. But this is not in my opinion such a case. The broker insures with the underwriter by the terms of the policy and treaty either as principal or as agent for another principal, and owes no duty of agency to the underwriter. It is true the underwriter must have confidence in the broker to make such a treaty as this; but so he must have in every open cover where he reinsures part of risks of which he knows nothing except that they are to be written by someone else. No one has ever suggested in the latter case that the assured owes any duty or agency or selection to the underwriter, though without confidence such a contract will not be renewed. Messrs. Symondson, in my opinion, are no more the agents of the plaintiffs than are the British and Foreign Insurance Company under the last cover to which I have referred. It is true they receive brokerage, but so does every broker who contracts, as well in his own name as in the name of any other person, &c., and on the position of such a person. I refer again to the judgment of Kennedy, J. on this point in the *Empress Insurance Company* v. *Bowring* (*sup.*). I may add that the plaintiffs put forward in the dark and by guesswork a series of allegations that reasonable care and skill had not been used in selection and improper closings had been made. After a prolonged investigation by their accountants they were unable to find any case to support these reckless assertions, which ought never to have been made. These findings dispose of the action and entitle the defendants to judgment with costs on the claim, while it was agreed that if the claim failed, judgment necessarily followed for the defendants on the counter-claim for 2566*l.* 18*s.* 8*d.*, and I give the defendants interest at 5 per cent. from the date of the respective credit notes, and with costs on the counter-claim. These findings relieve me from the necessity of expressing a final judgment on the difficult questions which arise under the Stamp Acts. Should any other tribunal consider that the plaintiffs are, on any ground involving the consideration of the treaty, entitled to judgment, it will apparently, under the decisions of the Court of Appeal in *Royal Exchange Assurance Corporation* v. *Vega Insurance Company* (87 L. T. Rep. 356; (1902) 2 K. B. 304) and *Home Insurance* v. *Smith* (1898) 2 Q. B. 351), and the judgment of Kennedy, J. in *Empress Insurance Company* v. *Bowring* (*sup.*), have to consider how far the new provisions of sect. 14 (4) of the Stamp Act of 1891, which by sect. 91 of the Marine Insurance Act override the provisions of sects. 21 and 89 of that Act, prevent the treaty being available in evidence for any purpose. It is to be noted that the treaty contains provisions which are not expressed in any stamped policy, and is called by the parties "a contract of reinsurance." As, however, I am not enforcing in this action any contract which is not expressed in a duly stamped policy, I have not thought it necessary to decide whether any stamp or penalty should be required from those producing the treaty, though they have undertaken to pay for any stamp or any penalty the court may impose on them.

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

Monday, Dec. 12, 1910.

(Before Channell, J.)

Leach and Co. Limited v. Royal Mail Steam Packet Company. (*a*)

Bill of lading—Charter-party—Discharge by shipowners—Damage to bags containing cargo—Liability for repairs.

Where a charter-party provides that shipowners are to discharge cargo, the cost of repairing bags in which the cargo is carried, in the absence of any stipulation to the contrary, falls upon the shipowners and not upon the charterers.

(*a*) Reported by Leonard C. Thomas, Esq., Barrister-at-Law.

Commercial Court.

Action tried by Channell, J. sitting without a jury.

The plaintiffs' claim was for 21*l.* 18*s.* 5*d.*, being the balance of freight due to them from the defendants under a charter-party dated the 26th June 1907, or alternatively as the cost of mending certain bags shipped at Rio de Janeiro in a torn or defective condition. The plaintiffs were the owners of the steamship *Sea Belle*, and the defendants were the charterers.

The bill of lading dated the 5th July 1907 and charter-party dated the 26th June 1907 provided for the carriage of certain bags of coffee from Rio de Janeiro to Havre.

The bill of lading stated that the goods were shipped "in apparent good order and condition," and clause 10 provided that the shipowners were not to be responsible "for any damage to or destruction of bales or bags."

The following were the material clauses of the charter-party :

9. The charterers' responsibility under this charter-party shall cease on the shipment of the cargo, the captain or owners having a lien on the cargo for freight, dead freight, and demurrage.

10. The owners authorise the charterers or their agents to sign the bills of lading for the cargo as usual, and agree to abide by all the conditions of the said bills of lading. The bills of lading are to be signed as presented, and at any rate of freight, without prejudice to this charter-party ; any difference to be settled before vessel sails, if the difference is in vessel's favour, in cash at current rate of exchange, less insurance ; if in charterers' favour, by draft of captain upon his owners, payable on discharge of vessel and payment of freight. . . .

12. The steamer shall be addressed at the port . . . of . . . discharge to the charterers' nominees (whom the owners hereby accept and appoint as agents for the steamer) paying the fee £10 10s. at each port, which, with an address commission of 2½ per cent. on the whole amount of freight, dead freight, and demurrage, shall be deducted by the charterers from the freight. The charterers' nominees at . . . Havre, Marcel and Co."

An arrangement was made that the accounts of the ship's agents at Havre should pass through the defendants' office in London. The defendants in making up the account debited the plaintiffs with 21*l.*, a sum paid by Marcel and Co., the ship's agents at Havre, for mending certain bags which had been torn.

Dunlop for the plaintiffs.—The charge for mending the bags is one which properly falls on the charterers, and they had no right to deduct it from the freight payable to the shipowners. The bill of lading contract was a contract between the defendants and the owners of the goods, and it was the duty of the defendants to perform that contract, and to bear charges similar to that in dispute, necessary to enable them to perform their contract of carriage. Further, as the mate's receipts were not clean receipts, the defendants or their agents had no right to sign clean bills of lading ; had they qualified the bills of lading as they could and ought to have done, there would have been no liability on the ship in regard to the torn bags.

Raeburn for the defendants.—Marcel and Co. at Havre were agents for the ship and not for the defendants, and if they have improperly paid the cost of mending the bags, they and not the defendants are the persons responsible to the plaintiffs. The bill of lading contract was a contract between the ship and the owners of the goods :

> *Calcutta Steamship Company Limited* v. *Andrew Weir and Co.*, 11 Asp. Mar. Law Cas. 395 (1910) ; 102 L. T. Rep. 428 ; (1910) 1 K. B. 759.

The ship is bound to fulfil her contract to deliver, and must bear all charges necessary to enable her to deliver the goods properly. Delivery of the coffee could not have been given unless the bags were mended, as the coffee would have been spilled in the process of discharge. It is immaterial that clean bills of lading were signed against qualified mate's receipts, because even if the bills of lading had been qualified they would not have protected the ship against liability for such a charge as this.

Channell, J.—This case involves a very small point, but it raises a question of considerable nicety and difficulty. The plaintiffs are the owners of a vessel which was chartered to the defendants to take the place of one of the latter's liners, and to bring a cargo from South America to Havre or other ports, but in the events which happened it was to Havre. The charter-party, which is in a fairly common form, provides for a lump sum freight, and by a clause which substantially is the usual clause it provides that the owners authorise the charterers or their agents "to sign the bills of lading for the cargo as usual, and agree to abide by all the conditions of the said bills of lading. The bills of lading are to be signed as presented, and at any rate of freight without prejudice to the charter-party ; any difference to be settled before vessel sails, if the difference is in the vessel's favour, in cash at current rate of exchange, less insurance ; if in charterers' favour, by draft of captain upon his owners payable on discharge of vessel and payment of freight." That seems to provide, as is common, that the shipowners are to receive into their pocket the lump sum freight and no more. Of course the shipowners necessarily have to collect the freight at the port of discharge, and therefore it is supposed that the account will be gone into at the port of loading. In practice I suppose it never is, and in this case it was not, but the scheme of the charter-party is that when the cargo is loaded and the various bills of lading are given, the total freight for the total number of bills of lading is added up, and it is seen whether or not it exceeds the chartered lump sum freight, which, of course, it always will if a full cargo is obtained. In that case the master of the vessel is to give a bill upon his owners payable on the discharge of the vessel and payment of freight It is not to be payable until he gets this freight for the difference. If, on the other hand, the vessel does not for any reason get a sufficient cargo to make the total bill of lading freight equal to the lump sum chartered freight, that difference is to be paid in cash at the current rate before the vessel sails. All that is somewhat inconsistent with the clause in the charter-party that the freight is to be paid in London on discharge of the cargo. But that is the scheme of the charter-party as regards freight. In this case that was not acted upon ; it would be extremely inconvenient to go into it at

the port of loading; and what was done was this: there was an arrangement that the accounts of the ship's agents at Havre should pass through the defendants' office in London; and that means, in substance, that the defendants, the charterers, got the bill of lading freight that had been paid by the consignees to the ship's agents at Havre, and that was remitted with their account to the defendants, the defendants making out that account, and, of course, in that account crediting the owners with the lump sum freight to which they were entitled. Of course they would also debit any sums which the ship's agents at Havre had paid for the shipowners. That was the arrangement that was made outside the charter-party, and the defendants in making out their account may, I think, fairly be looked at as if they were outside persons intrusted with the task of making out the account.

In making up the account the defendants debited the plaintiffs with 21*l.*, the sum now in dispute, which was the sum in fact paid by Marcel and Co., the ship's agents at Havre, for mending certain bags in which coffee had come over by the ship in question. The bags had been torn, and the mending was done in the ship before the bags were hoisted out of the holds, and it was, of course, necessary that this should be done to prevent the coffee leaking out in the process of discharge. Marcel and Co., who, as I have said, were the ship's agents, were nominated by the charterers under the charter-party, but, although nominated by the charterers, they were the agents for the plaintiffs, the shipowners. What they were doing was work which the charter-party undoubtedly put upon the shipowners, because the shipowners have to carry the goods and discharge them at Havre. The expense of discharge, under the clause, is upon the shipowners, and this particular expense was an expense necessary to effect a satisfactory discharge of the bags of coffee. The bags could not be hoisted out without a large amount of leakage unless they were mended before the operation began. It was thus an expense necessary to effect the discharge properly. Consequently it seems to me to be quite clear that the expense of mending the bags is a sum which Marcel and Co. would pay in their character as agents for the ship, and a sum payable for a service which the ship is bound to do—viz., discharge the coffee properly. I think they are bound to discharge the coffee properly, even if there is something in the bill of lading which might protect them in the event of the cargo being damaged; but that is a subordinate question which seems to me to come rather into the second branch of the case. The 21*l.* 18*s.* 5*d.* was a sum in fact paid by Marcel and Co. for the plaintiffs, the shipowners, for what they had to do. Upon that it seems to me to be quite clear that it is a sum which would be charged to the plaintiffs in account by any independent person, such as an accountant, in making up the accounts as being a sum in fact paid for the shipowners and not for the charterers. I am not quite sure, however, whether that really disposes of the whole matter, and for this reason. The defendants in making up the account were not in fact independent persons, such as an accountant would be; they were the charterers who had an account with the plaintiffs, the shipowners, and therefore if it were clear that this payment, although made by the plaintiffs, was a payment which the plaintiffs would be entitled to recover against the defendants, then, when the accounts are made up between the two parties by one of the parties, it is not quite clear that they would have a right to debit such payment to the plaintiffs. I have therefore to look a little further to see what are the obligations of the parties in reference to this expense which undoubtedly has been caused by the state of the bags. As to that, the bill of lading is before me. It is on a form used by the defendants, and it contracts to carry the goods on board the steamship belonging to or employed by the Royal Mail Steam Packet Company, and it is signed by the agents of the Royal Mail Steam Packet Company at Rio. I think, therefore, that this is a case in which the bill of lading is in such a form that as between the shipper of the goods or any holder of the bill of lading and the Royal Mail Steam Packet Company the shipper would be entitled to say to the Royal Mail Steam Packet Company: "It is you who have made this contract with me by the bill of lading"; but although the bill of lading is in point of fact made by the Royal Mail Steam Packet Company with the shippers, that does not seem to me to affect the case as between the shipowners and the charterers, because as between them the charter-party is the governing instrument, and the contract is that the owners authorise the charterers or their agents to sign the bill of lading, and they are bound by the conditions of the bill of lading, and, so far as they are concerned, the contract of carriage under the charter-party contains a clause providing that the charterers' responsibility shall cease "on the shipment of the cargo, the captain or owners having a lien on the cargo for freight, dead freight, and demurrage." There is a doubt in the case as to the exact meaning of that clause, but I think it clearly does mean that, when the cargo is on board, the people who are responsible for carrying it are the shipowners. They have to take it to Havre and discharge it there. The complaint of the owners in this case is that the bill of lading would in some way or other have protected them, and that they wanted the point raised at Havre that the consignees should pay this charge, and they say that as against the consignees they (the shipowners) would not have been liable to pay it but for the fact that the bill of lading was a clean bill of lading, and, being such a clean bill of lading, *primâ facie* the damage occurred subsequent to the time when the ship became responsible, and that therefore the consignees were entitled to say to the ship: "You must put these bags into proper condition; *primâ facie* you have damaged them, and you must put them in order to perform your contract properly to discharge the cargo at Havre." It is thus suggested that the form of the bill of lading threw this charge, for which they would not otherwise have been liable, upon the plaintiffs. Have the plaintiffs made out any cause of action? In the absence of evidence, all I can say upon the facts before me, and assuming that the burden is upon the plaintiffs, is that I am unable to see that they have made out a cause of action. If the damage did, in point of fact, happen upon the lighters, as the defendants say, and if the lighters were paid by the ship, and if the shipowners have been, as I understand they have been, credited with a sum

recovered from the lightermen in respect of some damage which was done on the lighters, then it follows that they cannot throw it upon the defendants. At any rate, what I decide is that in the statement of account this sum is properly charged in the first instance by the defendants to the plaintiffs, because it is a payment made by Marcel and Co. for the plaintiffs in respect of something which it was the plaintiffs' duty and obligation to do. *Primâ facie* it was properly charged to them, and, in my view, the plaintiffs have not established —I think, on the whole, their claim is negatived— a right against the defendants to recover this over from the defendants by way of damages. The result is that in this dispute the defendants are right, and accordingly entitled to judgment.

Solicitors for the plaintiffs, *Lightbound, Owen,* and *McIver.*

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

Tuesday, Feb. 21, 1911.

(Before HAMILTON, J.)

STRASS *v.* SPILLERS AND BAKERS LIMITED. (*a*)

Marine insurance—Increased value policies in addition to ordinary policies—Sale of cargo on c.i.f. terms—Right of seller to recover in respect of increased value policies.

A contract for the sale of a cargo of wheat upon c.i.f. terms contained the following clause; "Seller to give policy of insurance for 2 per cent. over the invoice amount, and any amount in excess to that for seller's account in case of total loss only." There were several dealings with the cargo, which was ultimately purchased by the defendants. The plaintiffs, who were originally interested in the cargo, had, in addition to the ordinary policies of insurance, taken out two "increased value" policies which they had not passed on to the buyers. A loss having occurred, the plaintiffs sent the defendants the two policies in question, and asked them to hand them to the receiver of the cargo, to be handed by him to the adjusters for the purpose of making up the general average statement, and "thus establish the amount due to us." The underwriters in due course paid the amounts due under these two policies, which the defendants retained. In an action by the plaintiffs for money had and received to the plaintiffs' use:

Held, that the plaintiffs were entitled to succeed as the benefit of the increased value policies did not pass under the contract of sale.

Ralli *v.* Universal Marine Insurance Company Limited (1 *Mar. Law Cas. O. S.* 160, 194, 197; 6 *L. T. Rep.* 34) *and* Landauer *v.* Asser (93 *L. T. Rep.* 20; (1905) 2 *K. B.* 144) *distinguished.*

COMMERCIAL COURT.

Action tried by Hamilton, J., sitting without a jury.

The plaintiffs' claim was to recover from the defendants certain sums, amounting together to 652*l.* 19*s.*, which the defendants had received in respect of two "increased value" insurance policies effected by the plaintiffs.

The defendants by their defence alleged that they were entitled to receive the policies in question from the plaintiffs, and to retain the amounts due thereunder for their own benefit.

E. M. Pollock, K.C. and *Mackinnon* for the plaintiffs.

Bailhache, K.C. and *Leck* for the defendants.

The facts and arguments are sufficiently stated in the judgment.

HAMILTON, J.—This action is brought by Mr. Emanuel Strass, trading as Strass and Co. at Antwerp, against Messrs. Spillers and Bakers Limited, to recover from them sums amounting together to 652*l.* 19*s.* which the defendants have in fact received from the British and Foreign Marine Insurance Company and the London Assurance Corporation in respect of two policies effected by Messrs. Strass and Co. originally, and which have been called increased value policies; and the case is put by the plaintiffs partly in conversion, and claiming as damages for the conversion the full amount of the sums recoverable on the policies, and partly as a claim for money received by the defendants to the plaintiffs' use. There are traverses to these claims, and the defendants set up that they were entitled to receive the policies in question from Messrs. Strass and Co. for their own benefit, and that, having collected the moneys due upon the policies, they are entitled to retain them for their own benefit. The facts arise out of a very ordinary transaction with regard to the sale of a cargo of Australian wheat. On the 30th Dec. 1908, Messrs. Spillers and Bakers, through Harris Brothers and Co., brokers, bought a cargo to arrive from Messrs. Dewar and Webb, and the cargo was to be shipped under bills of lading to be dated in Jan. and (or) Feb. 1909. Ultimately the cargo, which was declared to them, was the cargo of a sailing vessel called the *Leon Bureau.* There had been other dealings with this cargo before it reached British waters, and in particular by a contract in similar form dated the 16th March 1909, Messrs. Allatini had bought such a cargo from the plaintiffs, Messrs. Strass and Co., and then they in their turn under a contract which they had with Messrs. Dewar and Webb, passed on this same cargo which Messrs. Strass declared to them under their contract of the 16th March 1909. The vessel bound, I suppose, for the Bristol Channel, came to grief somewhere on the coast of Cornwall, and sustained considerable damage; but there was ultimately such salvage that the claim in respect of the cargo was only a particular average claim and not a general average claim. The 26th Aug. 1909 was the date of the average adjusters' adjustment in respect of this loss, and on the following day the policies upon the cargo for 21,300*l.* were paid on, and thereupon the whole transaction, as far as the people in this country were concerned, was supposed to be terminated. The policies which were handed over by Messrs. Dewar and Webb to Messrs. Spillers and Bakers and accepted by them as being the policies they had to receive under the contract and the policies handed over by Messrs. Strass and Co. to Messrs. Allatini, and I presume by Messrs. Allatini to Messrs. Dewar and Webb, did not include two policies on increased value, the policies in question, which on the 9th Feb 1909 Messrs. Strass had effected with the two English companies that I have mentioned,

(*a*) Reported by LEONARD C. THOMAS, Esq., Barrister-at-Law.

but after the loss on the cargo had been adjusted and as it was supposed closed, Messrs. Strass and Co. appear to have waked up to the fact that they had two policies—492*l.* with the British and Foreign and 2000*l.* with the London Assurance Corporation—upon which they were entitled in the event that had happened to make a claim. It is important to see what those policies were. The voyage was expressed in terms which covered the voyage of the *Leon Bureau*, and they covered the contracts of sale. The subject-matter was 2000*l.* increased value on about 12,439 quarters of wheat per that vessel; "to pay as cargo, but in case of general average to pay only the amount applying to the excess of contributory value over the other insurances effected on the cargo itself, without benefit of salvage. Warranted free from particular average and as per marginal clauses." There are certain marginal clauses not now material. It is to be observed that in this policy, first of all, it is expressed to be on increased value, no doubt the increased value of the cargo, but it is on increased value. It is then provided that it is to pay as cargo, showing that it is not in the ordinary sense a mere insurance on cargo, and it is then provided that the policy is to pay general average not *pari passu* with all other portions of the cargo or all other policies on cargo, but only in a particular way. It is then warranted free from particular average, and finally it is without benefit of salvage; it is an honour policy. It appears to me to be quite clear that that is a policy of such a sort that if it had been tendered as one of the policies on the cargo attached to the bill of lading the buyer under any one of these contracts might justly have excepted to it, that he could not put it in suit because it was an honour policy, that he might not be able to recover general average to the full amount of his liability, that he could in no case recover particular average, and that there was the point to be taken that it was not expressed to be on cargo, but expressed to be on increased value of cargo. I think also the object of that policy is quite clear. It was a speculation, a perfectly legitimate speculation, but it was a speculation such as is constantly effected by means of honour policies in view of the fact that there were changes taking place in the market for wheat which might lead Mr. Strass to desire to have some further business protection than the mere insurance of the cargo. I am told by Mr. Capel Cure, a highly experienced broker at Lloyd's, whose evidence was neither contradicted nor in any way challenged, that this form of insurance is common not as a mode of insuring cargoes but as I understand it ancillary to the trade in grain, that it is a mode of insurance which is treated as binding and definitive and, as soon as it is made, the value once insured is final, and cannot be reduced if there is a shortage shipped, and that the premium is due whether the whole amount of the cargo reaches the sum which the increased value fixes or whether it does not, and finally that it is the class of insurance upon which in business underwriters pay as a matter of course to the party holding the policy, although for the purpose of proof they do expect to have a particular average statement produced to them to verify that there has been a loss of the cargo referred to. Those two policies Messrs. Strass sent to Messrs. Allatini in a letter, dated the 20th Dec., asking them to hand them to the receiver of the cargo to be handed by him to the adjusters for the purpose of making up the general average statement, "and thus establish the amount due to us." Messrs. Allatini, according to the practice as between intermediate buyers and intermediate sellers, pass this on ultimately to Messrs. Dewar and Webb, through whom it reached Messrs. Spillers and Bakers. The policies were forwarded to Messrs. Spillers and Bakers in a letter from Messrs. Harris Brothers, brokers for Messrs. Dewar and Webb, dated the 24th Dec., which, quoting the language of the letter received by Messrs. Dewar and Webb from Messrs. Allatini, said that they were forwarded to the receivers of the cargo "in order that the average adjusters should include them in their statement for general average and secure the claim the insurers may have under their policies." Before the 28th Dec. owing to some expression of doubt by Messrs. Allatini to Messrs. Strass as to whether there was much likelihood of recovering any more, Messrs. Strass had asked to have the policies of insurance returned to them. Messrs. Allatini passed on that request to get the policies back, and it reached Messrs. Spillers and Bakers in a letter of the 28th Dec. from Harris Brothers and Co. in these terms: "Kindly return us documents of above and oblige" Messrs. Spillers and Bakers replied to both these two communications on the 29th Dec., acknowledging the receipt of the increased value policies from the sellers of this cargo of wheat, adding: "We do not see, however, how the insurers can have any claim under these policies under general average." They acknowledged the receipt of the memorandum and noted that Messrs. Dewar and Webb wish the documents relating to the cargo to be returned to them and asked what documents were meant: "Do they mean the bill of lading, &c." I do not think there can be any doubt that although the language used by Messrs. Allatini's representative was possibly obscure, the expression being "to include them in their statement for general average," it was tolerably clear to Messrs. Spillers and Bakers, who I do not find dispute this and certainly they have given no evidence to the contrary, that these documents were not sent to them for their benefit, and that there was no intention on the part of the person from whom they ultimately came apart from any contractual obligations he might have already entered into to hand them those documents at this late hour so that they might use them and receive the money for themselves. I think they might be well pardoned for not quite understanding what documents were to be returned, seeing that they were asked simultaneously to return the documents and to receive the increased value policies. What they did with the documents was promptly to send them simultaneously with their reply to Harris Brothers on the 29th Dec., their own London insurance brokers, asking them not to cause the amounts to be collected for the benefit of Messrs. Strass, but to get a supplementary particular average statement made up saying that there might be a recovery of the proportion due under these policies from the underwriters, and that meant that there might be a recovery from the underwriters for the benefit of Messrs.

Spillers and Bakers, and I think it is quite clear that Messrs. Spillers and Bakers at once took the view that these were policies which they were entitled to keep because they were receivers of the cargo, because these policies had been taken out by somebody who at the time in question and at the time of the loss had ceased to have any property in the cargo, and that therefore whether on general principles or on the exact terms of this contract I do not know, the benefit of those policies now belonged to themselves as the only persons with an insurable interest in the cargo at the date of the loss. The result was that through the London brokers Messrs. Francis and Arnold, the Cardiff average adjusters, who prepared the original adjustment, prepared the supplementary adjustment stating the alteration that was made in the various claims on the various policies by reason of the bringing into account of these two policies, plus two others of the same kind that Messrs. Allatini had forwarded which Messrs. Francis and Arnold say since the average adjustment was completed had been ascertained by the receivers of the cargo to have been effected. In due course the underwriters on production of the policies paid on the London assurance policy 524*l.* 0*s.* 9*d.* and on the British and foreign policy 128*l.* 18*s.* 3*d.* making up the amount claimed in this action, and the payment was duly endorsed upon the policies. While this was going on Messrs. Strass were anxious to see their documents again. On the 19th Jan. there was sent to Messrs. Spillers and Bakers by Harris Brothers a request which came ultimately from Messrs. Strass for the return of these two policies. On receipt of that letter on the 20th Jan. Messrs. Spillers and Bakers said that as soon as the policies came back to their hands they would return them. On the 4th Feb. in answer to a further request for their return Messrs. Spillers and Bakers made the same excuse, that they were still in the hands of the insurance brokers. On the 5th Feb. the insurance brokers did return them to Messrs. Spillers and Bakers and they in turn on the 7th Feb., returned them to Messrs. Harris Brothers, adding: "Return the same to us when done with and oblige." In due course they reached Messrs. Strass. Messrs. Strass's advisers observed that the policies had endorsed upon them the fact that the amount payable had been paid, and that they were therefore of no further use to Messrs. Strass. The documents were sent to Messrs. Spillers and Bakers for the purpose of passing out of their hands, and if they had been dealt with for the benefit of Messrs. Strass, as Messrs. Strass wanted them to be dealt with, they still would have passed out of Messrs. Spillers and Bakers' hands. I do not think, therefore, that by reason of their not being returned at once Messrs. Strass had any ground of complaint. I do not see any reason to suppose that they were out of Messrs. Spillers and Bakers' hands longer than would have been necessary for the purpose for which they were originally sent. When they came back to Messrs. Spillers and Bakers they were promptly sent back to Messrs. Strass, and I see no ground for saying there was any conversion of the policies themselves by demand and refusal to return them. I think, however, it is perfectly clear that Messrs. Spillers and Bakers received them for one purpose, and dealt with them for another purpose, and did so doubtless because they thought they had a right to do so. But at the same time I do not think there can be any doubt that it was perfectly clear to them that they were asked to collect money on these policies for a third person, and that unless therefore they were entitled to collect the money for their own benefit they were in the position of persons who had no right to use the policies, or collect the sums except for the benefit of that third person, and on the terms of accounting to him. Now, the main ground alleged by Messrs. Spillers and Bakers for their claim to retain the money turns on the construction of the contract. The contract is on the London Corn Trade Association, Australian wheat contract form, and this particular form is dated 1906, but it certainly is not shown to me that the material clauses in the policy are not of probably much older date. Each one of the contracts relating to this cargo was on this form, although there are one or two differences not only with regard to price, but in regard to minor matters inserted in writing. This is the 16th March contract. It is a contract for sale at the price of 39*s.* 6*d.* per 480lb., including freight and insurance to any safe port in the United Kingdom, and then follows this observation later on: "Seller to give policies of insurance for 2 per cent. over the invoice amount, and any amount over this to be for seller's account in case of total loss only." It is said by the defendants the words "including freight and insurance" mean that the subject-matter of the sale is an insured cargo, and that that must mean a cargo as it is insured by the seller, that it does not mean merely a cargo which the seller hereby undertakes before the buyer accepts it to get insured in accordance with this contract, and that in the case where he has insured it already, or does insure it to an extent in excess of the obligation of the contract, it is a sale of the cargo as so insured, and therefore passes to the buyer the benefit of such insurance as effected. Authority, it is said, exists for this in the case of *Ralli* v. *Universal Marine Insurance Company Limited* (*sup.*). There the contract was for a cargo at 53*s.* 7½*d.* per quarter, including freight and insurance, and in language somewhat differing, but substantially to the same effect, both members of the court said that it is a question of the construction of that contract, and that in their view the contract means that the wheat was sold as insured at the value which the vendors had set upon it in the policies of insurance which they had effected. Upon that it is said this contract sells this cargo, and it is as between every intermediate seller and buyer insured at the value which the vendors set upon it in any policies of insurance including policies on increased value which they had effected. And then it is deduced from that that although there is no privity of contract between Messrs. Spillers and Bakers and Messrs. Strass, still, in some way which I do not quite appreciate, Messrs. Spillers and Bakers are entitled to claim the policies which Messrs. Strass had effected on the increased value, upon the ground that in the ordinary course of business, which I have no doubt is the case, the policies attached to the bills of lading when handed over by the original sellers would probably be the same policies that would continue to be attached

to the bills of lading when they reached the hands of the ultimate buyer unless it was necessary to reduce the amount by taking away some second or third policy that had been attached to the original bill of lading. Assuming, however, that they are in a position to say that they can claim from the persons with whom they have privity of contract, the delivery of some insurance not effected by such persons, or assuming that they are in a position to say that the policy intended in December 1908 between Messrs. Spillers and Bakers, and Messrs. Dewar and Webb is a policy not effected until 1909, and then by Strass and Co., obviously according to his own ideas for his own benefit, one still asks one's self the question: How is that sentence to be reconciled with the subsequent clause, "Seller to give policy of insurance for 2 per cent. over the invoice amount, and any amount in excess to be for seller's account in case of total loss only," a clause which is of the utmost importance, which did not exist in *Ralli's* case, and to which the clause which did exist in *Ralli's* case does not appear to me equivilent? The clause in *Ralli's* case was, "In exchange for bills of lading and policies of insurance effected with approved underwriters." Here this clause is at the pains to specify the amount of the policies that are to be handed over instead of leaving that to be determined, as it was in *Ralli's* case, exclusively by reference to the price "including freight and insurance." Why should the parties specify here the amount of the policies of insurance which are to be given if the true meaning of the contract was under the words "including freight and insurance" that the policies to be given were the policies, in fact, effected by the seller? The answer that is given by Messrs. Spillers and Bakers is, That is because it is necessary to provide, in favour of the buyer, a minimum insurance which he is to have. The obvious answer to that is, that it does not say "minimum"; there is no suggestion of minimum. It says "Sellers to give policies of insurance for 2 per cent. over the invoice amount," a provision which seems directly pointed to giving not a minimum nor a maximum, but to bind the seller to insure effectively not only for the invoice amount, but for the margin which will be so much in favour of the buyer, and any amount over this to be for sellers' account in case of total loss only. It is said—and I think rightly—that the provision "in case of total loss only" means that any amount over this is not to be for seller's account in cases of particular average loss only, but the question is, what any amount over this may mean. Messrs. Spillers and Bakers want to read that as equivalent to: Any policy over this amount to be for buyers' account, except in case of total loss only. I do not think, without doing violence to the words, they can be so construed. It appears to me whether the object of these words was to deal with the case of *Landauer* v. *Asser* (*sup.*), or whether it is older than that, and the clause is intended to deal with the case of a policy for more than invoice value plus 2 per cent. being, in fact, handed over, the object of it is to secure that of the policies under which the seller is bound to give any surplus over the invoice value plus 2 per cent. is in case of total loss only to be for seller's account. The seller is to give policies for an amount which is fixed, and then the next words, I think, mean: And any amount, that is to say in the policies to be given by the seller, over and above the definite amount is to be for seller's account in case of total loss only. In this case it happened for the convenience of business that between Messrs. Allatini and Messrs. Strass, and again, as I understand, between Messrs. Allatini and Messrs. Dewar and Webb a policy was handed over which was in fact somewhat in excess of the invoice value between those two parties, the invoice value, of course, shifting with every pair of contracting parties and 2 per cent. over and above it, and in such a case as happened here, and I daresay may happen often, it is said that the amount over this defined amount is to be for seller's account in case of total loss only. That seems to me to have no relation at all to fixing a minimum, it is a clause for the purpose of fixing the amount of insurance that the seller is bound to effect, and, looking at this contract of Messrs. Spillers and Bakers in December as they looked at it in *Ralli's* case, it is not effected in view of some policies already made, it is effected in view of insurances to be made, and in the case of insurances to be hereafter made there can be no obligation beyond that of insuring for the invoice amount plus 2 per cent. Furthermore, I think it is quite clear that such a policy as this is not the kind of policy that the seller could have tendered to the buyer in discharge of his obligations to insure, nor is it in accordance with the transaction, as it appears to me, to regard this policy as within the category of the policies that are intended to be attached to the documents and to satisfy a contract of sale c. f. and i. This is the original seller's own private speculation. Whether or not the underwriters choose to pay is a matter for them. but it is a speculation of his own entered into for a perfectly intelligible reason, but not intended to be part of the contract of purchase and sale, and as I suggested in the course of the argument upon Messrs. Spillers and Bakers' construction, I do not see how the conclusion could be avoided of causing the ultimate receiver of the cargo to be also the ultimate collector of all and any increased value insurances which might have been effected prior to their sale by each and every one of the various sellers in the chain between the original seller and the ultimate buyer, the result of which would be that the receiver would be entitled not only to receive a complete indemnity upon the policy which is attached to the bill of lading, but to recover the aggregate of sums collectable upon a series of speculations entered into by a series of sellers for their own private purposes—a consequence that seems to me to be impossible. Under the circumstances I think that Messrs. Spillers and Bakers have no right to this money; they thought they had, but it appears to me they had not; they collected the money for themselves it is true, intending to keep it but without right to do so. It is said their intention with regard to its receipt does not prevent the money being in their hands money received to Strass' use, but the intention of the underwriters with regard to the paying of it would, and I was then invited to find as a matter of fact that the underwriters when they paid this money over to the broker for Messrs. Spillers and Bakers intended that the money should go to and stay with Messrs. Spillers and

Bakers, and not go beyond them, I am quite at a loss to understand how I am to draw that inference, the facts are all against it. There can be no question that the underwriters before they paid on these policies read the terms. On the evidence of Mr. Capel Cure there is no doubt it is a familiar transaction. The underwriters knew of the transaction and of the terms. There was a round sum policy, an honour policy free from particular average, and a policy not expressed to be on cargo but on increased value, to pay as cargo, and therefore I should think it is perfectly clear that when they paid they appreciated quite sufficiently that this was not the sort of policy that is tendered by an ultimate receiver of goods, but is such a policy as is tendered by persons who wish independently to issue the goods to protect themselves against the gyrations of the market. From that I should infer they not only meant to pay whoever could give them a good discharge, and in my opinion the persons who could give them a good discharge were Messrs. Strass, but they quite sufficiently appreciated whatever the name of the party might be that the persons they were paying were persons who probably had no insurable interest in the cargo, and who probably were persons who had parted with such insurable interest as they once had had. That is the description of Messrs. Strass and is not the description of Messrs. Spillers and Bakers. I therefore infer in fact if it be material that the intention of the underwriters was to pay the persons who occupy, and who alone occupy, the position of Messrs. Strass, and that being so the only obstacle that is suggested to the argument that if they were wrong on the contract Messrs. Spillers and Bakers owe this money as money had and received to the use of Messrs. Strass seems to me to fail because I do not interpret the language of Kennedy, J. in *Landuer* v. *Asser* (*sup.*) as applicable to the present case. His remarks are applicable to a case where as part of the transaction in pursuance of the contract of purchase and sale a policy, or equivalent of a policy, was handed over for more than the contract amount, I do not think it has any application to the present case where the transaction of purchase and sale was completed and performed long before, and when what was being done was the collection of some independent policies or sums claimed by the original seller to be his, quite independently of the subsequent transactions and dealings with the cargo. I think, therefore, there must be judgment for the plaintiffs for the amount claimed with costs.

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

Solicitors for the def ndants, *Thomas Cooper* and *Co.*

Wednesday, Feb. 22, 1911.

(Before SCRUTTON, J.)

FAIRFIELD SHIPBUILDING AND ENGINEERING COMPANY LIMITED *v.* GARDNER, MOUNTAIN, AND CO. LIMITED. (*a*)

Marine insurance — Broker—Lien on Policies—Estoppel.

The plaintiffs, builders of a steamship, were in Jan. 1908 *mortgagees in possession. On the 28th Jan.* 1908 *they chartered her, with an option of purchase, on time charter.*

Clause 6 *provided that the charterers were to insure the hull, &c., at Lloyd's in the owner's name for* 40,000*l. all risks, and* 20,000*l. total loss only. "All policies to be held by approved London brokers, who shall deal with all claims as they arise on behalf of owners, and charterers shall have all the benefit and shall be held free of all claims and liabilities covered by the said policies." The charterers instructed the defendants, insurance brokers, to effect a number of policies on the steamship, including, beside the* 40,000*l. all risks and* 20,000*l total loss only, insurances on disbursements and freight. At the request of the charterers the defendants wrote to the plaintiffs a letter dated the* 18*th March informing them of the insurances for* 40,000*l. and* 20,000*l., and concluding: "We have received instructions from the charterers to hold the above policies to your order, which we hereby undertake to do, subject to our lien on same for unpaid premium, if any." At this time the defendants had an agreement with the charterers that, though premiums were due on one payment from the defendants to the underwriters, the charterers should pay the defendants in four payments, one cash down, and three by three, six, and nine months' bills with interest. The charterers informed the plaintiffs of this arrangement, and also that they need have no misgivings as to the unpaid portion As a matter of fact the cash portion was not paid as arranged The first bill became due on the* 21*st June* 1908, *and the defendants extended the time for payment for one month, and informed the plaintiffs, who did not object On the* 29*th June it was brought to the plaintiffs' attention by their brokers that defendants might have a claim for premiums to set off against any sum they collected for losses. The steamship suffered damage, and the plaintiffs paid the cost of repairs. On the* 24*th July the defendants informed the plaintiffs that the postponed bill was not paid, and that "if not paid by the charterers on Monday next we shall be compelled to cancel these policies"; and on the* 29*th July informed the plaintiffs that the cash portion of the premium was still unpaid, and they must cancel the policies unless the plaintiffs guaranteed them the cash payment of* 838*l.* 18*s. and the bill for* 635*l.* 8*s.* 8*d. The plaintiffs did not guarantee the payments, and the defendants thereupon cancelled the policies and received a large sum for return premiums. The brokers then, with the consent of the plaintiffs, collected the average loss, but claimed to retain it by virtue of their lien for premiums.*

In an action brought by the plaintiffs claiming 763*l.* 11*s.* 11*d. as balance of a loss collected by the defendants as brokers, after crediting them with certain premiums paid by them:*

Held, (1) *that the unpaid premiums must be limited to those on the two policies in question; and* (2) *that the defendants, being under no duty to disclose to the plaintiffs the amount of premiums unpaid, were not estopped from alleging that the cash portion of the premium was in fact unpaid.*

Quære, whether a lien on documents gives a lien on proceeds collected under them?

West of England Bank *v.* Batchelor (46 *L. T. Rep.* 132; 51 *L. J.* 199, *Ch.*) *considered.*

(*a*) Reported by LEONARD C. THOMAS, Esq., Barrister-at-Law.

COMMERCIAL COURT.

Action tried by Scrutton, J. sitting without a jury.

The plaintiffs claimed from the defendants 768*l.* 11*s.* 11*d.* balance of a loss collected by the defendants as brokers after crediting them with certain premiums paid by them.

The defendants by their defence alleged that they had a lien for a large amount of premiums which overtopped the plaintiffs' claim.

The facts are set out in the judgment.

Danckwerts, K.C., *Atkin*, K.C., and *Rowlatt* for the plaintiffs.

Bailhache, K.C. and *Leck* for the defendants.

The facts and arguments are sufficiently stated in the judgment.

SCRUTTON, J.—In this case the plaintiffs claimed from the defendants 768*l.* 11*s.* 11*d.*, balance of a loss collected by the defendants as brokers, after crediting them with certain premiums paid by them. The defendants replied that they had a lien for a larger amount of premiums which overtopped the plaintiffs' claim. The plaintiffs, who had built the steamship *Volturno*, were in Jan. 1908 mortgagees in possession. On the 20th Jan. 1908 they chartered her, with an option of purchase, to Messrs. Robertson, Shankland, and Co. on time charter. Clause 6 provided that the charterers were to insure the hull, &c.. at Lloyd's in the owners' name for 40,000*l.* all risks, and 20,000*l.* total loss only. "All policies to be held by approved London brokers, who shall deal with all claims as they arise on behalf of owners, and charterers shall have all the benefit, and shall be held free of all claims and liabilities covered by the said policies." What this clause, which is a printed clause altered in writing, means in its ultimate form is very doubtful. Messrs. Robertson, Shankland, and Co. instructed the defendants, who are insurance brokers, to effect a number of policies on the *Volturno*, including, beside the 40,000*l.* all risks, and 20,000*l.* total loss only, insurances on disbursements and freight. At the request of Messrs. Robertson, Shankland, and Co. the defendants wrote to the plaintiffs a letter dated the 18th March, informing them of the insurances for 40,000*l.* and 20,000*l.*, and concluding: "We have received instructions from Messrs. Robertson, Shankland, and Co. to hold the above policies to your order, which we hereby undertake to do, subject to our lien on same for unpaid premium, if any." At this time the defendants had an agreement with Messrs. Robertson, Shankland, and Co. that though premiums were due on one payment from the defendants to the underwriters, Shankland should pay the defendants in four payments, one cash down, and three by three, six, and nine months' bills with interest. Messrs. Shankland told the plaintiffs of this arrangement, adding that the plaintiffs need have no misgivings as to "the unpaid portion," and I have no doubt the plaintiffs believed in consequence that the cash portion was paid. In fact it was not. On the 13th April the plaintiffs wrote to the defendants: "Will you kindly tell us the dates at which the premiums fall due, and in each case advise us that you have received the respective amounts?" The defendants answered: "The bills for the insurance fall due as follows" (giving the dates). "In the event of any of these instalments not being paid on the due date, we will advise you as requested." It would in the light of after events have been better that the defendants should have added, as was the fact, "There is a cash payment now due," and have informed the plaintiffs if it was not paid. But they honestly thought the plaintiffs were asking about the bills, and believed the cash payment was safe, and the plaintiffs thought they had Messrs. Robertson, Shankland's assurance that the cash payment had been made. The first bill became due on the 21st June 1908. The defendants extended the time for payment for one month, and informed the plaintiffs, who thought it curious, but did not object. On the 29th June it was brought to plaintiffs' attention by their brokers that defendants might have a claim for premiums to set off against any sum they collected for losses. The *Volturno* suffered damage, and the plaintiffs paid the cost of repairs. On the 24th July the defendants informed the plaintiffs that the postponed bill was not paid, and that "if not paid by Messrs. Robertson, Shankland, and Co. on Monday next we shall be compelled to cancel these policies"; and on the 29th July informed the plaintiffs that the cash portion of the premium was still unpaid, and they must cancel the policies unless the plaintiffs guaranteed them the cash payment of 838*l.* 18*s.* and the bill for 635*l.* 8*s.* 8*d.* The plaintiffs did not guarantee the payments; the defendants thereupon cancelled the policies and received a large sum for return premiums. This was done without objection from the plaintiffs or Messrs. Robertson, Shankland, and Co., but I must not be taken as deciding that a broker whose only interest in a policy in his name is a lien for unpaid premiums can, without the assent of the assured, cancel the policy, and collect return premiums. The brokers then, with the consent of the plaintiffs, collected the average loss, but claimed to retain it by virtue of their lien for premiums. This the plaintiffs objected to, and brought this action. The points taken by the plaintiffs were: (1) That the defendants had no general lien against them for premiums due from Messrs. Robertson, Shankland, and Co. other than those on the two policies for 40,000*l.* and 20,000*l.* (2) That the defendants were estopped by the letters of March and April from alleging that the cash portion of the premium had not been paid. Striking out the premiums on the other policies on the *Volturno*, and the cash portion of the premiums on these two policies, and giving credit for the return premiums, the plaintiffs admitted that the defendants were entitled to retain roughly 300*l.* The plaintiffs declined to raise the point that though the brokers had a lien on the policies they had no lien on the proceeds collected under them, and that even if they could have resisted a claim by Messrs. Robertson, Shankland, and Co. for the proceeds by setting off, or counter-claiming for the premiums, they could not do so against the plaintiffs, who were not personally liable for premiums. On the effect of a lien on documents I refer to the remarks of Fry, J. in *West of England Bank* v. *Batchelor* (46 L. T. Rep. 132; 51 L. J. Ch. 199); and I must not be taken as deciding that a lien on documents gives a lien on proceeds collected under them. Dealing

now with the two points raised by the plaintiffs. It is undoubted that an insurance broker has a lien on a policy against his employer not only for premiums due in respect of that policy, but also for premiums due on other policies he is instructed to effect by the same employer. And in this case the defendants undoubtedly had such a general lien against Messrs. Robertson, Shankland, and Co. and (or) the New York and Continental Line. But here they undertook to hold the two policies to the order of the plaintiffs, who act upon their undertaking by abstaining from taking action against the charterers. This undertaking does not seem to me to be a contract, for I see no consideration for it; but I think it is a statement of the defendants' position, which they are estopped from contradicting. If it had been unqualified in my view, the defendants would have been estopped from asserting against the plaintiffs that they held the policies subject to any lien, whether general or particular. But it is qualified: "Subject to our lien on same for unpaid premium, if any." I think this reservation must be read against the defendants, and in my view it is not clear enough to reserve their general lien. The defendants, indeed, shrank from saying they had a general lien for any premiums due from Messrs. Robertson, Shankland, and Co. on any ship, and endeavoured to limit it to premiums on other policies on the *Volturno*. I think the unpaid premiums must be limited to those on the two policies in question. The plaintiffs further contended that the defendants were in some way estopped from alleging that the cash portion of premium was unpaid. While I agree that the business effect of the transaction has been that the defendants have given time to Messrs. Robertson, Shankland, and Co. at the expense of the plaintiffs, I cannot see any legal ground for depriving them of their lien for this portion of the premium. They have made no false statement of fact that the cash premium is paid; they have not stated that the only sums remaining due are the three bills; and they were under no duty to disclose to the plaintiffs the amount of premiums unpaid. The plaintiffs are not sureties who are discharged from liability by giving time to the principal debtor. For these reasons I decide this contention against the plaintiffs. The parties must make the necessary adjustments of figures, and mention the result to me in order that I may give formal judgment and dispose of the costs.

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

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

Wednesday, March 8, 1911.

(Before SCRUTTON, J.)

SAILING SHIP KYNANCE COMPANY LIMITED *v.* YOUNG. (*a*)

Marine insurance — Policy covering voyage to "port or ports, place or places of call and (or) discharge"—Charter-party—One port of discharge named therein—Vessel proceeding to second port—Total loss—Right of assured to recover.

A ship was insured by a policy of insurance for a voyage from Newcastle, N.S.W., "to port or ports, place or places of call and (or) discharge backwards and forwards and forwards and backwards, in any order or rotation, on the West Coast of South America, and while in port for thirty days after arrival, however employed, or until sailing on next voyage, whichever may first occur." By the terms of a charter-party the vessel was to load a cargo of coal at Newcastle, N.S.W., and to discharge at Valparaiso, and the bills of lading were issued making it deliverable at that port. Under a second charter-party she was to proceed to Tocopilla and there load a cargo of nitrate for a European port. On reaching Valparaiso it was agreed between the shipowners and the charterers under the first charter-party that, instead of delivering the whole of the cargo of coal at Valparaiso, the vessel should proceed with 800 *or* 900 *tons of coal to Tocopilla and there deliver to the charterers. In consequence of this variation of the charter the captain was relieved from the necessity of taking ballast on board for the voyage from Valparaiso to Tocopilla. The vessel stranded on the voyage and became a total loss.*

Held, that the loss was covered by the policy.

COMMERCIAL COURT.

Action tried by Scrutton, J., sitting without a jury.

The plaintiffs, owners of the ship *Kynance*, claimed against the defendant, a Lloyd's underwriter, for a loss under a policy of marine insurance upon the ship *Kynance*.

The plaintiffs by their points of claim pleaded that they were fully interested in a policy of insurance dated the 9th May 1910 for 3500*l.* upon the ship *Kynance*, valued at 12,000*l.*, for a voyage "at and from Newcastle, N.S.W., to port or ports, place or places of call and (or) discharge backwards and forwards and forwards and backwards, in any order or rotation, on the West Coast of South America, and while in port for thirty days after arrival, however employed, or until sailing on next voyage, whichever may first occur."

The plaintiffs were also fully interested in a policy dated the 3rd Aug. 1910 for 5700*l.* upon the *Kynance*, valued at 10,000*l.*, for a voyage "at and from Valparaiso and (or) port or ports and (or) place or places, in any order or rotation, on the West Coast of South America" to European ports. This policy provided (*inter alia*), "risk to commence from expiration of previous policy" and "warranted nitrate or held covered at a premium to be arranged."

By the terms of a charter-party dated the 5th Jan. 1910 the *Kynance* was chartered by Messrs. James and Alexander Brown to load a cargo of coal at Newcastle, N.S.W., and therewith proceed to Valparaiso,

> Where . . . having been reported to charterers' agents, she shall receive orders to discharge there or at a safe port not north of Pisagua. . . . Freight for the said cargo to be paid at the rate of 17*s.* per ton. . . . Should the vessel be ordered to a direct port of discharge before sailing, 6*d.* per ton reduction in above freight.

By a charter-party dated the 17th March 1910 the *Kynance*, described as being "now at Newcastle, N.S.W., to load for Chili," was chartered to Messrs. Frederick Huth and Co.

(*a*) Reported by LEONARD C. THOMAS, Esq., Barrister-at-Law.

The charter-party provided (*inter alia*) that the ship "after delivery of present cargo for owners' benefit at Chili" should "proceed in ballast thence to nitrate loading port and there receive orders from charterers' agents, said orders to be given by charterers' agents at coal discharge port . . . and there load a full and complete cargo of nitrate" for carriage to Europe.

The *Kynance* loaded her cargo of coal at Newcastle, N. S.W., and sailed on the 27th April 1910 Before sailing the charterers directed that she should discharge her cargo at Valparaiso, and bills of lading were accordingly issued making the cargo deliverable at that port. On the 10th June 1910 she arrived at Valparaiso, and commenced to discharge her cargo. The agents of Messrs. F. Huth and Co. then gave orders that she should proceed under the charter of the 17th March 1910 to Tocopilla as the port of loading for her nitrate cargo.

While at Valparaiso, an agreement was made between the captain of the *Kynance* and Messrs. J. and A. Brown, the charterers under the charter-party dated the 5th Jan. 1910, that, in lieu of the discharge of the coal cargo being completed at Valparaiso, 800 or 900 tons of the cargo should be carried on by the ship to Tocopilla and discharged there, and that, as the presence of that cargo on the *Kynance* would relieve the captain from the necessity of taking on board ballast at Valparaiso, there should be a reduction of 3*s.* per ton on the charter-party freight of 16*s.* 6*d.* per ton upon the 800 or 900 tons to be delivered at Tocopilla.

Pursuant to this arrangement, freight on the cargo discharged at Valparaiso was paid, leaving freight on the 800 or 900 tons to be paid at Tocopilla upon delivery of the said cargo at that port.

On the 19th July 1910 the *Kynance* sailed from Valparaiso with 800 or 900 tons of coal on board bound for Tocopilla, and on the 29th July 1910 she stranded off Punta Blanca and became a total loss by perils of the sea, the plaintiffs alleging that the 800 or 900 tons of cargo was lost and, in consequence, the freight upon it.

The defendant, by his defence, pleaded that Valparaiso became and was the port of discharge of the *Kynance*, and that the captain of the *Kynance*, for the purpose of proceeding from Valparaiso, the port of discharge, to Tocopilla, the port of loading for nitrate, took on board as ballast 800 or 900 tons of coal. He admitted that the *Kynance* sailed from Valparaiso to Tocopilla on the 19th July 1910 and stranded off Punta Blanca and became a total loss with the said ballasting coal on the 29th July 1910. He did not admit that the *Kynance* sailed with 800 or 900 tons of coal on board, nor that the 800 or 900 tons cargo and the freight upon it was lost in consequence of the loss of the *Kynance*. He denied that he was liable for a loss under the policy of the 9th May 1910, as the risk thereunder had ended before the loss. He brought into court 33*l.* 6*s.* 8*d.*, the amount claimed by the plaintiffs as the defendant's proportion of the total loss under the policy of the 3rd Aug. 1910.

The facts and arguments are sufficiently stated in the judgment.

Bailhache, K.C. and *Mackinnon* for the plaintiffs.

Leslie Scott, K.C. and *Leck* for the defendant.

SCRUTTON, J.—In this case the Sailing Ship *Kynance* Company bring an action against Mr. Young, an underwriter, on behalf of himself and others, claiming that under a policy dated the 9th May, or in the alternative under a policy dated the 3rd Aug., they are entitled to recover in respect of the total loss of the ship *Kynance* a sum either of 66*l.* odd under the first policy or 33*l.* odd under the second. The defendants say that they are liable under the second policy for 33*l.* odd, which they bring into court, and deny that they are liable under the first policy. The facts are as follows: On the 5th Jan. 1910 the *Kynance* was chartered to Messrs. Brown, the well-known coal exporters of Newcastle, to load coal at Newcastle, N.S.W., and proceed to Valparaiso for orders to a port within certain limits on the West Coast of America at a freight of 17*s.* "Should the vessel be ordered to a direct port of discharge before sailing, 6*d.* per ton reduction in above freight." On the 17th Jan. a number of underwriters, including the defendant, underwrote a slip for the insurance of the *Kynance*. The slip bears the date of the 17th Jan. On the 17th March another charter was made of the *Kynance*, by which, after delivery of present cargo at Chili, it was to proceed in ballast to nitrate loading port and load nitrate home for the United Kingdom. The policy dated the 9th May insures the vessel from Newcastle, N.S.W., "to port or ports, place or places, of call and (or) discharge backwards and forwards and forwards and backwards, in any order or rotation, on the West Coast of South America and while in port or thirty days after arrival, however employed, or until sailing on next voyage, whichever may first occur." On the 3rd Aug. another policy was effected, being the second policy mentioned in the claim, "risk to commence from expiration of previous policy at and from Valparaiso and (or) port or ports and (or) place or places, in any order or rotation, on the West Coast of South America to port or ports of call and (or) discharge in the United Kingdom and (or) continent." The vessel appears to have been sometime in May ordered to discharge at Valparaiso. During the voyage from Newcastle, During the voyage from Newcastle, N.S.W., to Valparaiso negotiations were begun between the parties by which the vessel was to be allowed to discharge part of her cargo of coal at Tocopilla, but these came to nothing. At Valparaiso, however, an arrangement was come to for the benefit of both parties, to this effect: the charterers wanted some of their coal cargo to sell at Tocopilla, and as the shipowners had to get to their nitrate loading port and wanted to get some stiffening, it suited them that the coal should be taken to Tocopilla. Accordingly it was arranged that the ship, instead of discharging her full cargo at Valparaiso, should carry on 800 or 900 tons of coal and deliver same to the charterers at Tocopilla, they paying freight in respect thereof at the rate of 13*s.* 6*d.* instead of at the rate of 16*s.* 6*d.* I find as a fact that that delivery was a delivery of part of the original cargo which had also the effect of saving to the shipowners the expense of putting in ballast for the voyage to the nitrate port. The vessel accordingly sailed from Valparaiso to Tocopilla with the 800 or 900 tons of coal on board, but before she got there she become a total loss. The question is whether the ship is covered by

the terms of the first policy or of the second. In several kinds of commercial adventure the necessity has arisen for the shipowners to cover themselves during a round voyage which is really a series of transactions. At the time when sailing ships went to the West Indies the shipowner had to cover himself from the United Kingdom to the West Indies for a series of transactions at the West Indies, while the ship was at various ports or proceeding from island to island, partly discharging and partly picking up cargo for the homeward voyage to the United Kingdom. Similar transactions used to arise when sailing ships went to the East. In those cases various forms of words were used as to the risk covered on what was sometimes called the outward voyage, which was the outward voyage plus half the period of waiting, and similarly as to the homeward voyage. There has grown up a well-known course of trade for ships which bring home nitrate from the West Coast of South America. It suits them to make their outward voyage from the United Kingdom to some place in the East, then to proceed to Newcastle, N.S.W., take coal from there to the West Coast of South America and to discharge it at various ports on that coast, and then to proceed to certain other ports to load nitrate for the United Kingdom. Various forms of words, more or less obscure, have been devised to cover various parts of that round voyage or adventure. Shortly after the Commercial Court started there were three cases in reference to the same underwriter—Mr. Crocker—as to this particular course of business. These three cases were *Crocker and others* v. *Sturge and another* (8 Asp. Mar. Law Cas. 208 (1896); 2 Com. Cas. 43), *Spalding* v. *Crocker* (2 Com. Cas. 189), and *Crocker* v. *General Insurance Company of Trieste* (2 Com. Cas. 233). The last-mentioned case went to the Court of Appeal, and Mathew, J.'s decision was affirmed (3 Com. Cas. 22). The first words in all these three cases were the same, they were "at and from Newcastle, N.S.W., to any port or ports, place or places, in any order on the West Coast of South America," but the end of the clause was different in the three cases. In the first case the clause went on "and for thirty days after arrival in final port, however employed." In the second case the clause proceeded: "and for thirty days in port after arrival, however employed." In the third case the words were: "and for thirty days in port after arrival, however employed, or until sailing on next voyage, whichever may first occur." In these circumstances Mathew, J. had to decide how much of the round risk came under the form of words. He held that that form of words covered the voyage to the west coast, and staying there until the vessel left for her homeward voyage, and the Court of Appeal affirmed his view. For some reason, as to which I need not speculate, the parties in this case have altered that form, and have inserted after the words "port or ports, place or places," the words "of call and (or) discharge." It was argued by Mr. Bailhache that although those words were put in they had no effect because the words "however employed" destroyed the apparent restriction of the words "of call and (or) discharge." I cannot agree with that contention. The words "of call and (or) discharge" must be given some meaning. One can give a meaning to the words "however employed" limiting them to the clause in which they occur. I hold that this adventure is limited to a voyage from Newcastle, N.S.W., to a port or ports, place or places of call and (or) discharge.

At the time the accident happened the vessel was proceeding to Tocopilla for, amongst other purposes, the discharge of the 800 tons or 900 tons of coal which, from the cargo-owner's point of view, was part of the original cargo and was to be discharged as cargo. *Primâ facie* therefore Tocopilla is a port of discharge. It was a port where 800 tons or 900 tons—a substantial part of the original cargo—was going to be discharged. Why is it not to be treated as a place of discharge within the policy? If I correctly followed Mr. Scott's argument it was this: Tocopilla was not a place of discharge under the charter; at the time the policy was effected the shipowners had in contemplation an adventure to go to one port, and that one port was fixed when the vessel was ordered to Valparaiso; that the place of call and (or) discharge must be interpreted by the intention of the shipowners as expressed in the charter-party; and that general words which might otherwise apply to Tocopilla must be limited by the intention of the parties at the time the policy was effected. In fact as I have found, the two parties to the charter-party varied the mode of its performance by agreeing that instead of discharging at one port as originally provided inthe charter they should discharge the original cargo at two ports. It is undoubtedly the law that general words in certain parts of a policy must be limited by the intention of the parties. As to the assured you must limit them by the intention of one party. That was laid down in *Boston Fruit Company* v. *British and Foreign Marine Insurance Company* (22 Times L. Rep. 571; (1906) A. C. 336). There is some authority in sect. 26 (3) of the Marine Insurance Act 1906 for saying that as to the subject-matter insured you must limit the general words by the intention of the parties, but I desire to reserve my opinion as to what precisely that section means when the case arises. It was suggested to me that the earlier cases on voyage or duration of risk decided that you must limit the general words describing the voyage by the expressed intention of the parties, but when I asked for any case in which that was laid down counsel on neither side could supply one in which that had been clearly laid down. In *Preston* v. *Greenwood* (4 Douglas, 28) Buller, J. expressly directed the jury that "the underwriter knows nothing of and has nothing to do with the charter-party." I do not, therefore, wish to be taken as deciding that you can interpret general words as to the voyage or duration of the risk by the voyage that the assured at the time of effecting the slip or policy intends to carry out. It is not necessary finally to decide the matter, because it is clear that there may be an intention not to insure a definite person or definite goods, but such person or goods as at the time may be interested. It is clear to me in this case that the policy was taken out to cover such adventure to the West Coast of South America as the charterer and the shipowner had agreed to. The assured did not mean to shut himself out from varying the charter in its mode of performance. I have no difficulty in this case in holding that such a variation of the charter is well within the words of the policy, for what was

done was that part of the original cargo loaded at Newcastle, N.S.W., was discharged at two places of discharge, instead of one place, on the West Coast of South America, with the assent of shipowner and charterer. I do not propose to decide what would happen if a fresh cargo had been loaded at Valparaiso and discharged at Tocopilla, I come to the conclusion that the plaintiffs' claim under the first policy is well founded, and there will therefore be judgment for the plaintiffs for 66*l.* 13*s.* 4*d.* and costs.

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

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

Monday, March 20, 1911.

(Before Scrutton, J.)

Board of Trade *v.* Anglo-American Oil Company Limited. (*a*)

Distressed seaman — Maintenance — Medical attendance—Cost of repatriation—Disease occasioned by seaman's misconduct — Merchant Shipping Act 1906 (6 *Edw.* 7, *c.* 48), *ss.* 32, 34, 35, 40, *and* 42.

A seaman attached to a British ship was left behind at a foreign port, suffering from a disease caused by his own misconduct.

Held, that under the Merchant Shipping Act 1906 *the owners of the ship were liable for the expense of his repatriation and maintenance in the sense of board and lodging, but not for any medical or surgical expenses.*

Commercial Court.

Action tried by Scrutton, J. sitting without a jury.

The plaintiffs claimed 25*l.* 2*s.* 3*d.* as money expended by the consular authority at New Orleans in the maintenance, &c., of a distressed seaman who had served on board one of the defendants' vessels.

The agreed facts were as follows:—

On the 6th July 1907 George Crawford signed on the steamship *Genesee* as an A.B. at 4*l.* 10*s.* a month for a voyage from ports in the United Kingdom to ports or places within the limits of 75 degrees north and 60 degrees south latitude, and back to a final port of discharge in the United Kingdom. On the 5th Aug. at New Orleans George Crawford was found to be suffering from venereal disease, and on the doctor's recommendation was removed to the hospital He was without means save that there was due to him from the defendants 20 61 dollars for wages, which sum was handed on behalf of the defendants to His Majesty's Consul. He was discharged on the 14th Nov. 1907, and was sent to Liverpool. The plaintiffs, through His Majesty's Consul, incurred expenses amounting to 25*l.* 2*s.* 3*d.*

Sir *Rufus Isaacs* (A.-G.) (Sir *John Simon*, S. G., and *Rowlatt* with him) for the plaintiffs.—The question turns upon the construction of sects. 41 and 42 of the Merchant Shipping Act 1906. The defendants suggest that they are not liable for the hospital expenses, because these were occasioned by reason of the seaman's own misconduct. No distinction is made in sects. 41 and 42 in respect of expenses incurred in consequence of a seaman's illness even though occasioned by his own misconduct. Sect. 34 refers to the matter, but there is no reference to it in the sections in question. It is submitted that the defendants are under an absolute obligation to bear these expenses.

Bailhache, K.C. and *Dawson Miller* for the defendants.—There is no liability on the defendants in respect of the hospital expenses. The sections relied upon by the plaintiffs read in conjunction with sect. 34, show that the expenses claimed in respect of the seaman's detention in hospital are not payable by the shipowners, because those expenses are occasioned by the seaman's own misconduct. Sect. 23 of the regulations made by the Board of Trade (dated April 1908) show that these expenses are to be met as far as possible out of the seaman's wages; and the distinction made in sect. 34 as to the nature of the illness has to be read into sect. 41. The cost of the seaman's passage home was more than covered by his wages. They also referred to sects. 32 and 35 of the Merchant Shipping Act 1906.

Sir *Rufus Isaacs* (A.-G.) in reply.—Sects. 41 and 42 on the one hand and sect. 34 on the other deal with entirely different states of facts, and on the language of sects. 41 and 42 the defendants are clearly liable.

Cur. adv. vult.

Scrutton, J.—This action was brought by the Board of Trade to recover a sum of 25*l.* 2*s.* 3*d.* from the owners of the steamer *Genesee* in respect of the hospital expenses of a sailor, George Crawford, left behind by the *Genesee* at New Orleans, and the cost of his return to this country. The action was tried on an agreed statement of facts which I summarise thus: George Crawford being on board the *Genesee* on a round voyage from the United Kingdom to New Orleans and back to the United Kingdom was on the 5th Aug., whilst at New Orleans, found to be suffering from venereal disease and removed to the hospital on shore, being unfit by reason of his complaint to discharge the duties of a seaman. He necessarily remained in the hospital from the 5th Aug. to the 14th Nov., incurring what are described as "hospital expenses" of 1 dollar 25 cents a day. As soon as his health permitted, he was returned by the Consul to England. Wages were due to him of 20 dollars 61 cents. These were applied towards defraying the expenses of hospital, and conveyance home, and the balance unpaid, amounting to 25*l.* 2*s.* 3*d.*, was the claim of the Crown against the shipowners in this action. It was agreed that the seaman was without means, and Mr. Bailhache for the shipowners admitted he was a distressed seaman within the meaning of the Acts. The Attorney-General for the Board of Trade rested his case on sects. 41 and 42 of the Merchant Shipping Act 1906 (6 Edw. 7, c. 48). He said that the seaman was left behind from a British ship in a place out of the United Kingdom and was in distress in that place; that it thereupon became the duty of the Consul to provide for his return to a proper return port, and for his necessary clothing and maintenance until his departure to such a port. He contended that "maintenance" included "hospital expenses." He further

(*a*) Reported by Leonard C. Thomas, Esq., Barrister-at-Law.

relied on the power given under sect. 42 to recover expenses for maintenance, necessary clothing, and conveyance to a return port from the shipowner except in certain cases specified in sub-sect. 4, which cases did not include expenses caused by illness of the seaman whether brought on by his own misconduct or not. Mr. Bailhache for the shipowners contended that the shipowners' liability in case of illness of a seamen was to be found in sects. 34 and 35 of the Act. Sect. 34 deals with four classes of illness of seamen, in three of which the owner was to defray the expenses without any deduction from the seaman's wages. The first of these three cases specifically excluded "venereal disease or illness due to the seaman's wilful act or default or his own misbehaviour." The fourth case—namely, "in all other cases"—provided that if the owner without legal liability did incur medical expenses he might deduct them from the wages. Sect. 35 provided that in cases where the Crown paid expenses attendant on illness "which are to be paid under the Merchant Shipping Acts by the owner," the owner should repay such expenses. Here, argued Mr. Bailhache, was the complete code for illness of a seaman. Sect. 34, sub-sect. 1, requires the owner to provide necessary surgical and medical advice "and also the expenses of the maintenance of the seaman till his return to a proper return port and his conveyance to the port." But this is not to apply to illness caused by venereal disease. Therefore, said Mr. Bailhache, these owners are not bound to provide medical advice or conveyance home for this seaman who was suffering from venereal disease. He did not argue as to the meaning of maintenance in sect. 41, but his junior did argue that it did not include medical expenses. Mr. Bailhache further argued that if he was bound to convey home, at any rate he was not bound to pay hospital expenses, and that the wages should be applied to meet the cost of conveyance. In my view sects. 34 and 41 overlap in subject-matter. Sect. 34 applies to all seamen whether in distress or with means. In either case the master must, subject to exceptions, pay their medical expenses. Sect. 41 applies to all seamen in distress, whether well or ill; in either case the owner must pay their return home and their necessary clothing and maintenance. But when I find that sect. 34 distinguishes "necessary surgical and medical advice, &c.," from "the expenses of maintenance," and that sect. 41 only speaks of "necessary clothing and maintenance," omitting any provision for surgical and medical expenses, I feel bound to hold that this distinction and omission were intentional, and that the Legislature did not mean to put on an owner the medical expenses of a seaman except in the cases provided for in sect. 34, and did not intend to make him pay by sect. 41 expenses due to venereal disease from which they had expressly relieved him by sect. 34. So far, therefore, as the "hospital expenses" are fees for medical or surgical attendance and medicine I hold they are not recoverable from the owner. I cannot conceive that Parliament used the word "maintenance" to cover, say, the fee of a surgeon for amputating a leg. The distinction between "clothing" and "maintenance" in sect. 41 suggests that the latter word is intended to cover board and lodging — its ordinary meaning. I have felt more difficulty on the point whether the owner is liable for such maintenance as is due, not to the absence of a return ship or of suitable employment, but to illness for which the owner is not under sect. 34 liable. It would seem reasonable to hold that he is not, but I am sitting as a judge, not a legislator, and I cannot find any words justifying me in restricting maintenance under sect. 41 to maintenance of a person otherwise able to travel or work. Although I do not think the point was argued before me, I notice that sect. 41 requires the Consul to provide maintenance in accordance with the "Distressed Seamen Regulations." These are made by the Board of Trade under the authority conferred by sect. 40 with respect to the "relief, maintenance, and return" of seamen, and the seaman is not to have any right to be relieved, maintained, or returned except as provided in the regulations. The primary object seems to be rather to cut down the seaman's right than to increase the owner's liability. The term "relief" is not used in the other sections, and there is no provision that the owner shall pay the expenses of "relief." Regulation VIII. says: "Medical attendance and medicine must be provided when necessary," and Regulation XXIII. requires medical expenses caused by venereal disease to be defrayed as far as possible out of the seaman's wages. I do not think these regulations put on the owner any further liability than is contained in sects. 34 and 35 of the Act; if they do, they appear to me to be *ultra vires*. I have only to add that Mr. Bailhache based an argument as to the incomplete character of sect. 41 as a code on sect. 32 of the Act, and the position of a seaman discharged by his own consent; such a man, he argued, was not within the distressed seamen sections. It is not necessary for me to express an opinion on this point, which appears to require a careful consideration of the relevant sections. The Crown appear to be entitled to a declaration that they can recover from the owners the expenses of maintenance in the sense of board and lodging and conveyance home of a distressed seaman though suffering from venereal disease or other illness due to his own wilful act, default, or misbehaviour; but that they cannot recover any medical or surgical expenses of such seaman. Whether it is worth the while of the parties to proceed to dissect the sum of 25*l.* 2*s.* 3*d.* in accordance with this declaration I must leave them to consider. As neither party has succeeded in the whole of his contention I think that each side should bear their own costs up to date.

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

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

Friday, April 7, 1911.

(Before SCRUTTON, J.).

WILLIS, FABER, AND CO. LIMITED *v.* JOYCE. (*a*)

Marine insurance—Underwriting—Principal and agent—No notice of determination of agent's authority—Estoppel.

An underwriter employed an agent to underwrite for him by a written authority which expired on the 31st Dec. 1909. *Prior to this date the underwriter had paid many losses on policies effected through the agent, but neither at the end of* 1909 *nor at any time had he ever given any notice to those with whom he had done such underwriting business that the agent's authority to act for him had been determined, nor had he given any notice of the fact at Lloyd's. In an action by the plaintiffs in respect of certain policies ostensibly underwritten by the underwriter, who was defendant, through the agent after the* 31*st Dec.* 1909 :

Held, that the defendant was estopped from denying the agent's authority to act on his behalf, as he had given no notice of the determination of the authority.

Scarf *v.* Jardine (47 *L. T. Rep.* 258; (1882) 7 *App. Cas.* 345), Drew *v.* Nunn (40 *L. T. Rep.* 671; (1879) 4 *Q. B. Div.* 561), Trueman *v.* Loder (11 *A. & E.* 589 (1840) *followed.*

COMMERCIAL COURT.

Action tried by Scrutton, J. sitting without a jury.

The plaintiffs claimed to recover certain losses due on policies of marine insurance which they alleged were underwritten by the defendant.

The defendant by his defence pleaded that the policies were underwritten by one Angove without his authority.

The facts and arguments are sufficiently stated in the judgment.

Bailhache, K.C. and *F. D. MacKinnon* for the plaintiffs.

Atkin, K.C. and *McCardie* for the defendant.

SCRUTTON, J.—In this case Messrs. Willis, Faber, and Co. sue Mr. John Joyce for certain losses due on insurance policies. The defendant, while not admitting that there were claims on the policies, took what is really a preliminary point, that he was not bound on the policies at all because, while they were written in his name by one Angove, Angove had no authority from him to write them. As the account is voluminous, and going into what sums were actually due would involve considerable delay, it was ordered that this point should be decided as a preliminary question before the amount due was gone into. The facts appear to be these: Mr. Joyce, who is a shipowner in Liverpool and not, therefore, unacquainted with insurance matters, began writing as an underwriter at Lloyd's with one Holford as his underwriting agent somewhere in the year 1903. Holford was in fact writing for a species of syndicate with which a gentleman named Angove had a good deal to do, and which was sometimes known as the Angove syndicate. This underwriting with Holford continued for four years, until 1907, when Holford died, and Angove underwrote in his stead for the syndicate. It is not now disputed that Mr. Joyce gave Angove authority to write, and it is admitted that he (Angove) did write for him at Lloyd's from the year 1907 to the end of the year 1909. Whether Angove had authority to write for Joyce after the year 1909 is a matter in dispute between the parties. I am not deciding it, and it is open to Mr. Bailhache to raise it at any subsequent time because I have stopped the discussion on that point, as the point I am going to decide is enough to determine the case. I only wish to say that Mr. Joyce has a good deal to get over before he shows that Angove had no authority to write for him after the 31st Dec. 1909. The point which I have to decide at present, and which is enough to decide the case, is this: Mr. Joyce's written authority to Angove terminated on the 31st Dec. 1909. After the 31st Dec. 1909 Angove put Mr. Joyce's name on policies which would have been within the terms of the authority if they had been dated before the 31st Dec. 1909. Assuming Mr. Joyce to have revoked his authority, or to have terminated his authority by this agreement, he gave no notice of that termination at Lloyd's, and the plaintiffs dealt with Angove, and took Mr. Joyce's name on the policy, without any knowledge that Mr. Joyce's written authority to Angove had ceased some two months before. Now is it permissible for Mr. Joyce to say to people who sue on these policies: "Angove had no authority to write in my name; my authority had terminated two months before"? It appears to me that I, sitting as a judge of first instance, am bound by the present state of the authorities to hold that it is no answer for Mr. Joyce to say that the authority was determined in writing unless he proves that he gave notice of it. I find that Lord Selborne stated in *Scarf* v. *Jardine* (47 L. T. Rep. 258; 7 App. Cas. 345), in the House of Lords, when dealing with the question of partnership; "The principle of law, which is stated in Lindley on Partnership, is incontrovertible—namely, that 'when an ostensible partner retires, or when a partnership between several known partners is dissolved, those who dealt with the firm before a change took place are entitled to assume, until they have notice to the contrary, that no change has occurred'; and the principle on which they are entitled to assume it is that of the estoppel of a person who has accredited another as his known agent from denying that agency at a subsequent time as against the persons to whom he has acredited him, by reason of any secret revocation." The principle puts the reason of the partnership rule not on anything peculiar to partnership, but on the general principle of agency The passage in the earlier part of Lord Lindley's book, to which I will not refer, but which I have looked at, is dealing not with anything in the Partnership Act because it is made part of the law of the land by statute (sect. 36 of the Partnership Act is expressly embodied), but is dealing with the common law of partnership; and Lord Lindley also, as Lord Selborne did, bases it upon the application of the ordinary law of agency. I find the Court of Appeal in the case of *Drew* v. *Nunn* (40 L. T. Rep. 671; 4 Q. B. Div. 561) laying down the same principle. There the wife had authority to bind her husband with tradesmen. The husband became insane, and the court held that the wife's authority to bind her husband ceased; but they held that as she had been the husband's agent, and no notice had been given to

(*a*) Reported by LEONARD C. THOMAS, Esq., Barrister-at-Law

the tradesmen that her agency was determined, the husband was bound; and the two members of the court, perhaps the three, who decided that put it upon a general principle of agency, that an agent's authority once held out cannot be withdrawn to third persons without giving them notice of withdrawal. It appears to me that Lord Selborne's statement and the Court of Appeal's decision in *Drew* v. *Nunn* bind me, and if they are to be reversed they must be reversed by a higher tribunal than mine. The case that Mr. Bailhache handed to me of *Trueman* v. *Loder* (11 A. & E.) appears to me to decide the same thing. There the defendant was acting through an agent. He had been dealing with him for some years and he withdrew the agent's authority. The agent made a contract in his own name, and because it was known on the market that he was always acting for the defendant, the defendant was held bound, although he had withdrawn his authority, because he had not given good notice of the withdrawal. That set of cases must be overruled by a higher authority than mine. I desire to say this because it refers to the case that Mr. Atken cited. It is clearly also the law that where you know an agent has a limited authority you are put upon inquiry as to whether he is acting within that authority. There have been a number of cases stating that. The last case in which it has been stated is *Russo-Chinese Bank* v. *Li Yau Sam* (101 L. T. Rep. 689; (1910) A. C. 74), and *Baines* v. *Ewing* (14 L. T. Rep. 733; L. Rep. 1 Ex. 320) is an example of that class of case. It was proved it was well known at Liverpool that underwriters had a limit in their agreements as to what amount they might write, and it was held that that put anybody who took a policy from an underwriter upon inquiry as to whether the agency agreement allowed him to write to that extent or not. Such a class of case, limiting an agent's authority, appears to me to be quite different from the determination of an authority. If Mr. Atken's law is right, it appears to me that all partnership law is wrong, that Lord Selborne was wrong in *Scarf* v. *Jardine*, and the Court of Appeal was wrong in *Drew* v. *Nunn*, because it is common knowledge that any agency may be terminated, and in any partnership deed there may be a term which expires at a particular date, and in any underwriting agreement there may be a term which expires at a particular date. If that ought to put people on inquiry, then all the partnership cases are wrong, and the many cases which have held that where an agent has been held out to act, and there must be an actual notice given, would be wrong. It appears to me that they are clearly established as binding on a court of first instance, and I say if the other principle—the principle in *Baines* v. *Ewing*—is to be extended to this class of case, it must be done by some judge higher than a judge of the King's Bench Division. I only desire to say that I do not think there is any particular difficulty in this matter. Lloyd's is a small community carrying on business in a comparatively small room, with a notice board that everybody sees every day, and where information is obtainable with the greatest facility, and there is not the smallest difficulty to prevent any person who has ceased to write putting a notice on the board that he has ceased to write, and it will be seen probably by everybody at Lloyd's within twenty-four hours, and considering that underwriters at Lloyd's do go on acting for names for years, sometimes under agreements covering a period and sometimes on agreements extended from year to year by the course of business, it would be putting an intolerable burden upon underwriters if they were to be required to ask the names in every case, and to say "You have put A. B.'s name: let me see that you have authority to put it"; and it would be that sort of question which was held to be so objectionable by Mathew, L.J. in *Hambro* v. *Burnand* (90 L. T. Rep. 803; (1904) 2 K. B. 10), where he pointed out it would be necessary to say "Now tell me are you meaning to put this money into A.'s pocket or in your own." That was a matter which he commented upon in the strongest language in delivering judgment in that case. For these reasons on the preliminary point, and without deciding the point whether there was actual authority, there must be judgment for the plaintiffs, and the amount must be assessed by agreement between the parties.

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

Solicitors for the defendant, *Lewis* and *Lewis.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Jan. 31, *Feb.* 1, 2, *and* 3, 1911.

(Before Bargrave Deane, J. and Elder Brethren.)

The Ezardian. (*a*)

Collision — Upper Humber — Vessels meeting at Whitton Gas Float No. 3*—Flood tide—Duty of vessel proceeding against the tide — Humber Rules* 1910, *rr.* 4, 14, 22*—Humber By-laws* 1910, *Nos.* 7 *and* 8 *— Collision Regulations* 1897, *arts.* 25, 27, 28, 29.

When steamships are navigating in opposite directions in the neighbourhood of No. 3 *Gas Float near Whitton in the Upper Humber there is no general rule that the one going against the tide should wait above the bend until the other going with the tide has rounded the bend, but good seamanship demands that whenever there are cross streams meeting at No.* 3 *Float the steamship going against the tide should wait until the other has passed clear.*

Damage action.

The plaintiffs were the owners of the cargo laden on board the steamship *Lloyd*; the defendants were the owners of the steamship *Ezardian.*

The case made by the plaintiffs was that shortly before 4 p.m. on the 15th Oct. 1910 the *Lloyd*, a screw steamship of 896 tons gross and 588 tons net register, belonging to the port of Memel, was in the Upper Humber between the Middle Whitton and the Upper Whitton Lightships in the course of a voyage from Memel to Goole with a cargo of wood pulp and sleepers, including a deck cargo of sleepers, manned by a crew of fifteen hands all told. The weather was fine and clear, and the wind about south-east, a moderate breeze, and the tide was last quarter flood of the force of about two and a half knots. The *Lloyd*, which

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

was in charge of a duly licensed pilot for the Upper Humber and had the screw tug *Salvage* made fast ahead, was proceeding up the river, well over on the starboard side of the channel, making about seven and a half knots through the water. A good look-out was being kept on board of her. In these circumstances those on board the *Lloyd* observed several steamships coming down the river, one of which proved to be the *Ezardian*, which was about three miles off and bore about two points on the port bow. The *Lloyd* was kept on her course, and, having rounded the Upper Whitton Lightship, then followed the deep-water channel course for the Whitton Gas Float No. 3, keeping on the starboard side of the channel. As the *Lloyd* drew up towards the slack water and strong eddy which on the flood tide is encountered in the neighbourhood of the No. 3 float, those on board of her observed that the *Ezardian* was coming down very fast, and, instead of waiting above the bend, was overtaking and passing another down-coming steamship. One long warning blast was accordingly sounded on the whistle of the *Lloyd* and her engines were put to slow. After a short interval the helm of the *Lloyd* was put hard-a-port for the purpose of rounding the bend at the No. 3 float, one short blast was sounded on her whistle, and her tug towed off on the starboard bow. The *Ezardian* made no reply, but continued to approach at high speed. The helm of the *Lloyd* was kept hard-a-port and her tug continued to tow as hard as she could on the starboard bow, and the whistle of the *Lloyd* was again sounded one short blast. About this time the *Lloyd* was entering the slack water and eddy, and it was seen that she was refusing to answer her port helm. The engines of the *Lloyd* were thereupon stopped and put full speed astern, and three short blasts were sounded on her whistle, but the rope by which the *Lloyd's* tug was made fast carried away owing to the strain to which it was necessarily subjected. The *Ezardian* replied with three short blasts on her whistle, but still came on at high speed and with her stem struck the starboard side of the *Lloyd* about abreast the fore rigging a very heavy blow, doing her such damage that she shortly afterwards sank with the plaintiffs' cargo on board.

The plaintiffs charged those on the *Ezardian* with not keeping a good look-out; with neglecting to ease her speed and wait until the *Lloyd*, a vessel proceeding with the tide, had passed through the eddy existing near Whitton Gas Float No. 3 and rounded the bend in the narrow deep-water channel at Whitton Gas Float No. 3; with improperly attempting to pass the *Lloyd* in an improper place and at an improper time; and with proceeding at an excessive speed and failing to ease, stop, or reverse her engines.

The case made by the defendants was that shortly before 3 55 p.m. on the 15th Oct. 1910 the *Ezardian*, a steel steamship of 872 tons gross and 426 tons net register, manned by a crew of fifteen hands, was proceeding down the Upper Humber on a voyage from Goole to London with a cargo of coal. The weather was fine and clear, the wind south-east, a strong breeze, and the tide high water slack of the force of about a knot. A good look-out was being kept on the *Ezardian*, and she was on a down-river course for No. 3 Whitton Gas Float on her starboard-hand side of the channel, making about ten knots. In these circumstances those on board her saw the *Lloyd* with a tug ahead near the Upper Whitton Lightship between two and two and a half miles off and about four points on the port bow. The *Ezardian* was kept on her course for No. 3 gas float and well over on her own starboard side of the channel. When one short blast was heard from the *Lloyd*, the *Ezardian* gave one short blast, her helm was ported, and her engines, which had been working at various speeds since the *Lloyd* was first seen, were stopped. When the *Lloyd* continued to approach she was heard to repeat her one blast twice; the *Ezardian* replied with one short blast and kept her engines stopped. When the *Lloyd*, instead of shaping to pass the *Ezardian* port side to port side, as she could and ought to have done, kept over to the southward and into the *Ezardian's* water and the tow-rope of the *Lloyd's* tug parted, the *Ezardian's* engines were at once put full speed astern, her helm was put hard-a-port, and three short blasts were given. Three sets of three short blasts were then heard from the *Lloyd*, but she came on at great speed and with her starboard bow abaft the break of the forecastle deck she struck the stem of the *Ezardian* a heavy blow, doing damage.

Those on the *Ezardian* charged those on the *Lloyd* with not keeping a good look-out; with neglecting to keep to her own starboard side of the channel; with neglecting to keep clear of the *Ezardian*; with going at an immoderate speed; with neglecting to ease, stop, or reverse her engines; and with neglecting to pass port to port.

The following Humber Rules 1910 were referred to during the course of the case:

4. All vessels while navigating or anchored or moored in the river shall observe and obey the Regulations for Preventing Collisions at Sea (hereinafter referred to as "the General Regulations") made in pursuance of and for the time being in force under the Merchant Shipping Act 1894 or any subsisting statutory modification thereof, with the exceptions and additions made in the following rules:

14. When a steam vessel is commencing to turn round or for any reason is not under command and cannot get out of the way of an approaching vessel she shall signify the same by four short blasts of the steam whistle in rapid succession, and it shall thereupon be the duty of the approaching vessel to keep out of the way of the steam vessel so situated. A steam vessel commencing to turn round shall immediately before giving the signal referred to in this rule indicate the direction in which she proposes to turn by sounding the one short blast or two short blasts prescribed by art. 28 of the General Regulations. A vessel not under command shall as speedily as possible get fore and aft the river head to tide and under command. If a sailing vessel or any other craft in tow is situated as above mentioned the said whistle signals shall be made by the tug.

22. A vessel shall be navigated with care and caution and at such a speed and in such a manner as not to endanger the lives or cause injury to persons or involve risk of collision by causing a swell or endanger the safety of other vessels or moorings or cause damage thereto or to the river banks. Special care and caution shall be used in navigating such vessel where there is much traffic and when passing vessels employed in dredging or removing sunken vessels or other obstructions. If the safety of any vessel or moorings is endangered or damage is caused thereto or to the river banks by a passing steam vessel, the onus shall lie upon

the master or owner of such vessel to show that she was navigated with care and caution and at such a speed and in such a manner as directed by these rules.

The following Humber By-laws 1910 were also referred to:

7. A vessel (except dumb craft) while under way shall be manned by a competent master, and if over 10 tons burden shall also have a sufficient number of able-bodied and experienced men and shall at all times have a good and efficient look-out.

8. A vessel (except craft under 10 tons measurement and dumb craft being towed from dock to dock or to and from the dredging or depositing grounds) shall keep an anchor and cable ready for letting go in case of emergency, and any vessel slipping or parting from her anchor shall when practicable leave a buoy to mark its position.

The following collision regulations were also referred to:

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.

28. 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.: 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, "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.

Batten, K.C. and *H. C. S. Dumas* for the plaintiffs.—The *Ezardian*, having the tide against her, should have waited above the bend to give the vessel coming with the tide an opportunity to round the bend:

The Talabot, 6 Asp. Mar. Law Cas. 602 (1890); 63 L. T. Rep. 812; 15 P. Div. 194.

The evidence shows that the eddy tide is well known, and may have an effect on vessels going with it. The evidence of the pilot on the *Lloyd* is not to be trusted. He gave his evidence to the solicitor for the *Ezardian*, and refused to give any evidence to the plaintiffs.

Bateson, K.C. and *J. B. Aspinall* for the defendants.—The *Lloyd* is found on the wrong side of the river, and she is to blame for that; she ported too late and shot across the river. It is no excuse to say that nothing more could be done. If the vessel coming up is so built that she cannot navigate with one tug, she should employ two. That kind of excuse has not availed vessels when they have alleged that they could not go more slowly in a fog:

The Campania, 9 Asp. Mar. Law Cas. 177; 84 L. T. Rep. 673; (1901) P. 289.

The *Lloyd* broke rule 14 of the Humber Rules 1910. There is no rule that vessels should wait above the bend. The action of the pilot on the *Lloyd* shows that he acted too late. [BARGRAVE DEANE, J.—I do not think much reliance can be placed on his evidence.] The *Ezardian* was not to blame. She was on her right side. She had reduced her speed, and, on hearing the port-helm signal of the *Lloyd*, thought she would safely pass port to port. The cause of the collision was the *Lloyd* porting too late, and she should have reversed sooner when she found she was in a difficulty.

BARGRAVE DEANE, J.—I have no doubt at all about this case. The real point in the case is whether this is a dangerous place where the collision occurred, and on the one side the witnesses called by counsel for the defendants all say there is no danger at all about it; but I do not know why these Goole ships are constructed with extra big rudders if there is nothing difficult about the navigation, or why it should be suggested that foreign vessels coming up without them must take the risk. What is the fact? Here is a place where the channel is constantly shifting, and there is a point, a little lower down the river, called Whitton Ness, and the tide that comes up strikes Whitton Ness, and sometimes there is a channel which runs off to the north, right to the north shore, and then runs down again to the south shore—sometimes it goes straight along the south side, and sometimes it runs up to the north and then sharp down to the south; but whichever way it goes there is always, as the master of the *Ezardian* says, a swatchway running along the south shore between Whitton Ness and the mouth of the Trent. Of course, when it is low water there is less water going through, but when it is high water a fair amount of water goes through, and I am told, not only by the witnesses called for the plaintiffs, but also by those whose knowledge is great and who know the actual place, that there is always an eddy of a certain strength between Whitton Ness and the westward, and that the strength of that eddy depends upon the channel. When I am so advised, and when that advice agrees, as I think it does, with the sworn positive evidence given for the plaintiffs in this case, which in my opinion is stronger evidence than the negative evidence of the defendants, of course I have to give effect to it, for I believe it to be the truth. Now, who are the people who speak about it? First of all there is Mummery, the master of the tug which was towing this German steamer. Mummery says this: "The *Lloyd* steered well. She was laden, and she wanted help when crossing the tide"—that is what he was there for. "When she came to this place she would not come round. The flood tide caught the port quarter while the head of the *Lloyd* was in the slack. It is not safe to try to pass at that place. Downward bound vessels must wait for upcoming ones to round. That is the custom in the river." Here is a man working every day in this river, and that is what he says. The next witness is Smith, chief officer of the *Hessle*, a vessel which passed the *Lloyd* on the port bow. He says: "We had rounded No. 3 buoy, and her tug was just above the float. There is a slack above No. 3 buoy which would affect a vessel coming up. A vessel is liable to sheer and run head first on to the shore, and it is not prudent to pass a vessel there. There is no difficulty in a vessel going down stopping above the spot in question. The collision was caused by

the *Ezardian* overhauling and passing the *Argos* in the slack tide. The *Lloyd* appeared to be going to the southward when we passed her and if we had been a little later she would have hit us." That is the chief officer of the *Hessle*, and I shall presently read what the master of the *Hessle* says in contradiction of the chief officer. Then there is the mate of the lightship. He said: "There is a slack tide at the place. I have known vessels refuse to answer their helms there. The peculiarity of the tideway there is well known and downcoming steamers should ease down and not pass upcoming vessels there. It is the worst place in the river." Then Mr. Barley, superintendent of the Upper Humber Conservancy Board, said: "There is an eddy between the green light jetty and the Whitton Jetty, which results in some vessels failing to recover themselves and they may go ashore. They will not answer their port helm. This is a difficulty well known to all the pilots and navigators, and any vessel coming down and meeting another about No. 3 buoy should ease down and not pass her there." Then there is Thomson, a licensed pilot for the Upper Humber, and he says: "I have had fifteen years' experience up and down the river, and I was navigating a vessel on that very day. It is always dangerous to pass another vessel there, and I ease up and let the other vessel pass. Other vessels have eased up for me. I have known vessels go ashore there." Those are witnesses called on behalf of the plaintiffs. As against those witnesses we have George, the pilot of the *Lloyd*. I have already said that the opinion of the court is that he is an absolutely untrustworthy witness. I do not believe his evidence on a great number of points, and as I do not believe his evidence on a great number of points I am not going to take his evidence on any point as being of any value; he says that the collision was not due to an eddy; that the tide had nothing to do with it; there was no eddy, and it was not a dangerous place, and vessels did not come into collision there or run ashore. He said: "I never slow down, and I know of no practice which would require the *Ezardian* to wait, and I have been a pilot for four and a half years." He is called by the defendants, and he goes to that length. Then Captain Collier, master of the *Ezardian*, says it was not a dangerous spot in which to meet a vessel; that there is no eddy there, but there is a slack, and that you get a stronger tide on the bow, in the slack, than on the stern, and that it assists her helm in putting the bow to starboard. Then he says there is this swatch-way. Mr. Sherwood, chief officer of the *Ezardian*, says there was no danger that she (the *Lloyd*) would not answer her helm; that there was no eddy and no slack; and "I did not ease down to give the *Lloyd* more room." That last statement is in direct contradiction to the evidence of the other officers of the *Ezardian* on that point, and I do not know what becomes of the point made by counsel for the defendants about this. The second officer said: "Our engines were stopped for the *Lloyd* before she blew her one blast. It was to let her come round." I think I know where the truth is. Then there is Mr. Walker, the master of the *Hessle*. He says he holds a master's certificate and a pilot's licence, and that he knows the river very well. He says there is an eddy near No. 3 float early on the flood, and less at half flood, and so on; and that it is worse when the channel is near Whitton Jetty. He says he remembers how it was at the time of the collision, and that he is sure there was no eddy there at that time, and it was quite safe for him to pass a laden sailing ship, coming up on the flood, at that place. He added: "I have known it dangerous there, but that would be half an hour before high water." This collision happened in the last quarter of the flood. Now, that is the evidence, and upon the face of that evidence, even if I had not got the valuable advice which I have on my right hand, I should have no hesitation in saying that the evidence satisfies me this was a dangerous place at the time, and that it was the duty—whether there is a custom or practice I do not care, but I think there is a practice—it was the duty of the *Ezardian*, going down and seeing this heavily-laden vessel coming up on the flood, to have eased down before the vessel had got into the place of difficulty. Instead of doing that, this vessel, the *Ezardian*, started as the rearmost vessel of all from Blacktoft, five or six miles away, with the *Argos* in front. The *Argos* slowed down to do the very thing which the *Ezardian* ought to have done, but instead of slowing down the *Ezardian* goes past the *Argos* and runs on and puts herself into this place where difficulty might occur and did happen. I think that was extremely bad seamanship, and I think the master of the *Ezardian*, professing to be a pilot, must have known the difficulty of that particular place and he was bound to take the precaution which, I believe, the *Argos* did take —though there is no evidence of it. That fact in itself ought to have been a warning to him. What I find with regard to this place is this, and it is the advice given to me. I believe there is always an eddy above and west of Whitton Ness during the flood stream. The nearer the bend in the channel marked by No. 3 float happens to be to Whitton Ness, the greater must be the effect of this eddy on vessels negotiating the bend. On the other hand, when the channel between the Upper Whitton Lightship and No. 3 float happens to be well to the west, as at the time of this collision, and trending more or less across the general direction of the flood stream, the greater the difficulty of rounding No. 3 float, and the probably greater risk of a vessel failing to answer her port helm and running across the channel on to the Plumb, when she enters the slack. That I believe to be the true condition of things at the place. I do not think it very much matters how the channel is, unless there is only one channel, which runs along the south shore and nothing at all to the northward. Then, perhaps, you would not have cross streams; but whenever there are cross streams meeting at this place on the flood tide, then this extra precaution should be taken. I am not laying down a general rule, but merely saying why I think this extra precaution should be taken whenever there is, as on this occasion, a double stream meeting at No. 3 float. It is said that blame is also attachable to the *Lloyd* because of bad navigation; in other words, that the pilot is to blame. I do not myself find that that is established. It is said that the *Lloyd* ought to have ported before she came to No. 3 float. I do not think she could. In my opinion she was hampered by four vessels which took the

risk and passed up so as to reach and pass her before she got to the No. 3 float. As those vessels passed she had to keep to the starboard side of the channel, and she had to remember that she was crossing the flood tide with the tide on her port bow, setting her to the westward. That was a very awkward position. Again, she had a tug ahead, and directly she ported her helm her tug would have to get out on the starboard bow and tow to starboard. She could not put the tug out until she had cleared the float, and the evidence satisfies me that, as soon as the tug cleared the float, the tug got out as soon as she possibly could on the starboard bow. Then it is said that the speed of the *Lloyd* is a matter of blame. Once she got the tug out on the starboard bow she could not go fast. She would have overrun the tug and she was obliged to adopt the speed of the tug. As it was the tug nearly got girted. The collision was entirely caused by the *Ezardian* being in that place where she had no right to be. The fact that the *Lloyd* was sunk shows, if anything, that there was speed on the *Ezardian*. I think the *Ezardian* is alone to blame. Counsel for the defendants said something about blowing four short blasts. I do not think there was time to blow four short blasts. She was going ahead, hoping the tug would pull her round until the rope broke, and then I think the time was too short.

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

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

Jan. 26, 27, *and Feb.* 8, 1911.

(Before BARGRAVE DEANE, J. and Elder Brethren.)

THE HUNTSMAN. (*a*)

Collision—Crossing ships—Duty to give way—Duty to keep course and speed—Duty to take action to avert collision—Test to be applied with regard to the fulfilment of the duty—Collision Regulations 1897, *arts.* 19, 21, 22, 23, 27, 28.

Where a ship is bound under art. 21 *of the regulations to keep her course and speed, but it becomes necessary for her under the note to that article to take such action as will best aid to avert collision, some latitude must be allowed to an officer in charge of her, who is carefully watching the movements of the ship which has to keep out of the way, in determining when he ought to take action. It ought not to be made a complaint against him that he waited too long before acting or acted too soon.*

DAMAGE ACTION.

The plaintiffs were the owners of the steamship *Rameses*; the defendants and counter-claimants were the owners of the steamship *Huntsman*.

The case made by the plaintiffs was that shortly before 1.9 a.m. on the 27th Sept. 1910 the *Rameses*, a screw steamship of 2490 tons gross and 1585 tons net register, whilst bound in ballast from Alexandria to Constantinople, manned by a crew of forty-one hands all told, was in about latitude 32° 16′ N. and longitude 29° 16′ E. The weather was fine and clear and the wind a fresh breeze from about N. by W. The *Rameses* was on a course of N. 26° W. magnetic, and with engines working at full speed was making about ten knots. The regulation under-way lights were being duly exhibited and were burning brightly, and a good look-out was being kept. In these circumstances the two masthead lights of the *Huntsman* were seen about six or seven miles off, bearing about two or three points on the port bow. Later on the green light came into view. The *Rameses* kept her course and speed, but the *Huntsman* came on and did not appear to be taking any measures to keep out of the way. Shortly before the collision the engines of the *Rameses* were slowed and a long blast was sounded to attract the attention of those on board the *Huntsman*, and shortly afterwards the engines of the *Rameses* were put full speed astern and three short blasts were sounded, but the *Huntsman* continued to come on at high speed, apparently attempting to cross ahead of the *Rameses*, and, swinging under a starboard helm, with her starboard side about abreast of No. 2 hatch, struck the stem of the *Rameses* a very heavy blow, doing considerable damage.

Those on the *Rameses* charged those on the *Huntsman* with having a bad look-out; with not keeping clear; with attempting to cross ahead; with not easing, stopping, or reversing her engines in due time or at all; with starboarding; and with not indicating their course by sound signals.

The case made by the defendants and counter-claimants was that the *Huntsman*, of 7460 tons gross and 4828 tons register, while on a voyage from Liverpool to Calcutta with a general cargo, and manned by a crew of eighty-two hands all told, was in about latitude 32° 15′ N. and longitude 29° 26′ E. The weather was fine and clear, but dark, and the wind was a light breeze from the N.W. The *Huntsman* was on a course of S. 74° E. magnetic, and with engines working at full speed was making about eleven to twelve knots. The regulation under-way lights were being duly exhibited and were burning brightly, and a good look-out was being kept. In these circumstances those on board the *Huntsman* saw the masthead light of the *Rameses* about two and a quarter points on the starboard bow of the *Huntsman* about four to five miles off. Later on the second masthead light and red light and the Morse signalling light of the *Rameses* came into view. As the *Rameses* drew aft and the vessels approached nearer, the helm of the *Huntsman* was starboarded as a measure of precaution. The *Rameses* was then in a position to pass clear under the stern of the *Huntsman*. The *Rameses*, however, ported her helm and sounded one short blast, and thereby caused danger of collision. The engines of the *Huntsman* were immediately put full speed astern and three short blasts were sounded, and, with her helm steady starboard, the *Huntsman* continued reversing her engines. Three short blasts were sounded by the *Rameses*, but, coming on at high speed and swinging under a port helm, the *Rameses* with her port bow struck the starboard side of the *Huntsman* about abreast of the fore rigging a very heavy blow, doing serious damage.

Those on the *Huntsman* charged those on the *Rameses* with having a bad look-out; with not keeping their course; with improperly porting; with failing to indicate their course by whistle signal; with giving misleading signals; and with not easing, stopping, or reversing their engines.

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

The following collision regulations 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 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.

Art. 28. 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.: 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, "My engines are going full speed astern."

The action was tried on the 26th and 27th Jan.

Aspinall, K.C. and *C. R. Dunlop* for the plaintiffs, the owners of the *Rameses*.—The *Huntsman* is clearly to blame for the collision. She attempted to cross ahead, and those on board her failed to indicate their course by whistle signal when they starboarded, and did not immediately sound a whistle signal when they reversed their engines. The *Rameses* is not to blame. She kept her course and speed until in accordance with the note to art. 21 it became necessary for her to act, and then she slowed and reversed.

Laing, K.C. and *A. R. Kennedy* for the defendants, the owners of the *Huntsman*.—The *Rameses* is to blame for porting. It is clear she ported, for she sounded a port-helm signal, although those on board her now wish it to be thought that the short blast was a long warning blast. There was no point in a long warning blast, for those on the *Rameses* knew that they had been seen, for the vessels were signalling to one another by Morse code until shortly before the collision. Further, those on the *Rameses* did not keep their speed. The officer in charge did not obey art. 21 and the note to that article. If the *Rameses* had done nothing she would have crossed ahead of the *Huntsman*, and she ought to have done nothing; but, if the time had arrived at which she should have done something, she should have reversed at once. If she had reversed when she slowed there would have been no collision.

Aspinall, K.C. in reply.—The defendants in their pleadings allege and complain that the *Rameses* ported and did not ease, stop, or reverse their engines. They now wish to alter their case and say that the *Rameses* did ease her speed and was wrong in doing so. This point as to the speed which they now endeavour to make is important if the story of the *Rameses* as to not porting is accepted, for the defendants realise that if the *Rameses* did not port and the defendants' allegation that the *Rameses* approached at high speed is accepted, it tends to show that the *Rameses* obeyed art. 21. The statement of claim states that the *Rameses* slowed, but the defence makes no complaint of that; so this point is an afterthought. The officer in charge was in a position of difficulty; some latitude should be allowed him, for he was placed in a difficulty by the wrong manœuvres of the other ship :

The Albano, 10 Asp. Mar. Law Cas. 365; 96 L. T. Rep. 335; (1907) A. C. 193;
The Ranza, 79 L. J. 21, Adm. (n).

Judgment was reserved and was delivered on the 8th Feb.

BARGRAVE DEANE, J.—In this case a collision took place in the Mediterranean to the northward of Alexandria, between the *Rameses*, a steamship of 2490 tons gross, bound in ballast from Alexandria to Constantinople, and the *Huntsman*, a vessel of 7460 tons gross, bound from Liverpool to Calcutta, *viâ* the Suez Canal. The collision took place a little after one o'clock on the morning of the 27th Sept. last, the two vessels being on crossing courses, the *Rameses* heading N. 26° W. and the *Huntsman* S. 74° E. The case is one of the stand on and keep out of the way cases, because the *Huntsman* had the *Rameses* on the starboard side; and the first question, of course, which occurs to one is why was there a collision, when the *Huntsman* was the giving-way ship and had to keep out of the way of the *Rameses*? I have no hesitation in saying that the *Huntsman* was to blame for this collision. There are many reasons for it. First of all, she did not keep out of the way; secondly, when she altered her course by starboarding her helm she blew no blast; and, thirdly, when she reversed her engines she blew no blast till some time later. I am of opinion that the second officer of the *Huntsman*, who was in charge at the time, was not keeping an observation, as he ought to have done, upon the *Rameses*, but his attention was diverted at the material time away from the *Rameses*, and he was attending more to the Morse signalling going on between his vessel and the *Rameses* when really he ought to have attended to the movements of the *Rameses*. I think the evidence of that officer condemns him throughout. It was his duty, instead of trying to pass ahead of this vessel, to pass under her stern, and when he altered his helm and speed he blew no signals. The result was that he came into collision. But that does not conclude the case, because it is said in the pleadings that the *Rameses* is also to blame. In considering whether or not the *Rameses* is also to blame the court has to consider the effect of arts. 19, 22, and 21 of the Regulations for Preventing Collisions at Sea. Art. 19 reads: "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. 22 reads: "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. 21 reads: "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"; and the note to this article refers to arts. 27 and 29, which I will call for convenience the rules which import general good seamanship. It was undoubtedly the duty of the *Rameses* to keep her course and speed. She says she did keep her course. She admits that she did not keep her speed. It is strange to find that the pleadings of the defendants say and complain that she did not keep her course, and further complain that she did keep her speed. Upon these two issues I find that she did keep her course and that though by reversing her engines when the collision was inevitable her head no doubt went off to starboard a trifle before the actual contact, her helm was never in fact ported, nor did she give a short blast on her siren to suggest that she was directing her course to starboard. I accept the evidence from the *Rameses* on that point. I was satisfied that her witnesses were speaking the truth. On the other hand, the witnesses from the *Huntsman* were less satisfactory—they may also be mistaken. They say that they saw the course of the *Rameses* seemed to alter to starboard, and they assumed from that that she had ported, and they believe that she had given the appropriate one-blast signal. After seeing and hearing the witnesses on both sides, I have come to the conclusion that the real truth on this point comes from the *Rameses*. As to the question of speed, I have had more difficulty. It is perfectly plain that the defendants originally never intended to suggest that the *Rameses* did not keep her speed. The plaintiffs in the third paragraph of their statement of claim say that the *Rameses* kept her course and speed until shortly before the collision, when her engines were slowed and a long blast was sounded to attract the attention of those on board the *Huntsman*, and that shortly afterwards the engines were put full speed astern and three blasts were sounded. In their statement of defence the defendants admit that three short blasts were sounded by the *Rameses*, but in par 4, in which the defendants give the grounds of complaint against the navigation of the *Rameses*, I find (E) giving misleading sound signals, (F) not easing, stopping, or reversing the engines in due time or at all. Now, it is said: "Your fault was that you did stop when you ought not to have done so, and you never reversed and yet gave a misleading three-blast signal."

Upon this question as to altering her speed by a vessel whose duty it is to keep it under art. 21, it is almost impossible to lay down any fixed rule. Good seamanship requires that in any case a time may come when the course or speed or both of a stand-on ship may and ought to be altered. The difficulty in such a case is to decide at what exact time such alteration not only may be but ought to be made. It is impossible, mathematically speaking, to fix that time—various ingredients come into the matter—the light or clearness of the atmosphere by which a fair judgment of distances may be formed—the speed and course of the other vessel from which an accurate estimate may be formed of the point where the two intersecting courses will meet if both vessels continue their course and speed—and the further almost insuperable difficulty of detecting, as in this case, at one o'clock in the morning, the precise moment when the giving-way vessel may be altering her course and the precise moment when if she does not alter her course a prudent officer in charge of the stand-on vessel feels it to be his duty to do something, and if something what that something is to be. The burden of taking action and departing from the rule is cast upon that officer, who has to determine when that point of departure ought to occur. It must not be pressed too severely in any case. If the officer is carefully watching the movements of the other vessel and endeavouring to do his best to judge when the time shall arrive for him to act, it ought not to be made a complaint against him that he waited too long or he acted too soon. If he acts too soon he may disconcert any action which the other vessel may be about to take to avoid his vessel. It is difficult to determine the critical moment, and some latitude must be allowed to the officer of a stand-on ship who is clearly doing his utmost in a position of difficulty caused by bad navigation by those in charge of a giving-way ship. I have already said that I am unable to accept the evidence from the second officer and others on board the *Huntsman* as trustworthy. There was a manifest error of judgment as to the place in the intersecting courses where the vessels would relatively pass each other, with the result that instead of porting and passing under the stern of the *Rameses* the *Huntsman* kept her course and so did not keep clear of the *Rameses*. With regard to the evidence from the *Rameses*, it is clear, I think, that the chief officer, who was in charge at the time, believed that the *Huntsman* would eventually port, but as she kept on without porting and without obeying rule 22 he slowed his engines in order that, as he said, he might keep his vessel under command and go either ahead or astern more easily than if he was keeping the engines full speed ahead. He thought that at any moment the *Huntsman* might port, and that if so he could go ahead with his engines and get out of the way; but that if the *Huntsman* kept on then by slowing he thought he would be able to get reversed way upon his ship sooner and so avoid the collision. In my opinion, if he had not slowed his engines in all probability he would have been cut in two by this big ship instead of hitting her amidships on the starboard side. I think the conduct of the officer of the *Rameses* was not blameworthy, but that he did the best he could in extremely difficult circumstances, and that the collision was far less serious than it would have been if he had kept his speed without slowing. Otherwise he did everything that was right. He blew the necessary signals and kept his course, the only variation of course being by the head falling off when the engines were reversed. I think the *Huntsman* is alone to blame.

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

Solicitors for the defendants, *Pritchard* and *Sons*, for *Simpson, North, Harley,* and *Birkett*, Liverpool.

END OF VOL. XI.